[COMMON PLEAS DIVISION.]

MAUGHAN V. CASCI.

Way—Short Form Act—Continuous easement—Way of necessity—Highway—Statute of Limitations.

S. by his will devised his farm to trustees, who divided up the property into six several parcels, designated parcel 1, parcel 2, &c., according to a plan which was registered, and by contemporaneous conveyances under the Short Form Act, conveyed the parcels to the testators, six surviving children. The description of parcel 2, included the lane in question, described as a right of way, the use of which was thereby reserved to the owners of parcels 4 and 6, to which it was a way of necessity. Parcel 3, which adjoined the way, was conveyed without any mention of the lane. During the unity of title some farm buildings stood upon parcel 3, adjacent to the lane in question, which was used as a means of ingress and egress thereto, but they had long since disappeared. By the Short Form Act, R. S. O. ch. 102, sec. 4, every deed, unless an exception be made therein, shall be held to include all ways, easements, and appurtenances whatever to the lands therein comprised, belonging or in any wise appertaining or with the same, held, used, occupied, and enjoyed.

Held that the defendant claiming under the grantee of Parcel 3, could not claim a right of way over the lane: that sec. 4 of the Short Form Act could not, under the circumstances, be deemed to apply: that the right of way was not a continuous easement, or way of necessity; and that plaintiff's right thereto was not barred by the Statute of Limitations.

Held also that the defendant as owner of a part of parcel 4, could not claim the right to use the way as appurtenant to parcel 3.

STATEMENT of claim.

1. That the plaintiff was on the 1st of June, 1882, and since is the owner of 30 $\frac{37}{100}$ acres of land in the Township of York, parts of lots Nos. 7 and 8, in the 1st concession from the bay, which is styled on the plan of the subdivision of the estate of the late William Innes Small, filed in the registry office of the County of York as parcel No. 2. The description by metes bounds, so far as material, and the reservation of the right of way are given hereafter.

2. The said way is a private way or lane common only to the owners of the above described lands and of parcels 4 and 6, as shewn on said plan.

3. For a long time prior to the 21st of April, 1883, the defendant had wrongfully claimed to use the said way for his horses, carts, and waggons, on the alleged ground that a registered plan gave him the right to use the same, and the plaintiff had frequently warned him not to use the

same, and that it was a private way common only to the above mentioned owners.

4. The defendant has used the said way since the 1st of June, 1882, and has very often cut and broken down and removed a portion of the fence adjoining the said way in order to gain access thereto although warned not to do so.

5. The plaintiff claims damages for the wrong complained of; an order restraining the defendant from any repitition of the acts complained of, and such further relief, &c.

Statement of defence.

1. The roadway shewn on the said plan mentioned in the first paragraph of the statement of claim is a public highway dedicated to public uses, and free and open to the defendant.

2. That even if the said roadway, or any part of it was at any time heretofore vested in the plaintiff, or in any one from whom the plaintiff claims, the plaintiff's right to maintain the action is barred by the Statute of Limitations, the same having been used by the defendant and his predecessors in title without hindrance or molestation for over forty years.

3. The defendant is and was, before the commencement of the action, the owner of part of parcel No. 4 mentioned in the statement of claim, and as such owner was and is entitled to the use and benefit of the said way over which the plaintiff claims to exercise the rights of absolute ownership.

4. The defendant purchased the lands abutting on the said roadway according to a plan made and duly registered by the owners of the lands now claimed by the plaintiff, and the land of the defendant, which said plan shews the said roadway as open.

Joinder.

The action was tried before Osler, J., without a jury, at Toronto Summer Assizes of 1883.

The evidence shewed that the late Charles C. Small was the owner in fee of the whole of the land in question, and

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of other lands adjoining part of the same lots. He laid out, many years before his death, which was in 1862, a way or lane 30 links in width running from the Kingston road in an irregular manner in a northerly direction to the rear of his property. The whole land was used then for agricultural purposes. The site of the way or lane was and is well defined, and was not disputed.

In 1867, the devisees under his will made a partition of the land, according to a plan numbered 282, and deeds for that purpose were executed by the trustees of his will to the six parties, his children, who were entitled to it.

The deeds of partition were respectively dated the 26th of September, 1867, and were made under the Act to facilitate the conveyance of real property.

The description of parcel No. 1, so far as material, is: Commencing at the south-west angle of parcel No. 3, as shewn by the plan of sub-division; thence on a course north 26°, 42″, west 3 chains, 60 links to a stone monument; thence 68°, 51″, west 1 chain, 97 links to a stone monument. The last course along the Kingston Road is 6 chains 20 links more or less to the place of beginning. And it concluded, "reserving therefrom the right of way 30 links wide from the Kingston Road along the east limit, being the lane leading to the bridge crossing the Serpentine, as shewn on the registered plan of the said sub-division."

Parcel No. 2, so far as material, is described as follows: The description begins at the north-west angle of the parcel. The next course is to the north-east angle; the third course is from the north-east angle southerly 32 chains, 40 links, "to a point about midway on the bridge crossing the Serpentine, being the south-west angle of parcel No. 4: thence south 28°, 54″, east 5 chains, 24 links to a stone monument; thence south 68°, 51″, west 1 chain, 67 links to a stone monument, &c., reserving therefrom a right of way 30 links in width, as shewn on said plan of said sub-division through said parcel No. 2 for the use and benefit of the owners of parcels Nos. 4 and 6."

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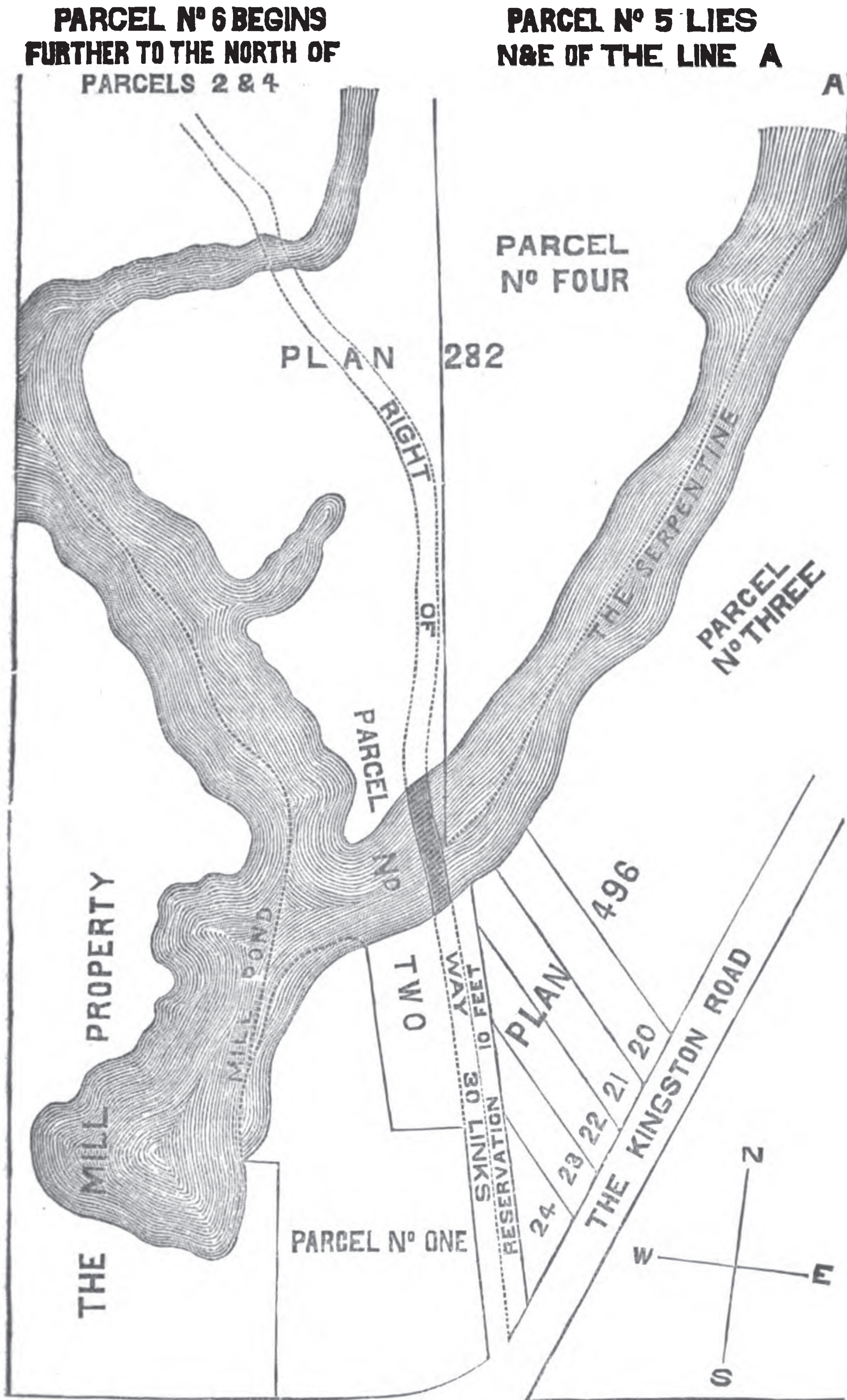
The following is a combined plan of plans Nos. 282, 496 :



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Parcel No. 3 is described as follows: Commencing at the south-east angle of parcel No. 1, as shewn on the said plan of sub-division; thence north 26°, 42″, west 3 chains 60 links to a stone monument; thence north 28°, 54″, west 5 chains, 24 links to a point about midway on the bridge crossing the Serpentine, as shewn on the said plan; thence, &c. reserving therefrom the land occupied and used as a family vault, with twenty feet of land on all sides thereof, and a right of way from the Kingston Road thereto."

Parcel No. 4 is described as follows, so far as material: The description begins at the north-east angle; the second course from that point south 26°, 58″, east 9 chains, 76 links to a stone monument; thence in a southerly direction, following the centre of the Serpentine to a point about the centre of the bridge crossing the Serpentine. The said point is also the north-west angle of parcel No. 3, as shewn on the said plan of subdivision.

Parcel No. 5 is in no way interested in the right of way.

Parcel No. 6, which is immediately to the north of parcels 2 and 4, and through which the lane or way passes after describing the boundaries of the parcel concluded: "Reserving therefrom a right of way 30 links wide as shewn on said plan of said subdivision for the use and benefit of the owner of the lands situated on the north side of the Grand Trunk Railway, and immediately north of the said parcel No. 6."

John Small who, after the subdivision, acquired parcel No. 3 laid out the part of it upon the Kingston road, and on the 7th of January, 1882, he conveyed lots 16 to 23, both inclusive, to the defendant "as laid out on Berkeley plan of lots, which plan is filed in the registry office for the County of York as plan No. 496, together with the privilege of the water's use fronting on said lots to the centre of the Serpentine, and also with the use of the ten feet reserved on the said plan at the west end of the said lots and lot 24 to the lane." And by a subsequent deed of the 29th of January, 1883, John Small conveyed to the

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defendant "lot No. 37 as laid out on Berkeley plan of the subdivision of parts of lots Nos. 6 and 7, in the 1st concession from the bay, in the Township of York, which plan is registered in the registry office for the County of York, as plan No. 504, together with all the title and interest which the party of the first part has or may have in the right of way 30 links in width running through and between parcels Nos. 1, 2, 3, 4, and 6, as shewn on plan of the subdivision of the late William Innes Small, filed in the registry office of the County of York as plan No. 282, reserving, however, out of the land hereby conveyed a strip two inches in width across the north end thereof. The defendant on several occasions broke down the Plaintiffs fence adjoining the right of way in the pleadings mentioned in assertion of his alleged right to use the way.

The learned Judge delivered the following judgment:—

OSLER, J.—This action was tried before me at the Toronto Summer Sittings, 1883.

The facts are shortly as follows.

The late Charles Coxwell Small died in the year 1862, seized in fee of a farm known as Berkeley Farm, of which he had been the owner, and in the actual use and occupation for a period of forty years, or thereabouts. Leading through this farm, in an irregular direction, northerly from the Kingston Road he had made a way or lane, defined by fences or buildings throughout the greater part of its course and used for the general purposes, and the better enjoyment of the farm. On the east side of the lane, and some four or five chains from the Kingston Road, stables and other farm buildings were erected immediately adjoining the lane, and forming a part of its easterly fence, and access and entrance to which was obtained from the lane.

By his will, Mr. Small devised his farm to certain trustees who held it, in the events which happened, in trust to divide it equally between six surviving children, share and share alike.

In 1867 the beneficiaries determined to make a partition of the farm, and a plan of the intended sub-division was made, dated 24th June, 1867, and registered as No. 282.

There is no evidence of any verbal or written contract or agreement relative to the partition other than the plan and the conveyances by which it was carried out.

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On the plan the farm is divided into six parcels of unequal dimensions described as parcel No. 1, parcel No. 2, etc., and the lane or way referred to is delineated thereon and described as "right of way thirty links wide." It passes through parcel No. 1 immediately adjoining part of the westerly side or limit of parcel No. 3, and through parcel No. 2 into parcel No. 6, adjoining in its course the remaining part of the west side of No. 3, and also part of the west limit of parcel No. 4.

Contemporaneous conveyances of the several parcels, bearing date the 26th September, 1867, and expressed to be made in pursuance of the Act to facilitate the conveyance of real property were then made by the trustees to the respective parties, the lands being described by reference to the plan as parcel 1, parcel 2, &c., and also by metes and bounds according to the courses, distances, and monuments marked thereon, the latter description including in the case of parcels 1, 2, and 6, the land occupied by the lane, with the following reservations respectively: As to parcel No. 1, which was conveyed to Charles C. Small, "Reserving thereupon the right of way 30 links wide from the Kingston road along the east limit (*i. e.*, of parcel 1) by the lane leading to the bridge crossing the Serpentine as shewn on the registered plan." As to parcel 2 conveyed to John Small, and now the property of the plaintiff "reserving thereupon a right of way, thirty links wide as shewn on the said plan of said subdivision through said parcel No. 2, for the use and benefit of parcels 4 and 6." And as to parcel No. 6, which was conveyed to Mrs. Ripley, "reserving thereupon a right of way as shewn on the plan for the use and benefit of the owners of land situate on the north side of the Grand Trunk Railway, and immediately north of parcel No. 6." The lands referred to in this last reservation, formerly constituting part of Berkeley Farm, had been sold, it was said, during the testator's life time. There was no evidence as to the terms or extent of the right of way, if any, granted to the purchasers, but they had always used the lane as their necessary access to the Kingston Road.

Parcel No. 4 was conveyed to Geo. B. Small, and parcel No. 3, of which the defendant's land forms part, to Mrs. Louisa Goldsmith. Neither of these deeds in terms refers to the right of way or lane. The barn, stable, and farm buildings already mentioned were on parcel No. 3, but they have long since disappeared and have never been

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replaced. Parcels 1 and 3 abut, for their whole width, 6 chains 20 links in one case and 34 chains 92 links in the other upon the Kingston road.

It was not stated whether the deeds of parcels 1, 2, and 6, were executed by the parties. Assuming that they were, the reservations would operate as a newly created easement by the grantees to the grantors: *Goddard* on Easements, 2nd ed., p 100; *Wilson* v. *Gilmer*, 46 U. C. R. 545, 551.

Parcel No. 3 was subsequently acquired by John Small, who subdivided the west part of it into a range of twenty-four building lots fronting on the Kingston road and with the Serpentine in the rear as shewn upon a plan, dated 17th November, 1881, and registered as No. 496.

This plan also shews that a strip of land ten feet in width is reserved between the westerly end or rear of lots 21, 22, 23 and 24, and the extreme west side or limit of parcel No. 3, and therefore immediately adjoining or contiguous to the way shewn on plan 282 from the Kingston road to the Serpentine, the latter being also shewn as a road on plan 496.

It was said that this reservation had been made with the view of widening the lane if the owners of parcels Nos. 1 and 2 would devote a similar strip on the other side for that purpose.

On the 7th January, 1882, Small by a deed expressed to be made in pursuance of the Act respecting short forms of conveyances, conveyed to the defendant lots 16 to 23 inclusive on plan 496, "with the use of the ten feet reserved on the plan at the west end of said lots and lot 24 to the lane."

The defendant afterwards, on several occasions, broke down the plaintiff's fence between the easterly side of parcel No. 2 and the ten feet reserve, in assertion of a right to use the way shewn on plan 282, and this action was brought to recover damages for the alleged trespasses, and to restrain the commission of further acts of a like nature.

The contention raised by the pleadings that this lane or way had become a public highway was not very forcibly urged at the trial.

On the evidence I find, as a fact, that it is not a public highway.

Nor can the defendant maintain any right to use it as being a way of necessity, for his land abuts upon a public highway, the Kingston Road, from which he has free access to every part of it.

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The defendant also relied on the Registry Act, R. S. O. ch. 111, secs. 82, 84, and the Land Surveyors' Act, R. S. O. ch. 146 secs. 70, 72, contending that as plan No. 282 was registered and parcel 3 sold in accordance with or by reference to it, he, as owning land in that parcel, is entitled to the use of all reservations which appear to be laid down thereon for lanes, streets, or right of way. But the provisions of these Acts do not, in my opinion, affect the case or give him by virtue of the registration of the plan more extensive rights than Mrs. Goldsmith, through whom he claims, acquired under the mere conveyance to her of that parcel by reference to that plan.

No allowance for a road is shewn or reserved upon it. What is shewn is distinctly described thereon as a right of way over some one else's land, and the purchaser of No. 3 could not acquire a right to use the way merely because as defined on the plan it adjoined her land: *Bolton* v. *Bolton*, 11 Ch. D. 968,

The case is not like *Rossin* v. *Walker*, 6 Gr. 619; *Cheney* v. *Cameron*, *Ib.* 623, to which I may add *Adams* v. *Loughman*, 39 U. C. R. 247, and others of that class in which it has been held that where building lots have been sold according to a plan, (whether registered or not is immaterial,) the portions of ground laid off as roads cannot afterwards be devoted to other purposes; because the plan only shews a right of way not necessarily appurtenant to parcel 3 or necessary in order to give the purchaser access to it; and also because Mrs. Goldsmith did not take that parcel on the faith of such right of way being appurtenant to it, either from its being described on the plan or otherwise.

From the descriptions I have referred to contained in the contemporaneous conveyances of other parcels, I should infer that the right of way was intended for the use of the owners of parcels Nos. 2, 4 and 6 only, and of owners of land north of the Grand Trunk Railway, and not for the purchasers of Nos. 1 and 3, which abut for their whole width upon the public highway.

As to the effect of a sale according to a plan, see *Squire* v. *Campbell*, 1 My. & Cr. 459; *Breynton* v. *London and North Western R. W. Co.*, 2 C. P. Cooper R. 108; *Randall* v. *Hall*, 4 De.G. Sm. 343; *Morton* v. *Corporation of St. Thomas*, A. R. 323,

A case of *Carey* v. *City of Toronto*, recently decided by

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my brother Ferguson, but not yet reported (*a*), was cited to me on the argument, but without a fuller statement of the facts than I have been furnished with, I do not see that it is in point. If the plaintiff's land there was described in his deed as bounded by a lane of defined width, without more, whether shewn upon a plan or not, and the plaintiff purchased on the faith of the existence of the lane, I can understand that the vendor might not be permitted afterwards, to close it up and say that there was no lane there: *Adams* v. *Loughman*, 39 U. C. R. 247. But that is not this case.

The real question is, whether, apart from the plan, which does not seem to be material, the right of way is appurtenant to parcel No. 3, or available for the owners of land in that parcel.

It is an easement or *quasi* easement which first existed or was created or used during the unity of ownership of the whole farm, and apart from the general words in the deed of the 26th September, 1867, the effect of which I will presently consider, it would not pass by implied grant, from the mere conveyance of parcel No. 3, not being an easement continuous in its nature, or necessary for the convenient and comfortable use of that parcel.

In *Polden* v. *Bastard*, L. R. 1 Q. B. 156, Exch. Ch., Erle, C. J., says, at p. 161: "There is a distinction between easements, such as a right of way or easements used from time to time, and easements of necessity or continuous easements. The cases recognize this distinction, and it is clear law that, upon a severance of tenements, easements used of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner by appropriate language, shews an intention that they should pass."

To the same effect is *Pearson* v. *Spencer*, 1 B. & S. 571, 3 B. & S. 761. I refer also to *Harris* v. *Smith*, 40 U. C. R. 33, and in appeal, 50, where the subject is much discussed, and to *Goddard* on Easements, 2nd ed., pp. 89, 98.

In the case of *Ewart* v. *Cochrane*, 7 Jur. N. S. 925, 4 Macq. H. L. 117, upon which the defendant relied, there had been unity of possession of both tenements, but the earlier conveyance was of the *quasi* dominant tenement

(*a*) See note 3 Can. Law Times, p. 406.

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and the *quasi* easement (a drain) was a continuous one, which had been used and was necessary for the comfortable enjoyment of the part of the property first granted. I do not regard that case as decisive of or indeed as affecting the case before me.

It is not necessary to say what decision I should have arrived at upon this question of implied grant if the way, in addition to being defined and precise in its character, had been made and used solely for the purposes of and in connection with parcel No. 3 instead of for the general purposes of the whole farm: *Watts* v. *Kelson*, L. R. 6 Ch. 166, 172, 174; *Langley* v. *Hammond*, L. R. 3 Ex. 161, at p. 170, per Bramwell, B.

But it is also argued that by the terms of the deed, or rather by terms which are to be read into it, the right, to use the way in question passed.

The deed is expressed to be made in pursuance of the Act to facilitate the conveyance of real property, meaning the Act respecting short forms of conveyances: C. S. U. C. ch. 91.

By section 3 of that Act it is enacted that every such deed, unless an exception be specially made therein, shall be held and construed to include all houses, &c., *ways* and easements, and appurtenances whatsoever to the lands therein comprised belonging or in any wise appertaining or *with the same held, used, occupied, and enjoyed*, &c.

The way in question was one which, at the date of the deed, was used and enjoyed in connection with that part of the farm conveyed as parcel No. 3 in going to the farm buildings thereon, and in coming therefrom to the Kingston Road, and other parts of the farm.

In *James* v. *Plant*, 4 C. & E. 749, Tindal, C. J., says, at p. 761: "We agree also in the principle laid down by the Court of Queen's Bench, that, in the case of an unity of seisin, in order to pass a way existing in point of user, but extinguished or suspended in point of law, the grantor must either employ words of express grant, or must describe the way in question as one 'used and enjoyed with the land,' which forms the subject of the conveyance."

Barkshire v. *Grubb*, 18 Ch. D. 616, is the latest case I have seen on the subject. Fry, J., at p. 622, there states the result of the authorities thus: "I think that when there are two adjoining closes, and there exists on one of them a formed and constructed road, which is in fact used for the purposes of the other, and that other is granted with the

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general words, 'together with all ways now used or enjoyed therewith,' a right of way over the formed road will pass to the grantee, even though that road had been constructed during the unity of possession of the two closes, and had not existed previously."

Watts v. *Kelson*, L. R. 6 Ch. 166; *Kay* v. *Oxley*, L. R. 10 Q. B. 360, are authorities to the same effect.

In *Harris* v. *Smith*, supra, Patterson, J., quotes a number or authorities and deduces the following proposition, *inter alia*, with reference to the point, at p. 61: "But if the intention appears from the deed to extend the meaning of the word appurtenances beyond its technical signification, and to embrace in it the right of way; or if the grant is of all ways 'used and enjoyed' with the lands granted; or if other words are used which are appropriate to indicate an intention to include existing ways in the conveyance, then a defined way actually existing and in use will pass."

Then the cases of *Edinburgh Life Ass. Co.* v. *Barnhart*, 17 C. P. 63, and *Adams* v. *Loughman*, 39 U. C. R. 247, are decisive in the defendant's favour as to the application of the general words imported by the statute into the short form of conveyance.

I think the effect of the deed, read in connection with the Act, was to pass a right of way to the purchaser of No. 3 as such right then existed or was used into, from, and out of that parcel over the way in question, namely, through the barn and buildings which then existed on it near the north-west corner.

No question was raised whether the easement had been extinguished by the subsequent conveyance from Goldsmith to Ripley, the owner of parcel 6, of that part of parcel 3 on which the barns, &c., were erected, or because the latter parcel had been laid out into building lots (see *South Metropolitan Cemetery Co.* v. *Eden*, 16, C. B. 42, 57,) the right of way being one, looking at the user which existed at the time of the grant, for agricultural purposes only. There is no evidence that the property, although subdivided into building lots, is not still practically used for those latter purposes.

Two points were made by Mr. Black which may be noticed, although their decision has become practically unimportant: one, that the action should have been brought by the trustees; and the other that the defendant, as the owner of a part of parcel No. 4, is entitled to use the way from parcel No. 3 to his land in parcel No. 4.

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As to the first, the answer is, that the plaintiff is clearly the owner of the land, subject to the right of way, and is the proper person to test the existence of the right, or to sue for any improper user of it. As to the second the right of way to parcel No. 3, and that to parcel No. 4, are different and independent easements, and the defendant cannot burden the plaintiff's land with the user of a way out of the former into the latter parcel: *Gale* on Easements, p. 557.

For the reasons already given the defendant is entitled to judgment.

During Michaelmas Sittings, *J. E. Robertson* moved on notice to set aside the judgment entered for the defendant, and to enter judgment for the plaintiff.

During the same sittings, November 27, 1883, *Bethune*, Q. C., and *J. E. Robertson* supported the motion. The contemporaneous conveyances, namely, the partition deeds. must be read together, and they expressly declare that the heirs of the late C. C. Small never intended to allow the owners of parcel 3 to use this lane, by limiting the use of it to the owners of parcels 4 and 6. There was no user of the way for the purpose of going to or from any parcels, as separate parcels. It was all one farm. As the deeds are contemporaneous, the intention must be looked at. The intention was clearly to reserve the use of the lane for the owners of parcels 4 and 6 alone. There is no implied burden of the easement in question. During the unity of ownership, no right of way would arise. It is clearly not a way of necessity. If any right of way existed, it has been abandoned. This appears also from a plan filed by Mr. John Small, with ten feet reserved for a lane in rear of the defendant's lots, and from John Small's and Etherington's evidence. There has been an extinquishment by alteration in mode of enjoyment; also by cessation of purpose. There was no user of the lane at the time Small conveyed to the defendant. The evidence shews that the farm buildings had long since disappeared and were never replaced. The rule is, that the surrounding circumstances may be looked at for the

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purpose of determining the subject matter of the grant. The ownership of a lot in parcel 4 cannot give the defendant the right he claims. It was purchased after the trespasses complained of. In any event the right to use it as appurtenant to parcel 4 cannot give the defendant the right to use it as appurtenant to parcel 3. The following cases were referred to *Swanborough* v. *Coventry*, 9 Bing. 305, 309; *Compton* v. *Richards*, 1 Price 27; *Wheldon* v. *Burrows*, 12 Ch. D. 31, 59; *Pyer* v. *Carter*, 1 H. & N. 916; *Dodd* v. *Burchell*, 1 H. & C. 113, 120-1; *Young* v. *Wilson*, 21 Gr. 144; *Pearson* v. *Spencer*, 1 B. & S. 571; 3 B. & S. 761; *Worthington* v. *Gimson*, 2 E. & E. 618; *Ewart* v. *Cochrane*, 1 Jur. N. S. 925, 4 Macq. H. L. 117, 122; *Polden* v. *Bastard*, L. R. 1 Q. B. 156; *Suffield* v. *Brown*, 4 DeG. J. & S. 185; *Crossley* v. *Lightowler*, L. R. 2 Ch. 478; *Watts* v. *Kelson*, L. R. 6 Ch. 166, 171; *Brett* v. *Clowser*, 5 C. P. D. 376, 382, 383; *Kay* v. *Oxley*, L. R. 10 Q. B. 360, 365; *Langley* v. *Hammond*, L. R. 3 Ex. 161; *Harris* v. *Smith*, 40 U. C. R. 33, 50; *Barkshire* v. *Grubb*, 18 Ch. D. 616; *Henning* v. *Burnet*, 8 Ex. 187; *National Guaranteed Manure Co.* v. *Donald*, 4 H. & N. 8; *Castle* v. *Fox*, L. R. 11 Eq. 542; *Mead* v. *Parker*, 15 Am. 110; *Baird* v. *Fortune*, 7 Jur. N. S. 926; *United States* v. *Appleton*, 1 Sumner 492, 500; *Lampman* v. *Milks*, 21 N. Y. 505.

S. H. Blake, Q. C., and *Delamere*, contra. The right to the lane in question passed by virtue of the R. S. O. ch. 102, sec. 4, under the words therein contained, namely, all ways, easements, and appurtenances whatever to the lands therein comprised, belonging or in any way appertaining, or with the same held, used, occupied or enjoyed. The deed being under the Short Form Act. The evidence shews that the way, at at the date of defendant's deed, had been so used, occupied, and enjoyed for upwards of forty years; and even if the so-called partition deeds are to be read together each one under the Statute must contain a grant to each grantee of a right of way over the lane. Under the Statute it is not essential that the easement should be a way of ncessity,

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and therefore if the doctrine of implied reservation be limited to way of necessity as laid down in *Harris* v. *Smith,* 40 U. C. R. 33, 50, and *Wheeldon* v. *Burrows,* 12 Ch. D. 31, 59, it is inapplicable here. The fact of the conveyance to the plaintiff's predecessor in title, covering the lane in question could not take away the defendant's right of user. The defendant also purchased according to a plan, and on the plan the way is set out and clearly defined as a way appurtenant to his lot, and he therefore was entitled to use the way, and his right cannot be defeated by any registered deed which might qualify his right. The defendant also as owner of part of parcel four is entitled to use the way. They also referred to *Gale* on Easements, 5th ed. p. 95 note 102; *Barkshire* v. *Grubb,* 18 Ch. D. 616; *Watts* v. *Kelson,* L. R. 6 Ch. 166, 171, 175; *Wheeldon* v. *Burrows,* 12 Ch. D. 49, 55-8; *Kay* v. *Oxley,* L. R. 10 Q. B. 360; *Ewart* v. *Cochrane,* 7 Jur. N. S. 925, 4 Macq. H. L. 117; *Edinburgh Life Assurance Co.* v. *Barnhart,* 17 C. P. 63; *Adams* v. *Loughman,* 39 U. C. R. 247; R. S. O. ch. 46 sec. 71, *et seq*; R. S. O. ch. 111, secs. 82-3; *Epsley* v. *Wilkes,* L. R. 7 Ex. 298; *Cousens* v. *Rose,* L. R. 12 Eq. 366; *Goddard* on Easements, 2nd ed., p. 90; *Dart* on V. & P., 3rd ed, 363-4; *United Land Co.* v. *Great Eastern R. W. Co.,* L. R. 17 Eq. 158.

March 7, 1884. WILSON, C. J.—The first thing to be determined is what the deeds say.

Parcel No. 1 commences at the south west angle of parcel No. 3 as shewn by the plan, and parcel No. 3 commences at the south east angle of parcel No. 1, as shewn on the plan. So far that shews nothing which is very certain. Then parcel No. 1 from that point runs north 26° 42′, west 3 chains 60 links to a stone monument, and parcel No. 3, is described in the like manner. Now upon the plan there is a stone monument shewn, upon the easterly side line of the lane just on that course, and at that distance from the point of the easterly side line of the lane where that line meets the northerly side of the Kingston Road. The starting

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point of parcels Nos. 1 and 3, that is, the south east angle of 1, and the south west angle of No. 3, is therefore at that point on the Kingston Road which is touched by the easterly side line of the lane. So that the lane is included in the description of Parcel No. 1, and is excluded from the description of parcel No. 3.

The second course of No. 1 proves the same thing, for it is: thence 68° 51′ west, 1 chain 97 links to a stone monument, and there is that monument shewn on the plan just at that distance, and on that course from the first mentioned stone monument on the *east* side line of the lane.

The description is therefore plainly along the *east* side line of the lane.

The second course of parcel No. 3 also proves that, for it is from the end of the first limit, then north 28° 54′, west 5 chains 24 links to a point about midway on the bridge crossing the Serpentine as shewn on the plan, that is manifestly keeping still upon the east side line of the lane.

The east limit of No. 1 is from west to east along the north side of the Kingston Road, 6 chains 20 links, more or less to the place of beginning, so that the southerly part of the lane as far northerly as the limit of No. 1 extends, is included within the description of No. 1, and it is just as plainly not included within the description of No. 3.

Then the *reservation* in the conveyance of No. 1, is of "the right of way" 30 links wide from the Kingston Road *along the east limit* being the lane leading to the bridge crossing the Serpentine as shewn on the registered plan of sub-division. While in No. 3 there is no such reservation, but a reservation of the family vault upon a different part of the property.

The second course in the description of No. 3 is to a point about the centre of the bridge, that line being as before stated necessarily on the *east* side line of the lane.

The second course of parcel No. 2 is southerly along the same line, and to the same point about midway on the bridge, and which point is described to be the south west angle of parcel No. 4. Now that point at the centre of the

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bridge in the description of parcel No. 4, is described to be also the north west angle of parcel No. 3, as shewn on the plan of sub-division. And looking at the plan, which is so important a part of all these conveyances, it is quite clear that the south west angle of No. 4 is upon a continuation of the *east* side line of the lane, and is the converging point where parcels Nos. 2, 3, and 4 meet.

Then the third course of parcel No. 2 is from the point at the centre of the bridge southerly along the same line 5 chains 24 links, to the stone monument on the east side of the lane at which the course of the description of No. 3 terminates.

The description of parcel No. 2, plainly includes the lane from the most south easterly point of No. 2, which is at the distance of 3 chains 60 links the most north easterly point of parcel No. 1, that last distance being measured from the north side of the Kingston Road.

The *reservation* contained in parcel No. 2 is "reserving therefrom a right of way 30 links in width, *as shewn on said plan through said parcel No. 2,* for the use and benefit of the owners of parcels Nos. 4 and 6."

Then parcel No. 6 has reserved from it the right of way "for the use and benefit of the owners of the lands situated on the north side of the Grand Trunk Railway, and immediately north of the said parcel No. 6."

So far as the conveyances shew it appears parcel No. 1 by metes and bounds includes the lane from the Kingston Road, so far as the easterly limit of that parcel extends, that is, for the distance of 3 chains 60 links reserving thereout the right of way. Parcel No. 2, includes by metes and bounds the lane from that north east angle of No. 1 all the way "through said parcel No. 2," for the use of parcels No. 4 and 6, for all that distance the lane is wholly upon No. 2. And parcel No. 6 includes the lane, but the right of way is reserved for those upon the same township lot, who are north of the Grand Trunk Railway.

The owners of parcels Nos. 1, 2, and 6 own the fee simple of the roadway; the right of way being reserved by the

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grantors of these parcels in the partition deeds which they executed for the use of 1, 2, 4, 6, and those who are north of the Grand Trunk Railway. Parcels Nos. 3 and 5, have no kind of share or interest in that lane so far as the conveyances are expressed.

The learned Judge has found that the way in question, from the Kingston Road northerly for a considerable distance, and far beyond the place in question, was a well defined ancient way for a period of 40 years at least, marked by fences and other indications.

It was also found as a fact, that the occupiers of parcels 1 and 3 had no way or claim of necessity, as their lands are not of any great depth, and they have access to their lands along the whole of their properties, which have respectively long frontages upon the public highway of the Kingston Road.

The conveyances shew that Charles C. Small, the then owner in fee of the whole of the parcels already named, devised the whole of these lands to trustees in fee, to have and to hold the rents, issues and profits thereof, and apply the same for the benefit of his son, William Innes Small, for his natural life, and in the event of his son dying, leaving a child or children him surviving, then to convey the said land to such child or children, if more than one, in equal shares, his, her, and their heirs and assigns; and in the event of his son dying without leaving a child or children, him surviving then to divide the same amongst such of the testator's other children as should then be living; his, her, and their heirs and assigns, share and share alike.

William Innes Small died after the testator, unmarried, and without leaving any child or children. And the deeds of partition were made contemporaneously to the testator's six surviving children, in parcels respectively as before stated.

Up to the time of the making of these deeds, on the 26th of September, 1867, the whole of these parcels was held by unity of title.

These deeds having been made at the same time, must

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be considered and read as one single transaction: *Swanborough* v. *Coventry*, 9 Bing. 305; and the cases there cited and referred to with approval in *Wheeldon* v. *Burrows*, 12 Ch. D. 31. at p. 59; *James* v. *Plant*, 4 A. & E., at p. 759.

In the present case the owner of parcel No. 3, accepted of that parcel without any mention of right of way over the land and assented to the grant of the fee simple of the roadway being made to the parties who received conveyances of parcels Nos. 1, 2 and 6, and of a right of way being expressly granted only to the owners of parcels 4 and 6, and to the owners north of parcel 6, and north of the Grand Trunk Railway.

The provision as to the right of way to the grantees of parcels 4 and 6, is contained in the conveyance to the grantee of parcel No. 2, and is strictly a way of necessity to them. Can the grantee of parcel No. 3, or the defendant who claims under such grantee, claim a right of way over the lane, the fee in which is vested in the plaintiff as owner of parcel No. 2, when that parcel was subjected by the grantors only and expressly to a right of way in favour of the owner of parcels Nos. 4 and 6? That is, can such claim be made under the R. S. O. ch. 102, sec. 4, which enacts that, "every such deed" [made under that Act] "*unless an exception is specially made therein*, shall be held and construed to include all * * ways, * * liberties, privileges, easements, * * and appurtenances whatsoever to the lands belonging or in anywise appertaining, or with the same, held, used, occupied, and enjoyed, or taken or known as part or parcel thereof?"

If the grantors cannot derogate from their grant, and claim a right of way themselves over the way which runs through parcel No. 2, in respect of their ownership of some parcel of land abutting upon the part which they held in their own right, or could burden parcel No. 2 with any other servitude than that reserved for or granted to the owner of Nos. 4 and 6, neither can the owner of parcel No. 3, who acquired title at the same time, and as part of the one transaction and conveyance from the same owner;

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according to the case of *Swanborough* v. *Coventry*, 9 Bing. 305, before mentioned.

And I think in this case the R. S. O. ch. 102, sec. 4, does not apply because there has been in effect "an exception specially made in the conveyance" to the grantee of parcel No. 3, of any right of way over the lane which runs through parcel No. 2, by reason of the special servitude which that parcel has been subjected to in favour of the grantees of parcels No. 4 and 6, with the knowledge and assent of the grantee of No. 3.

It appears to me the grantee of parcel No. 3 cannot make such a claim. The grantor could not claim such a right of way without an express reservation, for no reservation will be implied in his favour, but when the easement is one of necessity: *Harris* v. *Smith*, 40 U. C. R 33; *Wheeldon* v. *Burrows*, 12 Ch. D. at p. 50, *et seq.*; and the cases there cited. And the right of way here is not one of necessity, and it is not even a continuous easement: *Harris* v. *Smith*, 40 U. C. R. 33, 61, *et seq.* and cases cited: *Barkshire* v. *Grubb*, 18 Ch. D. 616, at p. 619; *Watts* v. *Kelson*, L. R. 6 Ch. 166.

If this defendant have the right of way in respect of his being an owner of part of parcel No. 4, he cannot exercise that right for the purpose of any part of parcel No. 3 *Henning* v. *Burnet*, 8 Ex. 187.

I am of opinion the conveyances shew the owner of parcel No. 3 upon, and by the deeds of partition which must be construed as all forming in effect, one conveyance did not by the terms of these conveyances, or by any of them obtain a grant of the right of way in question, and also that looking at the deeds of partition as being all one transaction the grantee of parcel No. 3 did not acquire by the operation of the R. S. O. ch. 102, sec. 4, any right of way over the lane in question.

I agree with the learned Judge in holding that the way was not, and is not a public highway; and that the right of the plaintiff to preserve the roadway has not been barred by the Statute of Limitations, and the finding is

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therefore against the defendant on the first and second paragraphs of his statement of defence.

The third paragraph of the statement of defence claiming the right to use the way as owner of parcel No. 4, must be found against the defendant. That third paragraph is very defective, for it does not aver the defendant was such part owner of No. 4 at the times when the acts of trespass were committed, nor does it allege the said acts were committed in the assertion of his rights as such part owner, and for the necessary use and enjoyment of the part of No. 4 of which he was owner. If the third paragraph means all that, there is a perfect issue joined. If it do not, it is demurrable, or it should be struck out as insufficient, and leading to nothing definite.

In the first place it is not true, if it is to be assumed as averring, that the defendant was part owner at the times when, &c., because the trespasses were committed in August and September, 1882, and the defendant did not become part owner of No. 4 until January 1883. And in the second place, it is not true the defendant committed the trespasses in assertion of his rights as part owner of No. 4, because the trespasses were committed opposite parcel No. 3, and had no connection with any part of parcel No. 4. If that paragraph means what I have stated, it was plainly disproved at the trial. If it do not mean that, the defendant cannot have judgment upon it, because, even although true, he cannot get judgment upon it, so long as the facts proved are not sufficient in law to entitle him to judgment: O. J. Act, sec. 44.

In my opinion the third paragraph is bad in law, and would warrant a judgment on that ground being given against its sufficiency.

Then as to the fourth paragraph of the statement of defence. If it relate to the same part of parcel No. 4 which is mentioned in the third paragraph, it must fall with that paragraph; but if it mean, as it is said it does, and was intended to do, under the term, "the defendant purchased *the lands abutting on said roadway according*

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to a plan, etc.," to refer to a part of parcel No. 3, or to *any* land, or to *certain* land, *abutting on the roadway,* then the land the defendant purchased may be sufficiently identified. But if it be, what is the meaning of that paragraph? The paragraph is, that the defendant purchased this land abutting on the roadway according to the plan, "and which plan shews the said roadway as open." And that is the issue tendered. But what of it that the defendant bought land abutting on a roadway according to a plan, and what of it that the plan shewed the roadway as open?

It can make no difference whether the plan shews the roadway as open or closed. If the defendant have no interest in the roadway, and he does not say he has, and the fact of his land abutting upon the roadway does not of itself give him a right of way over it. Besides the plan, whatever it shews as to the roadway being open, is not conclusive of the fact that it was open or should be open.

But what does the defendant mean by saying the plan shews the roadway as open? Open in what way? Along the land of the defendant abutting upon it, or open at the termini? I should say the defendant means the former, that is, that his land abuts upon an open roadway. If so, the plan does not shew that, but the contrary. But if the roadway be open abutting on the defendants land, what difference can it be to him that it is open, if he have not the right of user of it; or what is there to prevent the party or parties having the freehold of the roadway from fencing it off as against the defendant whose land merely abuts upon it? That issue, so far as it is material, must be entered against the defendant, for a person may have a right of way over his neighbour's open field, and yet be limited to a particular part of it.

The result is, that all the issues must be entered in favour of the plaintiff. The statement of defence being disproved, and the statement of claim proved.

Upon the issues and pleading as they are now, there is no ground on which the defendant can set up a right of way by virtue or aid of the statute: not on the first and

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second paragraphs of the statement of defence, because the roadway is not a highway, nor is the plaintiff's right barred to maintain his action by reason of the long user of it by the defendant and his predecessors in title. Nor to the third paragraph, for that relates to part of parcel No. 4, to which the defendant had no title at the times when, &c. Nor to the fourth paragraph, for that sets up no right of way excepting that his land abuts upon it, which means nothing but the mere fact that the land does abut upon it.

The motion of the plaintiff must therefore be allowed and the verdict and judgment rendered for the defendant be set aside, and entered for the plaintiff with the $25 damages, and the costs of the action and of his motion; and that the defendant be, and he is hereby enjoined from tresspassing on the land in question in this cause.

GALT, J., concurred (*a*).

(*a*) This case was argued before WILSON, C. J., and GALT, J., OSLER, J., having been appointed a Judge of the Court of Appeal, and the vacancy not having been then filled.

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