14, 1971

IN THE PRIVY COUNCIL No. 8 of 1970

ON APPEAL

FROM THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE GUYANA

BETWEEN

ROSALINE ANTIGUA Appellant

- and -

ISAAC BOXWILL Respondent

CASE FOR THE APPELLANT

1. This is an appeal from an order of the Court of Appeal of the Supreme Court of Judicature of Guyana, (Persaud, J.A., and Cummings, J.A., Crane, J.A. dissenting) dated the 14th October, 1968, dismissing the Appellant's Appeal from the judgment of George J. dated the 23rd February, 1968, granting the declaration sought by the Respondent.

2. This appeal raises the questions of whether the respondent's claim for a right of way was governed by the English Common Law or by Roman Dutch Law; and whether the respondent was entitled to a right of way over and along the appellant's premises.

3. This appeal concerns the south half of Lot 28 Lodge Village, which is divided into a north half and a south half. The former has its entrance northwards in D'Urban Street, the latter southwards in Princes Street, both public roads in the Greater Georgetown area. p.137(a)

p.26 lines 41-42 p.25 lines 18-26 p.26 lines 1-25 p.16 lines 19-21

4. In 1939 the south half of Lot 28 was owned by one Ellen Joseph. In November of that year, she let to the appellant the southern most portion of the lot on which the appellant erected a house which she has since occupied with her entrance on Princes Street. The appellant proceeded to fence her lot on the northern, southern and eastern side, (a fence west of her plot already existed), leaving a strip of land about four feet wide along the eastern boundary of the lot which gave access to the lands at the back.

p.26 lines 35-38 p.13 lines 33-34

5. In 1943 one Hodge rented the portion of the lot immediately north of the appellant and built a house thereon. In 1951 the respondent replaced Hodge as tenant of that house-spot and occupied the said house.

pp.37-38 lines 26-36 1-9 p.10 lines 27-32 p.17 lines 14-24

6. In 1953 one Thomas rented the remaining portion of land north of the respondent on which he also constructed a house which he still occupies. Both Hodge and Thomas and then the respondent gained access to Princes Street by means of the strip of land which had been left available by the appellant.

p.29 lines 6-10 p.30 lines 55-13 p.10 lines 34-42 p.129 exhibit "B"

7. In February 1955 Ellen Joseph as lessor and the respondent as lessee executed a written lease for a term of 5 years with a right of renewal for a term of 5 years with a right of renewal for a similar period, of that parcel of land on which the latter's house then stood. Under that lease the respondent was given a right of ingress and egress "along a strip of land 4 feet in width extending towards Princes Street, along the eastern boundary of the lot".

p.140 Ex.K 1 p.21 line 28 p.22 lines 28

8. In April 1956, Ellen Joseph died leaving one Margaret Kingston as the executrix of her estate. In 1957 the appellant moved her eastern fence westwards, widening the above mentioned passageway by a further $2\frac{1}{2}$ feet.

p.32 lines 28-30 p.11 lines 20-25 p.134 Ex.C

9. In December, 1960, the respondent who was still occupying the same area of land as tenant of the estate of Ellen Joseph deceased, paid $300.00 to his landlord's solicitors by way of a deposit on account of the purchase price of a portion of the south half lot 28 Lodge.

10. In 1961 the lot was surveyed and a plan prepared which sub-divided the south half lot 28 into sublot A and sublot B. Sublot A has its facade in Princes Street. Sublot B includes the strip of land measuring 174 feet long and 6 feet wide which also leads on to Princes Street, running immediately east of and along the appellant's palings. p.11 lines 45-48 p.18 lines 20-28 p.137 (a) Ex. G.

11. On May 24, 1965, transport of sublot A was passed in favour of the respondent by Margaret Kingston as executrix of the estate of Ellen Joseph in accordance with the plan mentioned above. P.12 line 11 p.127 Ex. A

12. No mention was made in the respondent's transport, as was the case in his lease, of a right of way over what is now sublot B. After the respondent acquired title to sublot A the appellant continued in occupation of the southern portion as his tenant. p.17 lines 24-27 p.4 lines 6-13 pp.29-30

13. In 1966 sublot B was transported by the executrix of the estate of Ellen Joseph to Hazel Johnson. p.17 lines 11-13

14. At the time of the initiation of this action the various parties therefore occupied as follows: a third person occupied sublot B, a portion of which was used by the respondent for purposes of ingress and egress to the public road; the respondent occupies the northern portion of sublot A in his capacity as owner; the appellant occupies as tenant of the respondent the southern portion of sublot A. Her area of land has since 1941 been completely fenced around with a gate leading on to Princes Street. The respondent does not have access to or through any portion of the land occupied by the appellant. p.83 lines 1-15

15. In March 1966, the respondent brought an action against the appellant in the High Court of the Supreme Court of Judicature of Guyana in which he claimed inter alia -

(a) a declaration that he was entitled to a way of necessity over the land occupied by the appellant.

(b) an injunction restraining the appellant from interfering with his right of passage.

The appellant in her defence denied that respondent was landlocked and contended that he

had adequate means of access to the public road.

16. RELEVANT STATUTORY PROVISIONS

The following are the relevant statutory provisions:

A. The Civil Law of Guyana Ordinance, Chapter 2 (1916) Sections 3 (B) (C) (D) and proviso (a) and (b).

(B) The common law of the Colony shall be the common law of England as at the date aforesaid including therewith the doctrines of equity as then administered or at any time hereafter administered by courts of justice in England, and the Supreme Court shall administer the doctrines of equity in the same manner as the High Court of Justice in England administers them at the date aforesaid or at any time hereafter;

(C) the English Common law of real property shall not apply to immovable property in the Colony;

(D) there shall be as heretofore one common law for both immovable and movable property, and all questions relating to immovable property within the Colony and to movable property subject to the law of the Colony shall be adjudged, determined, construed and enforced, as far as possible, according to the principles of the common law of England applicable to personal property:

Provided that -

(a) immovable property may be held as heretofore in full ownership, which shall be the only ownership of immovable property recognized by the common law and shall not be subject to any rule of succession by primogeniture or preference of males to females, or to any other incident attached to land tenure or to estates in land in England and not attached to personal property in England;

(b) the law and practice relating to conventional mortgages or hypothecs of movable

or immovable property, and to easements, profits a prendre, or real servitudes, and the right of opposition in the case of both transports and mortgages, shall be the law and practice now administered in those matters by the Supreme Court;

B. The Landlord and Tenant Ordinance. Chapter 185 (Sections 3 and 4 and section 19)

Nature of Tenancies and the Law applicable thereto.

3. (1) A tenancy for years is a holding of land or buildings under a contract for the exclusive possession thereof for some certain number of years or other determinable period.

(2) A tenancy from year to year is a holding of land or buildings under a contract, express or implied, for the exclusive possession thereof for a term which may be determined at the end of the first year or any subsequent year of the tenancy either by the landlord or the tenant by a regular notice to quit.

(3) A tenancy for less than a year is a holding of land or buildings under a contract for the exclusive possession thereof for an indefinite period less than a year, the hiring in the absence of stipulation to the contrary, being monthly or weekly according to the circumstances of each case.

(4) A tenancy at will is a holding of land or buildings under a contract for the exclusive possession thereof to hold at the will of the landlord.

(5) A tenancy on sufferance is a holding of land or buildings in exclusive possession by a person who, without the assent or dissent of the person entitled to possession, wrongfully continued in possession of the same after his right to the possession thereof expired.

4. (1) It is hereby declared that the tenancies defined in section 3 of this Ordnance comprise, and have always since the

1st January, 1917, comprised, the relationships between landlord and tenant in this Colony and that every such tenancy, as the case may be, had and, subject to the provisions of this Ordinance, shall continue to have in this Colony such and the same qualities and incidents as it has by the common law of England.

(2) It is further declared that the common law of England relating to the said respective tenancies has, since the 1st January, 1917, applied in this Colony, and subject to the provisions of this Ordnance, shall continue to apply to and to govern the said tenancies.

19. (1) A lease of land shall be deemed to include and shall by virtue of this Ordinance operate to grant with the land all servitudes, easements, rights and advantages whatsoever appertaining or reputed to appertain to the land, or any part thereof, or at the time of the lease occupied or enjoyed with or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

(2) This section shall not be construed as giving to any person a better title to any property, right or thing in this section mentioned than the title which the grant gives to him to the land expressed to be granted, or as granting to him any property, right or thing in this section mentioned, further or otherwise than as the same could have been granted to him by the lessor.

(3) This section applies only if and so far as a contrary intention is not expressed in the lease, and has effect subject to the terms of the lease and to the provisions therein contained.

C. The Rent Restriction Ordinance. Chapter 186
(Section 21)

21.(1) A tenant who by virtue of the provisions of this Ordinance retains possession of any premises to which this Ordinance applies

shall, so long as he does so, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as they are consistent with the provisions of this Ordinance, and shall only be entitled to give up possession of the premises on giving the notice which would have been required under the original contract of tenancy, or, if no notice would have been so required, on giving not less than one month's notice:

17. JUDGMENT OF THE TRIAL JUDGE

In his judgment dated 23rd February, 1968, the learned trial judge dismissed the respondent's other claims but granted a declaration that he was entitled to a way of necessity over the premises occupied by the respondent and awarded the respondent half the costs of the action. p. 75-76 lines 41-3

The learned judge said that:

(a) proviso (b) of Section 3 (d) of The Civil Law Ordinancy of Guyana had no bearing on the respondent's claim which was instead covered by the provisions of Section 4 of The Landlord and Tenant Ordinance of Guyana (Chapter 185) which applied the principles of the Common Law of England to the case. p. 64-65

(b) the respondent had the use of an alternative way over the passageway on sublot B and there was no evidence that he stood in any danger of losing the use of that passageway or that it was in any way less convenient than the one he claimed, nevertheless his right under his lease to use the six foot passageway east of the appellant's premises was extinguished when he acquired transport to sublot A and this subsequent user of the passageway was thenceforth merely a permissive one. p. 70-71 lines 41-3 p. 71 lines 45-49

(c) that such permissive user was not sufficient to bar the respondent's right to a way of necessity through the appellant's premises. p. 72 lines 1-12

(d) that he had jurisdiction to grant the relief sought as the right of way claimed "did not form any part of the original contract of tenancy" and was "de hors the previous contractual p. 75 lines 23-41

relationship"

p. 75 lines 41-47 He therefore granted the declaration sought by the respondent.

18. The appellant appealed to the Court of Appeal of the Supreme Court of Judicature of Guyana. The appeal was heard by Persuad, Cummings and Crane JJA and judgment was given on the 14th day of October, 1969, dismissing the appellants appeal by a majority.

19. JUDGMENTS OF COURT OF APPEAL

Persaud, J.A. in his judgment

(a) disagreed with the statement of the learned trial judge that section 4 (2) of Chapter 185 was applicable to the case, as the appellant held
p. 87 lines 35-43 over as a statutory tenant and not a contractual tenant from year to year.

(b) he found that the nature of the right claimed
p. 88 lines 1-35 by the respondent was neither that of a servitude nor an easement within the meaning of those terms
p. 89 lines 18-47 as used in proviso (b) of Section 3 D of the Civil Law Ordinance (Chap. 2 of the Laws of Guyana) but was a personal right analogous to a servitude.

(c) he held that in the circumstances, the
p. 90 lines 26-30 respondent's claim would be governed by the English Common Law principles relating to ways of necessity.

(d) he referred to Barry v Hesseldine (1952) 2 A.E.R.
p. 97 lines 44-47 417 and stated "it is true that the Hasseldine case concerns the right to a way of necessity of a grantee,
p. 98 lines -1-3 but the reasoning of Danckwerts, J can with equal reason be applied to a grantor or person standing in the place of the grantor".

(e) he found that "when the respondent purchased
p. 91 lines 10-17 and secured title to his portion he stepped into the shoes of the original owner (or grantor) and so far as that portion was concerned and therefore assumed the role of the grantor: as from that time he was landlocked" and concluded that in the circumstances a way of necessity was implied in favour of the respondent.

p. 98 lines 22-24 Cummings J.A. concurred with the judgment of Persaud J.A.

Crane J.A. dissenting, held that -

(a) A landowner should not in principle be allowed to lease a house spot and then divide the land into 2 sublots, and transport them to others in such a way as to create a way of necessity over the tenant's portion. — p. 99 lines 11-20

(b) The learned trial judge was correct in finding that Section 4 (2) of the Landlord and Tenant Ordinance of Guyana, applied the principles of the English Common Law to the respondent's claim. — p. 110 lines 43-45; p. 111 lines 1-6

(c) Although not mentioned in either the transport of sublot A in 1965 or of sublot B in 1966, the right of way in favour of the respondent over sublot B was not extinguished as it was a way of necessity and therefore was neither registerable nor required to be allocated or inserted in any transport. (Jaigopaul v Clement 1960 2 W.I.R. p.203) — p. 105 lines 10-18

(d) The respondent is possessed of an implied common law right in the nature of an easement of necessity to use the passage way now in sublot B where, as here, he would otherwise become land-locked. — p. 119 lines 26-31

(c) The respondent therefore still enjoys a legal and not merely a permissive right over the passage way along sublot B. — p. 120 lines 14-18

(f) In any case the executrix of the estate of Ellen Joseph as landlord of the appellant could not diminish her rights as lessee by creating a right of way in favour of the respondent over land issued by her. — p. 118 lines 10-39

(g) The appeal should be allowed and the order of the learned trial judge be set aside with costs. — p. 122 lines 45-47

SUBMISSIONS:

The appellant submits that:

1) The respondent failed to prove that he was land-locked as the evidence disclosed that his right of passage along the strip of land east of the appellant's premises was not extinguished by the passing of transport of sublot A to the respondent in 1965, but survived as a way of necessity from the premises occupied by the respondent to Princes Street.

When the respondent purchased sublot A the southern portion had been occupied by the appellant as tenant of the land for over 25 years and had been fenced by her since 1946.

It was therefore clear to both parties to the agreement of sale of December 6, 1960, that the northern portion of sublot A occupied by the respondent as then tenant of the vendors had only one way to the public road, namely, the pathway east of the appellant's fence which was included in sublot B, and which indeed has been used by the respondent since 1951, first as tenant and now as owner of the land occupied by him.

In these circumstances, when the express reservation of a right of way over the passageway contained in the respondent's lease of February 1955 was extinguished by his acquisition of full ownership of the land by transport in 1965 he became entitled to a way of necessity over the same passageway so long as the circumstances warranted it (Wilhelm v Norton 1935 E D L).

There is no need for such a way to be reserved in the transport as it was one of necessity. (Jaipaul v Clement (1960) 2 W.I.R. p.203).

2) The right claimed by the respondent came with the provisions of Section 3 (D) proviso (b) of the Civil Law Ordinance of Guyana.

This section refers to both real servitude and easements. The right claimed is an 'easement' within the meaning of the proviso not withstanding the fact that the appellant holds over the respondent's tenant and not as the owner of the land occupied by her became:

(a) The principle that an owner or a tenant cannot have an easement over it does not necessarily hold good where the dominant owner has an estate or interest in reversion only in the quasi servient tenement; and

(b) Even if the right claimed here is not such an easement or a real servitude and such rights were meant to be included within the ambit of the above proviso.

As the law and practice referred to in proviso (b) of Section 3 (D) of the Civil Law Ordinance was Roman Dutch Law, a mere permissive right to pass along the passageway in sublot B would be sufficient to defeat the respondent's claim (Lentz v Mullin (1921) E.D.L.p.268; Van Schalkwyk v DuPlessis 17 S.C.454; Gray v Gray and Estcourt Vol.123 Natal L.R.151).

3) Even if the right claimed by the respondent was neither a servitude nor an easement within the meaning of proviso (b) but a more personal licence analogous to an easement and arising by implication of law, the respondent was not entitled to it as

(a) the sale and transport of sublot A in 1965 could not have conferred on the respondent any rights over the appellant's premises not enjoyed by the vendors and

(b) no contractual relationship ever existed between the respondent and the appellant.

The appellant respectfully submits that her appeal should be allowed and the Judgments of the trial judge and majority Judgment and Order of the Court of Appeal of the Supreme Court of Judicature, Guyana, should be set aside, with costs, for the following, among other

REASONS:

1. BECAUSE the respondent has been at all times and still is possessed of a legally enforceable right of way over sublot B.

2. BECAUSE, even if such right of way is not legally enforceable, under the principles of Roman

Dutch Law which apply to this case, a more permissive right of passage was sufficient to bar the respondent's claim.

3. BECAUSE the respondent was not entitled to an implied licence to pass over the appellant's premises.

MILES GREEVES - FITZPATRICK

No. 8 of 1970

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BETWEEN

ROSALINE ANTIGUA Appellant

- and -

ISAAC BOXWILL Respondent

CASE FOR THE APPELLANT

Wm. Easton & Co.,
3, Bolt Court,
Fleet Street, E.C.4.