CHARLES RIOU (DEFENDANT).....APPELLANT; 1897

AND *Oct. 5. *Dec. 9.

JULIEN RIOU (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Deed—Construction of—Servitude—Roadway—User—Art. 549 C. C.

In 1831 the owners of several contiguous farms purchased a roadway over adjacent lands to reach their cultivated fields beyond a steep mountain which crossed their properties, and by a clause inserted in the deed to which they all were parties they respectively agreed "to furnish roads upon their respective lands to go and come by the above purchased road for the cultivation of their lands, and that they would maintain these roads and make all necessary fences and gates at the common expense of themselves, their heirs and assigns." Prior to this deed and for some time afterwards the use of a road from the river front to a public highway at some distance farther back, had been tolerated by the plaintiff and his *auteurs*, across a portion of his farm which did not lie between the road so purchased over the spur of the mountain and the nearest point on the boundary of the defendant's land, but the latter claimed the right to continue to use the way. In an action (*négatoire*) to prohibit further use of the way:

Held, affirming the decision of the Court of Queen's Bench, that there was no title in writing sufficient to establish a servitude across the plaintiff's land over the roadway so permitted by mere tolerance; that the effect of the agreement between the purchasers was merely to establish servitudes across their respective lands so far as might be necessary to give each of the owners access to the road so purchased from the nearest practicable point of their respective lands across intervening properties of the others for the purpose of the cultivation of their lands beyond the mountain.

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*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

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APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1), reversing the decision of the Court of Review (2), and restoring the judgment of the Superior Court, District of Kamouraska, which maintained the plaintiff's action with costs.

The plaintiff brought his action (*actio negatoria servitutis*) to prohibit the user of a roadway which the defendant claimed over certain of his lands by virtue of a title by deed and long usage, the plaintiff contending that the title claimed applied only to certain other lands and not to the particular strip of land in question in this case. In the trial court the action was maintained, but this judgment was reversed in the Court of Review by a majority of the judges, Larue J. dissenting. On appeal to the Court of Queen's Bench, the judgment of the Court of Review was reversed, the judgment of the trial court affirmed and the plaintiff's prayer granted with costs in all courts. From this decision the defendant appealed to the Supreme Court of Canada. A full statement of the case is given in the judgment of His Lordship Mr. Justice Gwynne now reported. A diagram of the lands affected by the dispute also appears in the judgment of His Lordship Mr Justice Girouard.

Langelier Q.C. (*Choquette* with him,) for the appellant. The conduct of the parties in permitting the user of the way shows the construction placed by them upon the deed, and that the intention was to establish the servitude. *The City of Quebec* v. *The North Shore Railway Co.* (3); *Les Président, etc., de la Commune de Berthier* v. *Denis* (4).

Pelletier Q.C. (*Riou* with him,) for the respondent. The strip of land in question was used at all times as a roadway by mere tolerance of the owner and was

(1) Q. B. 5 Q. B. 572.
(2) Q. R. 9 S. C. 144.
(3) 27 Can. S. C. R. 102.
(4) 27 Can. S. C. R. 147.

never affected by the agreement between the purchasers to furnish roadways to permit of passage round the mountain by the road purchased from Martial Riou. No title has been proved. Art. 549 C. C. The extent of servitude established by the deed was no greater than might be required to get round the foot of the mountain and back again over the lands contiguous to the mountain side and in rear of it. It cannot be aggravated. Arts. 541, 545, 558 C. C.; 8 Laurent no. 261, 263; 12 Demolombe 849, 854, 926; 40 Dal. Rep. Jur. "Servitude" nos. 910, 1002, 1159, 1204; 3 Aubry & Rau 93; 2 Toullier, Des Biens, nos. 602, 647, 648; 2 Marcadé no. 668 (1). The use by the former proprietor who had unity of possession gives no title, as he executed no writing specifying the nature, extent or situation of any servitude. Art. 551 C. C.; 44 Dal. Rep. Jur. "*Voirie, par terre*" nos. 145-7; 12 Demolombe no. 644.

TASCHEREAU J.—I concur with my brother Girouard and for the reasons stated by him I am of opinion that this appeal should be dismissed.

GWYNNE J.—The present action was instituted by the respondent against the appellant to have it declared that certain land of the respondent in the first concession of the parish of Trois Pistoles, in the province of Quebec, situate between an old road which was in existence prior to 1831 along the River St. Lawrence in front of the said concession, and a new road constructed and opened across the said concession in 1850 at the distance of about twelve and three-quarter arpents south of the said old road, and in substitution therefor, is not subject to a servitude in favour of certain land of the appellant in the same concession and parish giving a right to the appellant as claimed by

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him, of passing and repassing on foot and with carriages, &c. It is only to this land of the respondent situate between the said old road and the road constructed in 1850 that the present action relates.

The Superior Court maintained the contention of the plaintiff the now respondent, and rendered judgment in his favour. A majority of the Court of Review (Mr. Justice Larue dissenting) reversed that judgment and rendered judgment for the defendant; the Court of Queen's Bench in appeal unanimously reversed the judgment of the Court of Review and restored the judgment of the Superior Court, from which judgment the defendant in the action now appeals.

For some time prior to the year 1831, but for how long did not appear, Etienne Riou the great-grandfather of both the plaintiff and the defendant owned and occupied the lands now owned and occupied by the plaintiff and the defendant respectively, and also other adjoining lands. Upon which part of the tract owned by him he had his dwelling-house did not appear, but it would seem to have been, or at least probably was, on the land occupied now by the plaintiff for he had on that a farm road extending from the river bank in a southerly direction for the cultivation and enjoyment of his land. When Etienne Riou died did not appear. He had three sons named respectively Ignace, Germain and Julien, to each of whom the old man (whether by deed in his life time or by will did not appear) gave equal portions of his land. This must have taken place prior to 1831, for in that year they were in occupation of their several portions, that of Ignace being situate west of and adjoining to land owned and occupied then by one Martial Riou, that of Germain being situate west of and adjoining to the land of Ignace, and that of Julien west of and adjoining to the land of Germain. West of and adjoining to

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the land of Julien was land occupied by one Herménégelde Boucher; whether he was or was not a relation of the brothers Riou did not appear. In and prior to 1831 the three brothers Riou and Herménégelde Boucher lived in houses on their respective lands built near the river, and Julien's brothers, Ignace and Germain, and Herménégelde Boucher, not in virtue of any title whatever, but by the mere permission of Julien, were allowed to use the road on his land for the purpose of thereby reaching the rear of their respective lands. The reason for this permission being granted by Julien, apart from relationship and a neighbourly disposition, appears to have been that, at about the distance of five or six arpents from the river, the lands rose to a considerable height forming a ridge which crossed all the lands, and that upon the lands of Julien alone had a road as yet been made to ascend that height, and it was argued upon behalf of the defendant that it was so made in consequence of the height being of much greater difficulty to ascend upon any of the lots than upon that of Julien, but the evidence does not support that contention. On the contrary there does not appear to have been any greater difficulty attending the making of a road to ascend the height on the land now owned by the defendant than there was on the land now occupied by the plaintiff. The question is only one of cost, which one of the plaintiff's witnesses, and one witness also of the defendant, places it at about $50, while another of defendant's witnesses places it at about twice that amount; but what the cost would really be, or what the motive of Julien was in giving such permission for the use of a road on his land, are matters of no importance, for it is not alleged or pretended on behalf of the defendant that his *auteurs* had any right whatever to use the road in question otherwise than by the favour and mere permission of

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Julien Riou (who was grandfather of the plaintiff), prior to the execution of a deed of the 10th May, 1831, in virtue of which the defendant now asserts title to the servitude on plaintiff's land, now claimed by him; and the simple question therefore before us, is as to the construction of that deed.

It will be convenient, however, to state here that at the distance of about eighteen arpents south of the old road there was a great mountain which crossed all the lands west of the land of Martial Riou, and extended over the line between the lands of Ignace and Martial into the land of Martial where it abruptly terminated. It was impossible to cross this mountain for farm purposes from the lands on its north side to the lands on its south side, so that the parties owning land on the north side could not cultivate the lands on the south side although their lots extended over the mountain to the distance of twenty arpents from the foot of the mountain on its south side. South also of the new road which was opened in 1850, there extended "*un petit rocher*," across the lands of Ignace and Germain which terminated abruptly on the lands of their brother Julien, just across the line between the lands of Germain and Julien.

Now, upon the 10th of May, 1831, by deed of that date, Martial Riou conveyed a strip of his land to Ignace, Germain and Julien Riou, and Heménégelde Boucher, their heirs and assigns, purchased by them for a road round the mountain from the line separating the land of Ignace from the land of Martial on the north side to the same line continued on the south side of the mountain. This deed contained a clause that:

> It has been expressly agreed between the purchasers that they shall furnish respectively roads upon their respective lands to go and come by the said above purchased road for the cultivation of their lands

and that they will maintain these roads and make all necessary fences and gates at the common expense of themselves, their heirs and assigns forever.

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Now here it is observed that no particular locality or line for the roads upon the respective farms of the purchasers for the purpose of giving access to the road purchased from Martial is specified or indicated. The defendant however contends that this clause in the deed constituted a grant of a servitude imposed upon the land of Julien in favour of the lands of Ignace and Germain Riou and Herménégelde Boucher respectively, giving to them respectively and to their respective heirs and assigns forever, owners and occupiers of said lands, a right to pass and repass on foot and with carriages, &c., over the farm road so as aforesaid being on the land of Julien from the old public road in front on the bank of the river to and from all parts of their respective lands. This contention is not rested upon any express provision in the deed to that effect, but simply upon this, that as all the purchasers of the strip of land from Martial were living in 1831, when the deed was executed, on their lands abutting on the old public road in front, on the bank of the river, it must be assumed to have been intended that each should have access from his dwelling-house in front to all parts of his land above the height near the front for the culture of all his land, as well that lying north as that lying south of the mountain, and that it was but reasonable to hold that the road on Julien's place which all had been in the habit of using before the execution of the deed of May, 1831, should be continued to be used as formerly and should be the road to be furnished by Julien under the terms of the deed; but granting such an expectation to have been entertained, as there is not a word in the deed having any reference whatever to such previous user the use of the road after the exe-

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cution of the deed if continued must be attributed to the same origin as before, namely, the mere favour and permission of Julien and not to any other authority whatever, much less to a title sufficient to create a servitude within art. 549 C. C.

If this contention were well founded the servitude would still continue even though the respective purchasers of the road on Martial's land, or any of them, or their or any of their heirs or assigns, should sell to other parties the portions of their respective farms which lie south of the mountain; such a construction is in direct opposition to the express terms of the agreement in the deed which is relied upon as creating the servitude, for all that the agreement provides for is that each of the purchasers of the road from Martial shall have free access to such road from their respective farms across the intervening lands. This appears to me to be the plain natural construction of the language used. No place is stated in the deed where any of the purchasers shall enter on the land of his adjoining neighbour for the purpose of obtaining access to the purchased road round the mountain, but the natural construction of the deed is that each should enter from his own farm on to the road to be given on the land of his neighbour lying in the direction of the purchased road, not, as is contended by the defendant, that the purchasers of the road from Martial (whose lands lie east and west of Julien's land) and their respective heirs and assigns forever should have a common right of passing and repassing from the front of their respective farms, on to the old public road, on the river's bank, and to travel along such road, some more, some less than a quarter of a mile until they should reach the point where Julien's farm road entered upon such old public road and then travel up Julien's farm road to the point where he should enter upon Germain's

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land on the way to the purchased road. There is no suggestion offered in the deed, or outside of it indeed, why such a servitude should be imposed upon Julien's land without any consideration given to him therefor, a servitude liable to be increased in the event of any of the parties to the deed their heirs or assigns, dividing their respective farms, as has already been done in respect of Germain's farm, the west half of which is now owned by the defendant, and east half by one Prudent Belanger. The deed suggests no reason why each party should not enter from his own farm directly on to the roadway across his farm to be given by him under the provisions of the deed of May, 1831, to provide access for his adjoining neighbour to the west reaching the purchased road. The deed does not suggest any difficulty necessitating a different provision, nor in point of fact does there appear to have been any other than that attending the providing of a small sum of money which would be necessary in each case. There is nothing contained in the deed, nor has any reason been offered outside of it, which would justify the imposition of such a servitude upon Julien's land for the purpose of relieving the other parties to the deed from making farm roads through their own farms for the purpose of reaching the road across their farms to be given by them respectively under the deed of May, 1831, for the convenience of their next adjoining neighbour.

The plaintiff, however, appears to have always acted in the same liberal and neighbourly spirit as governed the acts of his *auteurs* in the old times, before the execution of the deed of May, 1831, by giving permission to his neighbours to use his farm road, and the defendant might still have enjoyed that privilege but for the abuse of it in which, in the estimation of the plaintiff, he has indulged in recent years. What the

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plaintiff is insisting upon now merely is that there is nothing in the deed of May, 1831, which would justify the construction that it converted a user which had previously been enjoyed as a mere favour by the permission of plaintiff's *auteurs* into a servitude imposed upon the plaintiff's land forever.

The new road opened in 1850 crossed the plaintiff's farm road near the place where the "*petit rocher*" terminates on the plaintiff's land just across the line which separates the land of the defendant from that of the plaintiff. Upon the road having been opened in 1850 the parties formerly residing near the river removed to the new road where they now reside, having built houses for themselves on the new road. The defendant's house is situate on the north side of the road and his farm buildings on the south side on the west half of the land formerly owned by Germain Riou. One Prudent Belanger resides on the east half of the same lot, upon which he has constructed a way for himself across the "*petit rocher*" to the road across the lot furnished for access by the plaintiff and the owner of Herménégelde Boucher's land to the purchased road. There is nothing to prevent the defendant making a similar roadway for himself upon his half of the Germain lot, but nevertheless the plaintiff's *auteurs* and he himself ever since 1850 have kept and maintained, on the land now the plaintiff's, a road leading from the public road of 1850 round the "*petit rocher*" to the road across the defendant's land on the south side of the "*petit rocher*," leading to the purchased road round the mountain; by this route the defendant has had and still has access to and from the road round the mountain, and this, as the plaintiff insists, affords complete compliance with all that under the agreement in the deed of 1831 he can be required to give even if the deed can be construed as relieving

the defendant from making on his own land communication with the road made across his land for giving access from the plaintiff's land to the purchased road; but as the present action relates only to the plaintiff's farm road, extending from the public road of 1850 in a northerly direction, wholly away from the purchased road, all that it is necessary to say is that as to this road the defendant has not by the deed of 1831 or otherwise acquired any servitude over the plaintiff's land and the judgment of the Court of Queen's Bench in appeal should therefore be affirmed and this appeal therefrom dismissed with costs.

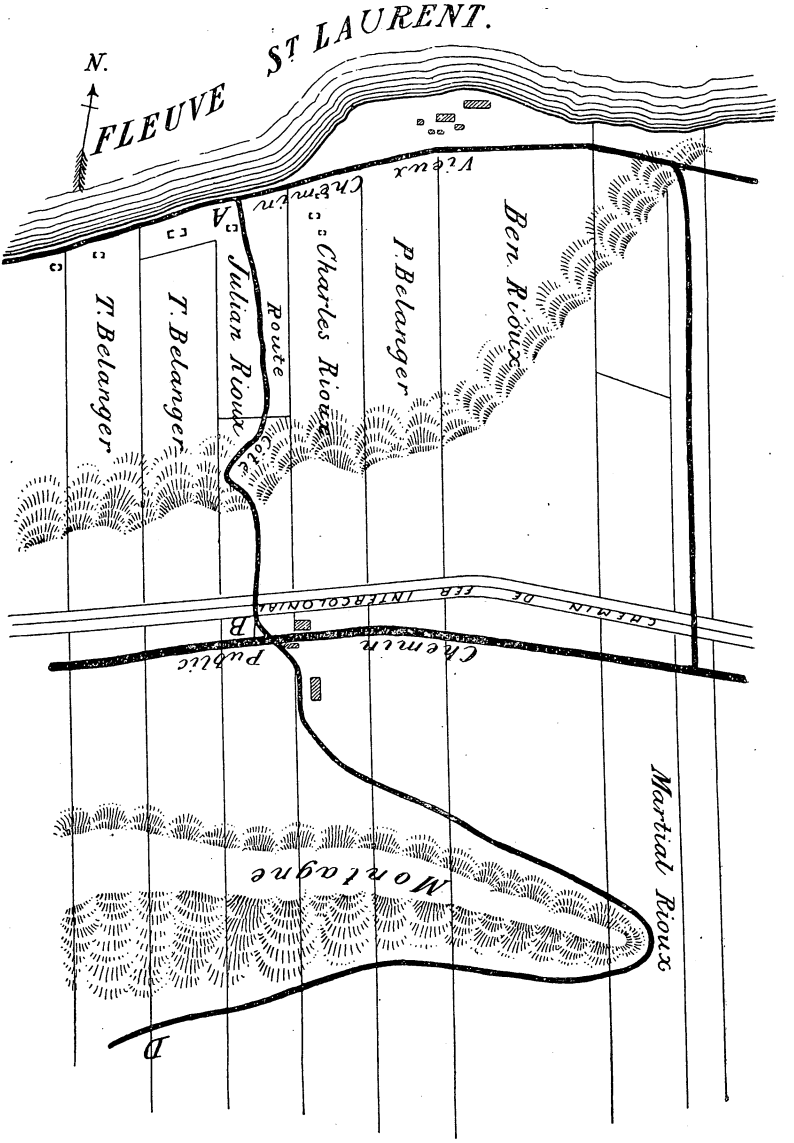
SEDGWICK and KING JJ. concurred.

GIROUARD J.—Le plan suivant explique la situation des lieux et sert considérablement à l'intelligence du litige entre les parties : (*Voir croquis, page* 64.)

Le demandeur, Julien Riou, nie au défendeur, Charles Riou, tout droit de passage entre le vieux chemin et le chemin public actuel. Le but du contrat de 1831 était d'assurer aux propriétaires qui y sont dénommés un accès à la partie de leurs terres qui se trouvait en arrière de la montagne au sud. Pour l'éviter, ils achètent un chemin de Martial Riou et puis il conviennent :

> Il a été expressément convenu entre les acquéreurs qu'ils se fourniront respectivement des chemins sur leurs terres respectives pour aller et venir par le dit chemin ci-dessus vendu pour la culture de leurs terres et qu'ils entretiendront ces chemins et feront toutes les clôtures et barrières nécessaires à frais communs entr'eux ainsi que leurs hoirs et ayants cause à perpétuité.

Cette convention est claire, et il n'est pas nécessaire d'examiner la conduite des parties pour en déterminer la portée ; le faire serait contredire, l'acte authentique. Or cette convention n'établit pas une servitude d'un chemin sur toutes les terres qui y sont indiquées


N.
FLEUVE ST LAURENT.
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Ben. Rioux
CHEMIN DE FER INTERCOLONIAL
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en faveur de toutes les parties intéressées "pour la culture de leurs terres." Ces chemins n'existent que "pour aller et venir au chemin ci-dessus vendu," c'est-à-dire, le chemin de Martial Riou. La convention ne permet pas, par exemple, à Charles Riou de monter sur la terre de Julien Riou pour se rendre au chemin acheté de Martial Riou; elle l'autorise simplement à passer sur la terre de P. Bélanger et de Benjamin Riou, en montant sur sa propre terre jusqu'à ce qu'il arrive au chemin de la Montagne, qui n'existe chez lui que pour son utilité et celle de T. Belanger et Julien Riou. Ce dernier ne lui conteste pas néanmoins le droit de passage au sud du chemin public actuel. Ce n'est qu'entre le vieux chemin et le chemin actuel au sud, qu'il lui nie cette servitude. Même lorsque Charles Riou et ses voisins avaient leurs résidences sur le vieux chemin, ils n'avaient pas le droit d'user de la terre de Julien Riou comme ils le faisaient à titre de pure tolérance et bon voisinage de la part de Julien Riou et de ses auteurs, auquel il peut mettre fin quand il lui plaît. A plus forte raison, doit-il en être ainsi, depuis qu'ils ont transporté leurs bâtisses et leurs résidences sur le chemin nouveau, près de l'Intercolonial. On ne peut pas certainement prétendre que quand Charles Riou se dirige vers l'ancien chemin, c'est "pour aller et venir par le dit chemin ci-dessus vendu," c'est-à-dire, le chemin de la Montagne. L'appel est renvoyé avec dépens.

Appeal dismissed with costs.

Solicitor for the appellant: *P. A. Choquette.*

Solicitor for the respondent: *S. C. Riou.*