

SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL No.1 of 1992

BETWEEN:

(1) CLARENCE MICHEL

(2) FRANCES MICHEL

Appellants

and

(1) LENNARD AUGIER

(2) ARLETTE AUGIER

(3) ADRIAN AUGIER

Respondents

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice

The Honourable Mr. c.M.Dennis Byron - Justice of Appeal

The Honourable Dr. Nicholas J.O.Liverpool - Justice of Appeal

Appearances: Mr. o.v.o. Theodore for the Appellants Mr. C. A. McNamara
for the Respondents

1993: October 25;

1994: January 24;

June 20.

JUDGMENT

SIR VINCENT FLOISSAC, C.J. The appellants and the respondents are owners of **lands** situated at cambon, Bois d'Orange in the Quarter of Gros Islet in the island of Saint Lucia and shown in the Land Registry as parcels of Block 1253 B. The appellants own parcel No. 208, Lennard and Arlette Augier own parcel No. 102 and Adrian Augier owns parcel No.

122. The respondents' parcels are contiguous but the appellants' parcel is not contiguous to either of the respondents' parcels.

The map sheet from the Land Registry indicates a footpath which leads from the appellants' parcel to and over parcel No.103 belonging to one Clovis and then to Adrian Augier's parcel. There the footpath continues over Adrian Augier's parcel to Lennard and Arlette Augier's parcel where it joins a private road which runs through Lennard and Arlette Augier's parcel and leads to the public highway on 3rd April 1989, the appellants filed a writ in the High Court against the respondents. The writ was endorsed with a statement of Claim wherein the appellants claimed (inter alia) a Declaration that they are entitled to a right of way of necessity over the footpath and the private road. At the trial, there was no dispute as to whether the appellants are entitled to a pedestrian right of way over the footpath. The issues were whether the appellants are entitled to a vehicular right of way of necessity by virtue of article 486 of our Civil Code (the Civil Code of Saint Lucia) and consequently or otherwise are entitled to an enlargement of the footpath into a vehicular road and to a conversion of the right of way from a pedestrian right of way to a vehicular right of way.

By judgment dated 17th December 1991, *Matthew J* dismissed the appellants' action. The appellants are dissatisfied with the judgment and have appealed against it. The issues in this appeal are (1) whether the appellants are entitled to a right of way of necessity over the footpath and (2) whether the appellants are

- entitled to the said enlargement and conversion.
- (1) Right of way of necessity

The appellants rely on article 486 of our civil Code which provides that:

"A proprietor whose land is enclosed on all sides by that of others, and who has no communication with the public road, may claim a way upon that of his neighbours for the use of his property, but must pay an indemnity proportionate to the damage he may cause."

Admittedly, the appellant's parcel is landlocked and the appellants have no direct access to the public road. The appellants are therefore entitled to a right of way of necessity by virtue of article 486 of our Civil Code. The appellants may claim that right of way from some of their neighbours, but the neighbours chosen must be the appropriate neighbours having regard to articles

487 and 488 of our Civil Code which provide as follows:

"487. The way must generally be had on the side where the crossing is shortest from the land so enclosed to the public road. 488. It should however be established over the part where it will be least injurious to him upon whose land it is granted."

The choice of the appropriate neighbours whose lands should constitute the appropriate servient tenements of necessity to landlocked land is therefore required to be based on objective suitability and convenience. The proprietor of landlocked land cannot arbitrarily select the neighbours from whom he will demand a right of way of necessity. The requisite objectivity of the choice of the appropriate neighbours and the appropriate servient tenements in civil law is clarified in article 700 of the civil Code of Louisiana which provides that:

"The owner of the estate, which is surrounded by other

lands, has no right to exact the right of passage from which of his neighbors he chooses.

The passage shall be generally taken on the side where the distance is the shortest from the inclosed estate to the public road.

Nevertheless, it shall be fixed in the place the least injurious to the person on whose estate the passage is granted."

The question required to be answered in the present case is whether the appropriate neighbours of the appellants are the respondents or Clovis or whether the appropriate servient tenement of necessity to the appellants' parcel are the respondents' parcels or Clovis' parcel. This invites a comparison of the relative suitabilities and conveniences of the respondents' parcels and

Clovis' parcel as appropriate servient tenements of necessity to the appellants' parcel.

on the one hand, Clovis' parcel is contiguous to the appellant's parcel and is more than half of the latter's north- western boundary which faces the highway. Clovis' parcel is the intermediate land between the appellant's parcel and the highway and affords direct access to the highway.

On the other hand, no part of the respondents' parcels abuts the appellants' parcel. In fact, Adrian Augier's parcel is some distance away and Lennard and Arlette Augier's parcel **is even** further away from the appellants' parcel. The passage over the respondents' parcel from the appellants' parcel to the highway is circuitous and much longer than the passage over Clovis' parcel. Access to Adrian Augier's parcel from the appellants' parcel is over Clovis' parcel and by means of the said footpath. But for the footpath, there could have been no justifiable reason for selecting the respondents' parcels as the appropriate servient tenements of necessity to the appellants' parcel. But a footpath does not *ipso facto* signify a right of way of necessity. A footpath usually signals a conventional or prescriptive right of way which is enjoyable independently of necessity. But a footpath per se is not evidence of a right way of necessity.

The learned judge (who visited the locus) was satisfied that

- a vehicular right of way of necessity over the respondents' parcels

would be most injurious to the respondents. The learned judge said:

"It is palpably clear from a view of the Registry

map and also from a view of the locus that the way claimed by the Plaintiffs over the Defendants' land could not be the shortest route from the Plaintiff' land to the Castries/Gros Islet Highway. The shortest route would follow a path between Mr. Clovis' land at lot 103 and lot

102. Counsel for the Plaintiff no doubt concedes this for he says that the term "where crossing is shortest" is only a rough guide. He has provided no authority for that statement. Article 488 also requires that the right of way "should however be established over the point where it would be least injurious to him upon whose land it is granted". I agree with Adrian Augier and the map sheet so indicates that the vehicular right of way sought over the lands of the Augiers would, in effect, be dividing both properties."

The proper inference to be drawn from these circumstances is that the respondents are not the appropriate neighbours whose parcels should be held to be the appropriate servient tenements of necessity to the appellants' parcel. All indications are that Clovis is the appropriate neighbour and Clovis' parcel is the appropriate servient tenement of necessity within the spirit and intent of article 486 of our Civil Code. However, since Clovis was not a party to the proceedings and was not given an opportunity to be heard, no decision adversely affecting his rights and interests can be given.

(2) conversion of the right of way

Since the right of way over the footpath is either conventional or prescriptive, the other question required to be decided is whether the beneficiary of a conventional or prescriptive right of way over a footpath is entitled to an enlargement of the footpath into a vehicular road or to the conversion of the right of way from a pedestrian to a vehicular right of way. In support of his submission that the appellants are entitled to such enlargement or conversion, counsel for the appellants relied on various authorities including *"Traite de Droit Civil du Quebec"* (Third Edition 1945) by Andre Montpetit and Gaston Taillefer and the decision of the Court of Appeal of Montreal in the case of **Bissonette-Courteau v Gougoux** (1982) C.A. 565. Since these authorities were all concerned with rights of way of necessity, they are not relevant to and do not assist in solving the problem in this case which is concerned with a conventional or prescriptive right of way.

The solution to the problem in this case is to be found in article 504 (read together with article 1(61) and articles 496 and

497) of our Civil Code.

Article **504**.

"He who has a right of servitude can only make use of it according to his title, without being able to make, either in the land which owes the servitude, or in that to which it is due, any change which renders the servitude more onerous."

Article **1 (61)** "The word "title" is used with reference to property to denote either the act or contract upon which the right to such property is founded, or the document which is the principal evidence of such act or contract, the meaning applicable in any particular case being determined by the context."

Article **496**.

Article **497**.

"No real servitude can be established without a title; possession, even immemorial, is insufficient for that purpose."

"The want of a title creating the servitude can only be supplied by an act of recognition proceeding from the proprietor of the land subject thereto."

The principle enshrined in article 504 (read together with article 1(61) and articles 496 and 497) of our civil code is that where a servitude (including a right of way) is created by title (contract, document or other human act), the title governs the extent of the servitude.

The dominant owner cannot unilaterally exceed the authority of his title by unilaterally aggravating the servitude or unilaterally increasing the burden of the servient tenement. In the case of a conventional servitude, the extent of the servitude is governed by the documentary title or by the servient owner's act of recognition (if any). In the case of a prescriptive servitude, the

extent of the servitude is determined by reference to the extent of the possession which generated the prescriptive title. In either case, the dominant owner has no right unilaterally to enlarge the servitude beyond the limits of

- his title or to demand such enlargement from the servient owner.

- In **Frechette v La compagnie Manufacturiere De st. Hyacinthe** (1883) 9 A.C. 170 at 180, *Sir Arthur Hobhouse* (delivering the judgment of the Privy Council in an appeal from Quebec) said:

"The substantial difficulty this: that they are seeking servitude by the act of recognition;•. " in the way of the plaintiffs is to establish a new and different man without either grant or Those words are apposite here. The appellants are demanding an improved servitude which has not been proved to be within the scope or contemplation of the contract, document, act of recognition or possession which constitutes the appellants' title to their conventional or prescriptive servitude. such a demand has no legal foundation under Quebec, Louisiana or Saint Lucia Civil Law.

Nor is such a demand entertainable at common law. In **Mills v Silver** (1991) 1 A.E.R. 449, the English Court of Appeal held that the defendants' prescriptive right of way over a track did not authorise the defendants to make improvements to the track to the plaintiffs' detriment. *Dillon L.J.* said (at page 461):

"In the second place if the appellants or their predecessors had been expressly granted a right of way for all purposes with or without vehicles over the disputed track that would have entitled them not merely to repair the disputed track but to improve it to make it suitable for the accommodation of the dominant tenement even if the dominant tenement was to be used for some purpose not in contemplation at the time of the grant (see *Newcomen v Coulson* (1877) 5 Ch D 133). This is founded on the presumed intention of the grant. In the simplest case, if a general right of way is granted with or without vehicles, which is to be the principle access to a house, it is permissible for the grantee to improve it by making it up as a carriageway (**see** for instance *Gerrard v Cooke* {1806} 2 Bos & PNR 109, 127 ER 565).

In the third place, however, a prescriptive right of way differs from a right of way by express grant in that the extent of a prescriptive right of way is limited by the nature of the user from which it has arisen (see *Wimbledon and Putney Commons Conservators v Dixon* (1875) 1 Ch D 362). If the dominant owner under a prescriptive grant cannot increase the burden on the servient tenement by building further buildings

- e.g. additional houses - on the dominant tenement, I do not see why he should be entitled to increase the burden on the servient tenement by building a made road over the servient tenement, so as to make the way usable at times of the **year** and in weather conditions when it was not passable before."

The principle incorporated in this decision is the same as the principle embodied in article 504 of our civil Code. Applying that principle and articles 486 to 488 of our civil Code, I conclude (1) that the appellants are not entitled to a right of way of necessity over the footpath or over any part of the respondents' parcels numbers 122 and 102 (2) that the appellants' right of way over the footpath is either a conventional or a prescriptive right of way (J) that the appellants have not proved that the improved servitude demanded is within the scope or contemplation of their conventional or prescriptive title to the servitude and (4) that the appellants are not entitled to an enlargement of the footpath into a vehicular road or to the conversion of the right of way from a pedestrian to a vehicular right of way. For these reasons, I would dismiss the appeal with costs to the respondents to be taxed if not agreed. I hope that notwithstanding the outcome of the appeal, *it* is still possible for the appellants, the respondents, Clovis and their lawyers to resolve the appellants' problem amicably and in a neighbourly spirit.

SIR VINCENT FLOISSAC

Chief Justice

I concur.

C.M. DENNIS BYRON

Justice of Appeal

LIVERPOOL, J.A.

The appellants have for some time been the owners of a portion of land shown in the Registry map of St. Lucia as parcel 208 of Block 1253B. In order to reach the public road the appellants are entitled to a pedestrian right of way via a footpath over parcel

103 which is owned by one Clovis, a pedestrian right of way over parcel 122 owned by the third respondent, and a vehicular right of way over the land of the first and second respondents (parcel 102).

When the appellants were about to build their home they wrote to the first and second respondents requesting permission to enlarge the footpath into a vehicular road. Permission was refused. Whereupon the appellants filed a writ claiming that they were lawfully entitled to a right of way in accordance with Article 486 of the Civil Code of St. Lucia (the Code). Code states -

Article 486 of the "A proprietor whose land is enclosed on all sides by that of others, and who has no communication with the public road, may claim a way upon that of his neighbours for the use of his property, but must pay an indemnity proportionate to the damage he may cause."

Since the appellants' land is landlocked, the pedestrian right of way which now exists over the land of the third respondent could only be enlarged if the appellants could prove a suitable grant to them of such an extended right. This they did not attempt to do. Instead, they invited the learned Judge not to restrict his consideration of their claim to the provisions of Article 486 as pleaded, but to decide the nature in law of the right of way required and to make a decision accordingly. The learned Judge refused to accept this invitation, and found for the third respondent. In so doing he was supported by the following words of *Chief Justice Wooding in Roberts v Toussaint and others, Law Reports of Trinidad and Tobago (1966-69) Volume 19, Part 3, page*

700 at pages 707-708 -

"Every case must be decided on the issues which appear on the record. So to insist is not mere pedantry. on the contrary, it would, in my opinion, be most unjust to find against a party to any suit, whether civil or criminal, upon allegations of which he has had no due or proper notice and which, consequently, he has not been warned he will have to meet. To give such notice is the function of pleadings in civil cases in the same way and just as essentially as it is the function of an information or an indictment to do in criminal proceedings. 11

In his argument before this court learned Counsel for the appellants cited several Canadian authorities on the interpretation of Article 540 of the civil Code of Quebec which is in pari materia with Article 486 of the Code. However, despite his undoubted industry he was unable to cite any authority which would empower the Court to permit the appellants to enlarge the pedestrian right of way over the land of the third respondent .

I would therefore agree with the learned trial Judge that the appellants are entitled to a vehicular right of way over the land of the first and second respondents; and to a pedestrian right of way over the land of the third respondent which they are not entitled to enlarge by virtue of the provisions of Article 486 of the Code.

I too would dismiss the appeal with costs.

NICHOLAS J.O. LIVERPOOL

Justice of Appeal