14/1971

IN THE PRIVY COUNCIL No.8 of 1970

ON APPEAL

FROM THE GUYANA COURT OF APPEAL

BETWEEN:

ROSALINE ANTIGUA
(Defendant)
Appellant

- and -

ISSAC BOXWILL
(Plaintiff)
Respondent

CASE FOR THE RESPONDENT

Record

1. This is an appeal from the judgment of the Guyana Court of Appeal dated the 14th October 1969 (Persaud and Cummings JJ.A., Crane J.A., dissenting) whereby the Appellant's appeal from a judgment of the High Court of Guyana (George J.) dated 23rd February 1968, allowing a claim at the suit of the Plaintiff (now the Respondent) and ordering the Defendant (now the Appellant) to pay one half of the Plaintiff's costs was dismissed with costs in favour of the Respondent. pp.80-122 pp.51-76

2. The Appellant is the owner of sub-lot "A" part of the south half of 28 Princess Street, South Section Lodge Village, East Coast Demerara. He became owner when a transport or document of title No.960 was passed to him for that sub-lot on the 24th May, 1965, by Margaret Kingston, executrix of the estate of Ellen Joseph, deceased. Princess Street is a public road. p.10;ll.7-10 p.137(a)Exh.G pp.127-9 Exh.A p.4;ll.16-25

3. Prior to the passing of the transport the Appellant, the Respondent and Nebert Thomas were tenants respectively of three portions of land situate one behind the other and comprising the said sub-lot, the landlord being Ellen Joseph, deceased. The Appellant was a statutory tenant holding over after the expiration of her contractual tenancy. p.13;l.43 p.37;ll.26-30 p.10;ll.21-25 36-40 p.31;ll.9-21

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4. Until her death Ellen Joseph held the south half of lot 28 Princess Street. She devised to two beneficiaries the property which comprised sub-lot "A" passed by transport by her executrix Margaret Kingston to the respondent and sub-lot "B" passed by transport No.138 dated 14th February 1966, by the said executrix to Hazel Johnson, a minor.

pp.138-8
Exh.H
p.11;ll.17-19

5. The division of south half lot 28 Princess Street into sub-lots "A" and "B" was effected by the executrix of the estate of the deceased for the benefit of the two beneficiaries, Joyce Rodney and Hazel Johnson, to whom it was devised in equal shares. Sub-lot "A" which was purchased by the Respondent represented the interest of Joyce Rodney.

p.22;ll.9-12
p.22;ll.32-6

6. While the tenancies subsisted and until the passing of transport to the Respondent, both Nebert Thomas and the Respondent whose holdings were situate behind that of the Appellant obtained at all material times ingress to and egress from the portions of which they were tenants to Princess Street by passing over and along a strip of land which fell within the portion which became sub-lot "B" after the division. The portion rented by the Appellant adjoined Princess Street and the Appellant has and had at all material times direct access thereto.

p.17;ll.8-24
p.10;ll.22-5
p.27;ll.11-13

7. From the time the transport was passed to him and until the trial the Respondent obtained access to Princess Street by using the strip of land within sub-lot "B". The Respondent obtained the permission of Doris Johnson, the mother and guardian of Hazel Johnson, to do so subsequent to the passing of transport to Hazel Johnson.

p.17;ll.8-24
pp.28-9;l.43 1-5
p.21;ll.1-8

8. Following his acquisition of title by transport, the Respondent asked the Appellant, who became his statutory tenant by reason of the purchase, to provide him with a way over and across the land held by her to enable him to have access to Princess Street, but the Appellant refused the request.

p.12;ll.24-37

9. The Respondent in consequence instituted a suit in the High Court of Guyana claiming a declaration that he was entitled to a way of necessity over the land of which the Appellant was a statutory tenant and for other relief including damages for trespass and an injunction. This appeal concerns only the way of necessity sought by the Respondent and ancillary relief connected therewith.

pp.2-3
p.3;ll.16-20
p.78;ll.22-38

10. The Respondent supported his claim to a way of necessity to the public road by contending that his

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user of sub-lot "B" for ingress and egress was only permissive. He claimed that he was landlocked and was entitled to a way of necessity over the land held by the Appellant. p.12;ll.30-5 p.4;ll.16-26 p.13;ll.10-16

11. The Appellant on this issue answered the Respondent's claim by contending that the Respondent was using the strip of land over sub-lot "B" to Princess Street, the public road, and that such way was adequate for the Respondent as a means of ingress and egress to and from Princess Street. p.8;ll.15-25 p.28;ll.34-40 p.8;ll.17-25

12. In his judgment the trial judge reviewed the evidence relating to the past and present occupation of sub-lot "A" and on the issue of trespass found for the Appellant. From that part of the judgment there was no appeal. pp.51-59 p.59;ll.46-50

13. The trial judge then dealt with the issue whether the Respondent was entitled to a way of necessity over the land held by the Appellant. pp.60-76

14. The first question which was considered by the trial judge was whether Roman-Dutch or English law applied to the Respondent's claim. He referred to the proviso (b) to subsection 3(D) of the Civil Law Ordinance, Chapter 2, which reads as follows:- p.60;ll.24-44

> "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;"

15. The trial judge then examined the argument in favour of the application of Roman-Dutch Law but held that in the view he took of the case English law was to be applied because of the provisions of Sections 3 and 4 of the Landlord and Tenant Ordinance, Chapter 185. He found it unnecessary to rule on the nature of the claim in Roman-Dutch law. Sections 3 and 4 of the Landlord and Tenant Ordinance read as follows:- pp.60-65 p.64;ll.12-17

> "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 definied in section 3 of this Ordinance 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 Ordinance, shall continue to apply to and to govern the said tenancies."

p.67;l.30 16. The trial judge then applied the English Common Law to determine whether the right of way of necessity

p.72;ll.1-14 claimed by the Respondent existed and he held that it arose by implication after holding that the right of the Respondent to use the strip of land within sub-lot "B" for access to Princess Street was permissive

p.71;ll.45-9 only. The Respondent lost the right to use sub-lot "B" because of the operation of S.23 of the Deeds Registry Ordinance, Chapter 32, which reads as follows:-

23.(1) From and after the 1st January, 1920, every transport of immovable property other than a judicial sale transport shall vest in the transferee the full and absolute title to the immovable property or to the rights and interest therein described in that transport, subject to -

(a) statutory claims;

(b) registered incumbrances;

(c) registered interests registered before the date of the last advertisement of the transport in the Gazette;

(d) registered leases registered before the date of the last advertisement of the transport in the Gazette:

Provided that any transport, whether passed before or after the 1st January, 1920, obtained by fraud shall be liable in the hands of all parties or privies to the fraud to be declared void by the Court in any action brought within twelve months after the discovery of the fraud, or from the 1st October, 1925, whichever is the more recent.

(2) A transport, letters of decree, or a declaration of title issued under the provisions of subsection (1) of section 4* of the Civil Law of British Guiana Ordinance, passed or issued before the 1st January, 1920, and in force at that date shall, after the expiration of two years from that date if still in force, vest in the transferee or grantee thereof the full and absolute title to the immovable property or to the rights and interest therein described, subject to the provisions contained in paragraphs (a), (b), (c) and (d), of the preceding subsection.

*i.e. section 4 (1) as printed in the 1929 edition of the Laws; the section has been repealed by 62 of 1952.

No right of way in favour of sub-lot "A" had been registered as an incumbrance over sub-lot "B" when the Respondent took transport. p.70;ll.43-8

17. The trial judge also considered the effect of section 21 of the Rent Restriction Ordinance, Chapter 186, and section 19 of the Landlord and Tenant Ordinance, Chapter 185, in relation to the Appellant's rights as a statutory tenant. Section 21 of the Rent Restriction Ordinance reads as follows:-

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"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:

Provided that, notwithstanding anything in the contract of tenancy, a landlord who obtains an order or judgment for the recovery of possession of the premises or for the ejectment of a tenant retaining possession as aforesaid, shall not be required to give any notice to quit to the tenant.

(2) Any tenant retaining possession as aforesaid shall not, as a condition of giving up possession, ask or receive the payment of any sum, or the giving of any other consideration by any person other than the landlord, and any person acting in contravention of this provision shall be liable on summary conviction to a fine not exceeding four hundred and eighty dollars and the court by which he is convicted may order any such payment or the value of any such consideration to be paid to the person by whom it was made or given, but any such order shall be in lieu of any other method of recovery prescribed by this Ordinance.

(3) Save as provided in the proviso to subsection (7) of section 16 of this Ordinance where the interest of a tenant of any premises to which this Ordinance applies is determined, either as the result of an order or judgment for possession or ejectment, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued."

Section 19 of the Landlord and Tenant Ordinance reads as follows:-

> "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."

He held that Section 21 of the Rent Restriction Ordinance by virtue of which the Appellant was entitled to the benefit of all the terms and conditions of her original contract of tenancy did not by implication prevent the operation of the common law principle relating to a way of necessity for the reason that statute did not alter the common law further or otherwise than it expressly declared. p.73;ll.32-48

18. In consequence the trial judge held in favour of the Respondent and declared the right of the Respondent to a way of necessity over a strip of land three feet in width over the land held by the Appellant. p.74;ll.4-11

19. The trial judge finally considered the question whether in view of the provisions of section 26 of the Rent Restriction Ordinance, Chapter 186, he had jurisdiction to entertain the Respondent's claim. Section 26 (1) reads as follows:- pp.74-75

> "26.(1) Subject to the provisions of subsection (3) of section 3 of the Summary Jurisdiction (Petty Debt) Ordinance, any claim or other proceedings (not being proceedings under the Summary Jurisdiction Ordinances or proceedings before the Rent Assessor as such) arising out of this

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> Ordinance shall be made or instituted in a magistrate's court."

Section 3(3) of the Summary Jurisdiction (Petty Debt) Ordinance, Chapter 16, reads as follows:-

> "The Court shall not have cognizance of any action in which any incorporeal right, or the title to any immovable property, is or may be in question, or in which the validity of any devise, bequest or limitation under any will or settlement is or may be disputed, or of any action for malicious prosecution, libel, slander, seduction, or breach of promise of marriage."

20. After consideration of the terms of section 26 and after reviewing the relevant authorities the trial judge held that the claim was not one in respect of which the
p.75;ll.18-38 High Court had no jurisdiction. He held that section 21 of the Rent Restriction Ordinance only related to the terms and conditions of the original contract of
p.75;ll.39-47 tenancy and that the section did not apply to the establishment of a right of way which was dehors the contractof tenancy. The High Court therefore had jurisdiction to grant relief and a declaration and an injunction were accordingly granted and the Appellant was
p.76;ll.1-3 ordered to pay one half of the Respondent's costs.

pp.77-9;ll.22-38 21. By notice of appeal dated the 5th March 1968, the Appellant appealed against that part of the declaration of the trial judge whereby the declaration and injunction were granted and the Appellant was ordered to pay one half of the Respondent's costs of the action.

pp.80-122 22. The appeal was heard by the Guyana Court of Appeal (Persaud, Cummings and Crane JJ.A) and judgment was given on the 14th October 1969.

pp.78-9 23. In her notice of appeal the Appellant sought to impeach the part of the judgment complained against
p.78;ll.40-44 on the grounds that the Respondent's claim ought to have been determined by Roman-Dutch law, that the
p.79;ll.7-23 Respondent had a right of way of necessity over sub-
p.79;ll.24-6 lot "B" which was sufficient and that the High Court had no jurisdiction to entertain the Respondent's claim.

pp.80-98 24. In the judgment of the Hon. Mr. Justice Persaud with which the Hon. Mr. Justice Cummings concurred, His Honour observed that the appeal concerned only

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the question whether the Respondent was entitled to a right of way of necessity over the land held by the Appellant. His Honour reviewed the arguments for the Appellant which were that the Appellant held over as a statutory tenant after the expiration of her lease and that the sections 3 and 4 of the Landlord and Tenant Ordinance applied only to contractual tenancies. That even if section 21 of the Rent Restriction Ordinance meant that English common law terms were incorporated into the statutory tenancy there was no right of way created during the contractual tenancy. That in the circumstances the Respondent was claiming a right analogous to a real servitude or an easement and the claim was to be determined by Roman-Dutch law under which the Respondent could not succeed because of his permissive use of the strip over sub-lot "B". His Honour differed from the trial judge who appeared to be of the opinion that a tenancy from year to year was created in favour of the Appellant after the contractual tenancy came to an end. The appellant was a statutory tenant.

p.83;ll.21-6
pp.85-6
p.85;ll.37-42
p.85;ll.43-6
p.86;ll.1-4
p.86;ll.8-29
pp.86-7
p.87;ll.35-40

25. His Honour proceeded to analyse the nature of the right claimed by the Respondent and held that it was neither an easement nor a servitude and that Roman-Dutch law did not apply.

pp.88-90
p.90;ll.6-10

26. His Honour then applied the principles of the English Common Law and held that a right to a way of necessity was implied by law to enable the Respondent to have access to Princess Street over land held by the Appellant as statutory tenant. His Honour concluded that the Respondent was landlocked from the time the Respondent secured title to sub-lot "A" and he saw no bar to the Respondent's claim by reason of the fact that the Respondent acquired title to property a tenancy of which had been created before the Respondent became landlord. His Honour considered the principles applicable to the existence of a way of necessity and took the view that the principles applied where part of the land as in this case was left inaccessible. His conclusion was expressed as follows:-

p.90;ll.26-46
p.91;ll.16-26
p.91;ll.17-26
pp.91-93

> "My conclusion in this matter therefore is that a right of way of necessity is implied in favour of the respondent (landlord) and the fact that he is (or was at the time of the filing of the claim) permitted to use a pathway over sub-lot "B" is no answer to his claim."

27. Having reached this conclusion His Honour held that the appeal would be dismissed and that the judgment of the High Court would be affirmed with costs in favour of the Respondent.

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pp.99-122

28. Im his judgment Crane J.A., disagreed with the opinion of the majority. He thought there was good reason why the Respondent ought not to be allowed to derogate from his grant and should not commit a breach of the implied covenant for quiet enjoyment.

29. His Honour disagreed with the opinion of the trial judge that sub-lot "B" was conveyed free of an easement in favour of sub-lot "A" which was purchased by the Respondent. He considered that sub-lot "A"

p.105;ll.10-18

passed with an easement which was an easement of necessity and was neither registrable nor required

p.106;ll.11-13

to be annotated in any transport. He expressed the opinion that whichever legal system was applicable the Respondent's claim must fail.

p.107;ll.1-9
10-21

30. His Honour agreed however with the opinion of the trial judge that Roman-Dutch law was not applicable and that the relations between the parties were governed by the provisions of section 3 and 4 of the

pp108-109;
p.110;ll.43-5
pp.111-113
p.113;ll.35-41

Landlord and Tenant Ordinance by virtue of which English law applied. He considered section 19 of the Landlord and Tenant Ordinance to be applicable to the rights of the Appellant so that her land included a right of way or easement appurtenant to it. In this

p.113;ll.1-19

respect he disagreed with the opinion of the trial judge who held that "building land" in terms of the Rent Restriction Ordinance did not include rights of way or easements appurtenant thereto.

31. He thought that because sub-lot "B" was used for

p.114;ll.8-28

ingress and egress to and from the Respondent's premises to Princess Street while he was a tenant and before the sale and conveyance a quasi-easement arose as a result of an implied grant based on the presumed int-

p.119;ll.25-36

ention of the parties. In the result the Respondent's right to usesub-lot "B" was not merely permissive and his previous right to use the said sub-lot was not lost by the passing of the conveyance. The trial judge had also erred in failing to take into account the incidents of the landlord and tenant relationship.

p.119;ll.3-24

32. His Honour also considered the position of the Appellant as a statutory tenant and held that since she was entitled to the benefit of all the terms and conditions of the original contract of tenancy the trial judge could not correctly hold that there was no barrier to the Respondent's claim.

p.120;ll.10-18
p.122;ll.8-18
30-31

33. The Respondent's right was not permissive. The finding that the Respondent was landlocked could not be maintained. The appeal would be allowed and an

order made setting aside the order of the trial judge with costs. p.122;ll.45-7

34. On the question of which legal system was applicable to the case it is submitted that the entire Court was correct in holding on appeal that the English Common Law applied and that Roman-Dutch law was excluded for the reason that the Respondent could not claim an easement or a real servitude over his own land in either system of law.

35. It is further submitted that the judgments of the trial judge and of the majority of their Honours in the Court of Appeal were right and that the judgment of Crane J.A., was wrong and that this appeal should be dismissed for the following among other

REASONS

(A) Because on the issue whether the Respondent had access to the Public Road as a matter of right over sub-lot "B" owned by Hazel Johnson the trial judge correctly found that his right of access was merely permissive and there are concurrent findings on this issue by the High Court and the Court of Appeal;

(B) Because the Respondent was landlocked;

(C) Because the Respondent was entitled in English law to a right of way of necessity over that portion of his own sub-lot held by the appellant under a statutory tenancy;

(D) Because the Respondent was not in any event bound or obliged to seek permission from the owner of sub-lot "B" to use a portion of that sub-lot for ingress and egress to the public road which adjoined his own land;

(E) Because permissive user of sub-lot "B" was no bar to the existence of a right of way of necessity;

(F) Because Roman-Dutch law did not apply;

(G) Because the Respondent had no right to use sub-lot "B" to gain access to Princess Street by virtue of an easement subsisting in his favour;

(H) Because a right of way of necessity in favour of the Respondent arose by implication of law despite the right of the statutory tenant to enjoy the terms and conditions of her original contract of tenancy;

(I) Because the High Court had full power, jurisdiction and authority to entertain the Respondent's claim; and

(J) Because of the reasons given by the trial judge (George J.) and the majority of the Court of Appeal (Persaud and Cummings JJ.A)

FENTON RAMSAHOYE
29th April,1970.

No.8 of 1970

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Appellant

- and -

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Respondent

CASE FOR THE RESPONDENT

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