

HERVE BARLOW (*Plaintiff*) . . . . . APPELLANT;

1962

\*Oct. 18  
Nov. 23

AND

HARRY COHEN (*Defendant*) . . . . . RESPONDENT.ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE,  
PROVINCE OF QUEBEC*Real property—Servitude—Passageway—Sale of part of dominant land non-contiguous to servient land—Whether servitude extinguished—Whether servitude by destination created—Action confessoire—Civil Code, arts. 549, 551, 556.*

The plaintiff was the owner of a property on Sherbrooke Street in Montreal bearing civic number 1525. The defendant owned number 1529 immediately to the west, the fence between these two properties being common. The defendant also owned the immediate adjacent property to the west bearing number 1535. Prior to 1899 these three implecements belonged to one owner. This owner sold part of the lot to Mrs. C M who had houses 1525 and 1529 built. Under the deed of sale, provision was made for a passageway between the property remaining with the vendor and the property sold to the purchaser. Subsequently, Mrs. C M sold number 1525 to Miss A M. This deed contained no reference to the passageway. Later Mrs. C M sold number 1529 to B. This deed referred to the passageway for the use in common of the owners of numbers 1529 and 1535. A similar reference is contained in the subsequent deeds of conveyance of number 1529 up to and including the defendant's deed of acquisition. The plaintiff acquired number 1525 from the purchaser through Miss A M and his deed contained no reference to the passageway. There was no evidence that a gate in the dividing fence between numbers 1525 and 1529, which has been in existence from and after 1914, had existed prior to that date.

The plaintiff instituted this *action confessoire* to obtain a declaration that number 1529 was charged with a servitude of passage in favour of number 1525 in order to reach the passageway over which the plaintiff also claimed to have a right of passage. The trial judge maintained the action. This judgment was reversed by the Court of Queen's Bench. The plaintiff appealed to this Court.

*Held:* The appeal should be dismissed.

The plaintiff has never acquired a servitude consisting in the right of passage over the land belonging to the defendant upon which the building number 1529 was erected. No servitude can be established without a title, and when the existence of a right of servitude is in doubt, that doubt must be resolved in favour of the servient land. The authorities under art. 556 of the *Civil Code* are clear that while the purchaser of a portion of the dominant land may have a right to exercise a servitude over the servient land, in common with his vendor, it does not follow that such purchaser is entitled to make use of his vendor's property in order to exercise such right. Moreover, when Mrs. C M sold number 1525, which was not contiguous to the passage, without referring to it, and without creating any additional servitude

1962  
 BARLOW  
 v.  
 COHEN

over the land retained by her, that sale had the effect of extinguishing any servitude which might have existed in favour of the part sold on that date. Furthermore, the mere existence since the year 1914 of a gate in the common fence was not sufficient to establish a servitude by destination under art. 551 of the Code and no such servitude was created.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec<sup>1</sup>, reversing a judgment of Batshaw J. Appeal dismissed.

*Peter R. D. MacKell*, for the plaintiff, appellant.

*H. L. Aronovitch*, for the defendant, respondent.

The judgment of the Court was delivered by

ABBOTT J.:—This is an appeal from a judgment rendered by the Court of Queen's Bench<sup>1</sup> which allowed respondent's appeal from a judgment of the Superior Court and dismissed appellant's action with costs, Bissonnette J. dissenting.

The facts which are fully set out in the judgments below are really not in dispute. Appellant is the owner of a property upon which is erected a building bearing civic number 1525 Sherbrooke Street West, in the city of Montreal. This property measures twenty feet in width, by a depth of approximately one hundred and fifty-eight feet.

Respondent is owner of the property immediately to the west of appellant's property, with a building erected thereon bearing civic number 1529 Sherbrooke Street West, the easterly wall of which is *mitoyen* with appellant, the said property measuring thirty-six feet in width, by approximately one hundred and fifty feet in depth. Respondent is also the owner of the immediately adjacent property to the west, measuring twenty-seven feet in width by approximately one hundred and thirty feet in depth, upon which is erected the building bearing civic number 1535 Sherbrooke Street West.

Prior to April 5, 1899 these three emplacements—all of which are unsubdivided parts of original lot 1728 on the Official Plan and Book of Reference of St-Antoine Ward—belonged to one Thomas Collins. For purposes of convenience, I shall hereafter refer to the three properties in question by the present civic numbers of the buildings erected thereon.

<sup>1</sup>[1961] Que. Q.B. 453.

By Deed of Sale executed April 5, 1899, before W. de M. Marler, notary, the said Thomas Collins sold to Mrs. C. J. McCuaig the vacant land upon which the buildings bearing civic numbers 1525 and 1529 Sherbrooke Street West are now located. Under the said deed, provision was made for a passageway nine feet in width by seventy-five feet in depth running back from Sherbrooke Street, between the properties of the vendor and purchaser, the clause providing for such passage reading as follows:

A strip of land of four feet six inches, English measure, off the South West side of the said sold property by a depth of about seventy-five feet from the said Sherbrooke Street, with a similar strip of like width and depth off the adjoining property, belonging to the Vendor, forms a passage of nine feet, English measure, in width, for the use in common of the property now sold and the property of the said Vendor, and the said passage is to be kept, used and maintained as such by the Purchaser & by the said Vendor their respective heirs & assigns forever.

The Purchaser will have the right to place openings on the said passage for light.

Some time prior to the 21st of April 1902 Mrs. McCuaig appears to have built the two houses now bearing civic nos. 1525 and 1529, and on that date by deed before E. H. Stuart, notary, she sold no. 1525 to a Miss Agnes McDougall. This deed contained no reference to the passage in question.

On August 31, 1911, by deed before H. M. Marler, notary, Mrs. McCuaig sold no. 1529 to W. A. Black. This deed does refer to the said passage and, after describing it, goes on to say:

for the use in common of the piece of land now sold and the property of the said George H. Smithers, which passage is to be kept, used and maintained as such by the purchaser and the said Henry James Taylor (previously mentioned as being the owner of No. 1535) their respective heirs and assigns forever, the owners of either side of the said passage having the right to place openings on the said passage for light.

A similar reference is contained in the subsequent deeds of conveyance of no. 1529 up to and including respondent's deed of acquisition.

On May 3, 1945, by deed before Lucien Morin, notary, appellant acquired no. 1525 from Chas. M. Black and this deed states that Mr. Black had acquired the property from Miss McDougall on November 20, 1920, by deed before J. A. Cameron, notary. Appellant's deed of acquisition from Charles Black contains no reference to the passageway.

1962  
 BARLOW  
 v.  
 COHEN  
 ———  
 Abbott J.  
 ———

1962  
 BARLOW  
 v.  
 COHEN  
 Abbott J.

The only other facts to which reference need be made are that from and after 1914 a gate appears to have existed in the *mitoyen* fence separating the rear parts of no. 1525 and no. 1529. The Court below found that there is no evidence to establish the existence of such a gate prior to 1914 and I am in agreement with that finding. It also appears to be common ground that Charles M. Black was a son of W. A. Black and that for some considerable time after 1920 there was a close family relationship between the owners of no. 1525 and no. 1529.

The present *action confessoire* was taken by appellant to obtain a declaration that respondent's property, no. 1529 Sherbrooke Street West, was charged with a servitude of passage in favour of appellant's property no. 1525 in order to reach the nine foot lane over which appellant also claims to have a right of passage.

No servitude can be established without a title, and possession even immemorial is insufficient for that purpose (art. 549 C.C.). The fact that over a period of years a gate existed in the fence between no. 1529 and no. 1525, and that the occupants of no. 1525 crossed the rear of no. 1529 to reach the nine foot passage, does not create any presumption that they did so in virtue of a servitude. It is obvious that the existence of a right of passage, such as that claimed by appellant, would preclude the owner of no. 1529 from building on the rear part of his land, while the owner of no. 1525 would suffer no such limitation on his rights as owner. One is never presumed to have created a servitude upon one's property and when the existence of a right of servitude is in doubt, that doubt must be resolved in favour of the servient land—*Cross v. Judah*<sup>1</sup>; *Coulombe v. Société Coopérative Agricole de Montmorency*<sup>2</sup>, per Rinfret C.J.

Basing his claim however upon the sale made by Mrs. McCuaig to his *auteur* Miss McDougall, appellant's contention is that he is entitled to a servitude consisting in the right of passage over the land belonging to respondent in order to exercise a right of passage in the nine-foot lane above referred to, by reason of the provisions of art. 556 C.C. which reads:

If the land in favor of which a servitude has been established come to be divided, the servitude remains due for each portion, without however the condition of the servient land being rendered worse.

<sup>1</sup> (1871), 15 L.C.J. 264.

<sup>2</sup> [1950] S.C.R. 313 at 323.

Thus in the case of a right of way, all the co-proprietors have a right to exercise it, but they are obliged to do so over the same portion of ground.

Article 556 C.C. is in virtually the same terms as art. 700 of the *Code Napoléon* and decisions of the French courts and comments of the French authors are therefore applicable. From these authorities it is clear that in France the principle enunciated in art. 700 C.N. applies only to the rights of the owner (or owners) of the dominant land over the servient land, and that while the purchaser of a portion of the dominant land may have a right to exercise the servitude over the servient land, in common with his vendor, it does not follow that such purchaser is entitled to make use of his vendor's property in order to exercise such right. Demolombe t. 12, Des servitudes (2), p. 372, no. 865; Baudry-Lacantinerie, *Traité de Droit Civil*, t. VI, p. 871; Tribunal Civil Seine, 9 juillet 1900, *Gazette du Palais*, Table Quinquennale 1897 à 1902, p. 580; *Pandectes Français*, Répertoire: t. 51, p. 686.

The law in the Province of Quebec as to the interpretation and effect of art. 556 C.C. is similar to the law in France and I am in agreement with the view expressed by the majority in the Court below that appellant has never acquired a servitude consisting in the right of passage over the land belonging to respondent, upon which the building bearing civic no. 1529 Sherbrooke Street West is erected.

Moreover, as I have stated, no. 1529 was built by Mrs. McCuaig along the line of the passage and extended back a distance of some sixteen feet beyond the end of that passage. She later sold no. 1525, which is not contiguous to the passage, without referring to it, and without creating any additional servitude over the land retained by her. In my opinion this sale had the effect of extinguishing any servitude which prior to April 21, 1902, may have existed in favour of the part sold on that date to Miss McDougall. *Gosselin v. Charpentier*<sup>1</sup>.

Neither the learned trial judge nor Bissonnette J. were of the view that appellant was entitled to benefit from the provisions of art. 556 C.C. Both learned judges appear to have held that a servitude by destination under art. 551 C.C.

1962  
 BARLOW  
 v.  
 COHEN  
 Abbott J.

<sup>1</sup> (1909), 19 Que. K.B. 18.

1962  
BARLOW  
v.  
COHEN  
Abbott J.  
—

had been established. The mere existence since the year 1914 of a gate in the *mitoyen* fence between no. 1525 and no. 1529 is not sufficient to establish a servitude by destination and I agree with the finding of the Court below that no such servitude was created.

The appeal should be dismissed with costs.

*Appeal dismissed with costs.*

*Attorneys for the plaintiff, appellant: Walker, Chauvin, Walker, Allison, Beaulieu & Tetley, Montreal.*

*Attorneys for the defendant, respondent: Chait & Aronovitch, Montreal.*

---