Gamble v. Birch Island Estates Ltd. et al.
Eastern Contractors et al v. Gamble et al.

[1970] 3 O.R. 641
HIGH COURT OF JUSTICE
STARK J.
17 JULY 1970

Real property -- Rights of way -- Unlawful user -- Grantee of right of way to lakefront lot acquiring island opposite lot -- Grantee developing island as cottage property -- Whether grantee entitled to use right of way to lakefront lot for access to island.

"G" was the owner of property bordering on a lake. He subdivided his land and sold one of his lots to one of the individual defendants in the first action "in trust". The defendant purchaser was a member of a group interested in the development of an island in the lake and purchased the lot in order to obtain access to the island from the mainland. The deed to the defendant contained a right of way over other land remaining to the plaintiff, connecting the lake front lot to the nearest township road. G did not know the defendant's purpose in acquiring the lot, and had, in fact, told the defendant he would not sell him the lot if the defendant had anything to do with the island. The defendant assured G that he had no interest in the island. The lot and right of way was conveyed sequentially to the other individual defendant, and, finally, to the corporate defendant. Subdivision of the island was commenced and the right of way was used for this purpose over the objections of G, who attempted to prevent such use.

In an action by G for damages and an injunction against the defendants prohibiting their use of the right of way as a passageway to the island, and a second action by the defendants in the first action for damages against G, held, G should have judgment in both actions.

There was nothing in the deed or in the contract leading up to the deed or in the extrinsic circumstances surrounding the execution of the contract extending the user of the right of way to the occupants of the island. A right of way restricts the owner of the dominant tenement to the legitimate user of his right, and the burden on the owner of the servient tenement cannot be increased without his consent beyond the terms of the grant. In the present case, the right of way was granted to the owner of the

lakefront lot and could not be used by the owner of that lot for the purpose of passing over G's land and the lakefront lot to the island. G was entitled to protect his property and to require the defendants to adhere to the original purpose of the right of way.

ACTIONS (1) by a landowner for damages resulting from an unlawful user of a right of way and for an injunction prohibiting such user, and (2) by the grantee of the right of way and his successors in title for damages against the plaintiff in the first action for his interference with the use of the right of way.

[The Shannon, Ltd. v. Venner, Ltd., [1965] 1 All E.R. 590; Smith et al. v. Morris, 1935 CanLII 56 (ON CA), [1935] O.R. 260, [1935] 2 D.L.R. 780; Laurie v. Winch, 1952 CanLII 10 (SCC), [1953] 1 S.C.R. 49, [1952] 4 D.L.R. 449; Leggott v. Barrett (1880), 15 Ch.D. 306; Callard v. Beeney, [1930] 1 K.B. 353; Miller v. Tipling (1918), 1918 CanLII 464 (ON CA), 43 O.L.R. 88, 43 D.L.R. 469; Harris v. Flower & Sons (1904), 91 L.T. 816, refd to]

H.L. Morphy, for plaintiffs in first action and defendants in

second action.

Glen J. Kealey, for defendants in first action and plaintiffs

in second action.

STARK J.:-- In these two actions, which were jointly tried at Toronto over a period of six days, the basic issue was to determine the proper user of a certain right of way. The basic facts must be set out first.

The plaintiff in the first action, Robert W. Gamble, is a farmer and is the owner in fee simple in possession of part of Lot 9, Concession 7, in the Township of South Crosby in the County of Leeds. Mr. Gamble is now 79 years of age and has lived on his farm since he bought it in 1917. The farm is some 200 acres in extent and it borders on Sand Lake, one of the Rideau Lakes, on which he has a frontage of some two miles.

Before these proceedings he had sold four cottage lots from his property, one to his son Charles, who now operates his farm for him, one cottage lot to his daughter and two other lots to other persons. He still had three lots which have been surveyed and which he planned to sell and he had a sign on his property indicating that such lots were for sale. The centre one of these three lots is the most closely located to an island in Sand Lake which was owned by one Howard Burtch but has come to be known as Birch Island. This island was largely undeveloped but there were three or four cottages on the island at various points.

On May 9, 1968, two men, Ralph E. Robertson, one of the parties in both actions, and one Jack Burnett, who might be described as real estate promoters or developers, visualized the potentialities of Birch Island for vacation uses and entered into an agreement of purchase and sale with Howard Burtch for the entire island, except those parts which had been sold and a section to be retained by Howard Burtch, for the sum of $55,000. The offer was made conditional upon the purchaser being able to purchase a lot with a right of way from Robert Gamble, and it was also conditional upon obtaining permission from the Department of Transport to allow a road to be built from the mainland to the island. The next day, May 10, 1968, Messrs. Burnett and Robertson attended upon Robert W. Gamble and negotiated an agreement of purchase and sale. A copy of Mr. Gamble's survey was attached to this agreement which was prepared in handwriting by Mr. Robertson and which reads as follows:

> AGREEMENT OF PURCHASE AND SALE, DATED this 10th. day of May 1968.

BETWEEN: JACK BURNETT and RALPH E. ROBERTSON of Ottawa, Ontario.

(In Trust) Hereinafter referred to as the Purchaser --

-- and --

ROBERT W. GAMBLE, R.R. No.3, Elgin, Hereinafter referred to as the Vendor.

> The Purchaser agrees to purchase one cottage lot with 278 ft. frontage on Sand Lake from the vendor. This lot is located in Lot 9 in Con. 7 in the Township of

South Crosby in the County of Leeds outlined and marked on a survey by G.W. Bracken, O.L.S., attached hereto. The purchaser will pay the sum of Five Thousand Dollars ($5,000.00) for the described lot, one dollar on signing this agreement with the balance of four thousand nine hundred and ninety nine dollars ($4,999.00) on closing. A right of way to the lot will be given to the purchaser through the vendor's property from the County Road along an existing road. The vendor will allow the purchaser to build a suitable road to the lot and will allow the purchaser to take road building material from his premises from an existing open pit. Road to be 16 ft. wide. A closing date will be set for May 30th. 1968. The purchaser will have 15 days from the date of this agreement to search title at his expense and make any objections on title to the vendor. The purchaser must be fully satisfied with the title.

Signed this 10th. day of May 1968 at Elgin, Ontario.

Receipt of a copy is hereby acknowledged by both parties.

(Signed) Jack Burnett

---------- R.E. Robertson,

(Purchaser) Witness Robert W. Gamble

------- ---------- Mrs. Florence Gamble. (Vendor)

Mr. Robertson then took the agreement to his own solicitor, and a few days later a deed was executed from Mr. Gamble to Mr. Robertson, Mrs. Gamble joining to bar her dower and Mr. Burnett no longer appearing in the deed since in the meantime he had lost interest in the project.

The description of the parcel of land conveyed and the right of way, as these appear in the deed, are as follows:

> ALL AND SINGULAR that certain parcel or tract of land and premises, situate, lying and being in the Township of South Crosby in the County of Leeds and Province of Ontario, and being composed of part of Lot Number Nine (9) in the Seventh
>
> (7) Concession of the said Township of South Crosby, which said parcel is more particularly described as follows, that is to say:
>
> PREMISING that the bearings herein are astronomic, referred to the meridian through the most Easterly angle of Lot Number Nine (9) in the Sixth (6) Concession of the Township of South Crosby;
>
> COMMENCING where an iron bar has been planted within the said Lot marking the South-Western angle of the herein described parcel, and which said point of commencement is distant Three Thousand and Four and Sixty-Eight One-Hundredths (3004.68) feet as measured on a course of South 46 degrees 42 minutes 40 seconds West from the most Easterly angle of Lot Number Ten (10) in the Seventh (7) Concession;
>
> THENCE North 25 degrees 39 minutes 30 seconds West, a distance of Ninety-Two and Sixty-Four One-Hundredths (92.64) feet to an iron bar planted at an angle;

THENCE North 44 degrees 50 minutes 30 seconds East, a distance of Sixty-Five (65) feet more or less, to the intersection with the high-water-mark along the shore of Sand Lake; THENCE in a general South-Easterly, Southerly and South- Westerly direction along the said high-water-mark, a distance of Two hundred and Seventy-Eight (278) feet more or less, to the intersection with a line drawn on a course of South 81 degrees 25 minutes East from the point of commencement;

THENCE North 81 degrees 25 minutes West, a distance of Fifty- Three (53) feet more or less, to the point of commencement;

Together with a Right-of-Way in common with the Grantor, and all others entitled thereto, from the South-Western limit of the hereinbefore described parcel in a general Southerly direction across Lot Number Nine (9) in the Seventh (7) Concession to the present travelled Township Road;

THE HEREINBEFORE DESCRIBED parcel is shown bordered in red on a plan of survey attached hereto, signed by George W. Bracken, P. Eng., Ontario Land Surveyor, dated February 14, 1968, and which said plan of survey forms part of the legal description.

Robertson now moved quickly to develop his plans and to subdivide Birch Island into over 100 lots for summer cottages and to provide access to these cottages by means of a causeway connecting the island to the lot purchased from Robert Gamble and to use the right of way over Gamble's farm to connect with the adjoining township road. Robertson introduced the project to other persons, including two of the defendants in the first action, namely, John Raphael McMahon and Alfred Roger Appleton. A company was formed under the name of Birch Island Estates Limited, shares in which were owned by the three personal defendants in the first action, and a contract was entered into with Eastern Contractors, a division of Dyferus Enterprises Limited, division of Dyferus Enterprises Limited, a company controlled by Robertson for the construction of the causeway. On August 26, 1968, Robertson conveyed the lot and right of way which he had purchased on the mainland to Appleton and McMahon in trust, and on June 3, 1969, Appleton and McMahon conveyed the property to the new company Birch Island Estates Ltd. Attractive brochures were prepared and sales commenced of cottage lots on Birch Island. The consent of the Department of Transport to the building of the causeway was obtained. Since Burnett was no longer interested in the project, a revised agreement of purchase and sale was entered into between Robertson and Howard Burtch on August 7, 1968, and on October 22, 1968, Howard Burtch conveyed the Birch Island to Birch Island Estates Ltd. The purchase price of the island was $55,500, of which some $10,000 was paid in cash and the balance secured by first mortgage. Subsequently, parts of these lands were subdivided into lots and conveyed to the parties McMahon, Appleton and Robertson in trust. The evidence indicated that at the time of trial some 58 cottage lots had been sold either by deed or by agreement of sale including rights of way over Mr. Gamble's land.

The position advanced by Mr. Gamble's counsel was that the deed of May 15, 1968, being ex. 3 of these proceedings, conveying the lot on the mainland with a right of way from Gamble to Robertson was the governing document, that there was no ambiguity in the document, that the dominant tenement was clearly described in the deed, that the right of way was similarly clearly defined and that the Court should not concern itself with the intentions of the parties or with any negotiations or discussions preceding or following the execution of the deed. He further contended that, even if there were any ambiguities, these were patent rather than latent ambiguities and extrinsic evidence was not admissible.

Opposing counsel contended that the deed was ambiguous and he listed these ambiguities in this way:

(1) He contended that the phrase contained in the description of the right of way in the deed, namely, "and all others entitled thereto", was ambiguous and that extrinsic evidence was required in order to determine who are the others referred to.

(2) The right of way is described as commencing "from the South-Western limit of the hereinbefore described parcel". Counsel contends that no particular point on the south- west limit has been specified.

(3) Since the width of the right of way is not specified, evidence is required to clarify this point.

(4) The phrase "in a general Southerly direction" is too vague and evidence is required to clarify it.

(5) The word "across" in the description invites the question "whereabouts across?".

(6) Finally, and more importantly, counsel contends that there is no description of the dominant tenement and, therefore, surrounding circumstances must be looked at.

Subject to the objection of Mr. Gamble's counsel, allowed this evidence in, promising to give the matter further consideration in the light of the numerous authorities to

which I was referred. In considering whether such evidence should be received, I was influenced also by the position taken by Mr. Kealey in explaining the position which he was taking on behalf of the Birch Island group of defendants. He said this:

> Our position is that apart from Exhibit 2 (the agreement of purchase and sale between Messrs. Burnett and Robertson and Robert Gamble) and Exhibit 3 (the deed of the Gamble lot to Ralph E. Robertson in Trust) there was a definite clear agreement between Gamble and Robertson and Burnett with regard to the use of the right-of-way, to not merely build a road over the existing road and then to the shore, but also a definite agreement that Robertson and Burnett and their assignees would be permitted to use the right-of-way and the lot to go to Birch Island. Since the documents are silent as to go or not to go to Birch Island, we say there was a collateral agreement entered into on May 10th, 1963.

I have read all the many decisions to which I was referred and I have now satisfied myself that the evidence given had some relevance and should be given consideration. Phipson on Evidence, 10th ed. (1963), p. 756, para. 1851, gives the rule thus:

> WHERE the language of a document is clear and applies without difficulty to the facts of the case, extrinsic evidence is not admissible to affect its interpretation; but where the language is peculiar, or its application to the facts is ambiguous or inaccurate, extrinsic evidence may, subject to the qualifications hereinafter stated, be given in explanation.

Of course, as Phipson points out at p. 720, para. 1781:

> WHEN a transaction has been reduced to, or recorded in, writing either by requirement of law, or agreement of the parties, extrinsic evidence is, in general, inadmissible to contradict, vary, add to or subtract from, the terms of the document.

In the case at hand, it was argued that the extrinsic evidence was being given not to contradict the written document but simply to clear up a latent ambiguity and to make clear the full nature of the user of the right of way. This might well fall within the doctrine of the law summarized by Phipson at p. 726, para. 1791, in this language:

> Moreover, although there exists a contract purporting to be fully expressed in writing, whether required by law to be so or not, proof may be given of a prior or contemporaneous oral agreement or warranty, not inconsistent with the document, and which forms part of the consideration for the main contract . . . So where the alleged collateral agreement is really a material term of a contract required by law to be in writing, it will be inadmissible on that ground; but where it is on an independent matter, this does not apply.

It appears to me that, in my task of construing the words used in the deed of May 15th, I may receive some guidance by an examination also of the agreement of purchase and sale which gave rise to the completed deed and by considering the circumstances under which that original agreement of purchase and sale was entered into. Especially is this necessary, so it appears to me, in considering the difficult question of the extent of the rights of user of a right of way. The law in this regard has been summarized in 12 Hals., 3rd ed., p. 569, para. 1237, in the volume dealing with easements, in this language:

> A private right of way may be defined as a right to utilise the servient tenement as a means of access to or egress from the dominant tenement for some purpose connected with the enjoyment of the dominant tenement, according to the nature of that tenement. A right of way can validly be made appurtenant to land with which the way has no physical contiguity, but it must be beneficial in respect of the occupation of that land.

Again at pp. 571-2, para. 1242:

> If a right of way is claimed under an express grant which is actually existing, the nature and extent of the right depends upon the proper construction of the language of the instrument creating it. It is for the court to put the true construction upon the words used in the grant, guided, in the absence of any clear indication of the intention of the parties, by the maxim that a grant must be construed most strongly against the grantor.
>
> The construction of the grant depends on the circumstances surrounding the execution of the instrument. Thus, a grant of a right of way per se and nothing else may be a right of footway or a general right of way or a right to any other kind of

> way, according to the circumstances of the case. Amongst these circumstances the nature and description of the lands or buildings comprising the dominant tenement, and the nature of the locus in quo over which the right is granted as it existed at the date of the grant, are always very material considerations.

Mr. Kealey contends that, since no dominant tenement is directly specified as such in the offer to purchase or in the completed deed, he is entitled to bring in extrinsic evidence to show that the dominant tenement was in fact not merely the mainland lot sold by Gamble to Robertson but indeed the whole of Birch Island. He points out that the cases show that actual contiguity is not an essential feature and he points to the case of The Shannon, Ltd. v. Venner, Ltd., [1965] 1 All E.R. 590, a decision of the Court of Appeal where the facts were these [headnote]:

> In an action brought by the plaintiffs the issue was to what land, as dominant tenement, a right of way granted by a vendor in a conveyance dated Feb. 6, 1930, to the plaintiffs was attached. On behalf of the plaintiffs evidence was adduced that the land conveyed to them was acquired with a view to the extension of their factory, which was on adjoining land that they had fairly recently purchased from the same vendor, and that this purpose was communicated to the vendor before the conveyance. There was no physical division between the two parcels of land. The conveyance of Feb. 6, 1930, did not identify the dominant tenement, but merely conferred the right of way on to the plaintiffs"and their successors in title", without specifying to which land the words "successors in title" referred. . . .
>
> Held: the question in issue turned on the true construction of the conveyance of Feb. 6, 1930, and, as the meaning of the relevant words of the conveyance was not clear, the court was entitled to consider the surrounding circumstances and, as part of them, evidence was admissible that the purchasers, the plaintiffs, had certain plans for the use of the land conveyed, which were communicated to the vendor before the conveyance; taking this evidence into consideration, together with the other facts mentioned above, the dominant tenement was the whole of the plaintiffs' land, viz., the existing factory site and the land conveyed by the conveyance of Feb. 6, 1930 . . .

In that case Danckwerts, L.J., at pp. 593-4 said:

> It is one thing to allow a party to say "By the words in the deed, I meant this meaning" (which is not admissible), and quite another thing to advance evidence that, in acquiring a particular piece of land, the purchaser had certain plans for the use of that land which may explain the form which the document took. The evidence was rightly admitted as throwing light on the circumstances in which the document came to be executed.

It is sufficient to refer to the words of UPJOHN, L.J., giving the judgment of the court in Johnstone v. Holdway, [1963] 1 All E.R. 432; [1963] 1 Q.B. 601. He repeated the quotation by WRIGHT, J., in Callard v. Beeney, [1930] 1 K.B. 353 at p. 360, of the observation of LORD WENSLEYDALE in Lord Waterpark v. Fennel (1859), 7 H.L. Cas. 650 at p. 684:

> "The construction of a deed is always for the court; but, in order to apply its provisions, evidence is in every case admissible of all material facts existing at the time of the execution of the deed, so as to place the court in the situation of the grantor."

UPJOHN, L.J., went on to say:

> "In our judgment it is a question of the construction of the deed creating a right of way as to what is the dominant tenement, for the benefit of which the right of way is granted and to which the right of way is appurtenant. In construing the deed the court is entitled to have evidence of all material facts at the time of the execution of the deed so as to place the court in the situation of the grantor."

Also significant is the language of Danckwerts, L.J., at pp. 594-5:

> It was contended by counsel for the defendants that, in the absence of a statement identifying the dominant tenement, there must be a presumption, or possibly an inference, that the land actually conveyed by the deed is the dominant tenement. That may be so in the absence of evidence causing an inference that some other land is the dominant tenement for the benefit of which the easement was created, but it cannot be an irrebuttable presumption.

Again, reference should be made to Smith et al. v. Morris, 1935 CanLII 56 (ON CA), [1935] O.R. 260 at p. 263, [1935] 2 D.L.R. 780 at p. 782, a decision of the Court of Appeal, where Masten, J.A., said:

> My study of the cases leads me, however, to the conclusion that an easement constituted by grant is to be interpreted according to the intention of the parties at the time of the grant, having regard primarily to the words of the grant itself, though in a case like the present, the surrounding circumstances are also relevant as evidence to interpret the rights which are implied in the particular case.

Further, in Laurie v. Winch, 1952 CanLII 10 (SCC), [1953] 1 S.C.R. 49 at p. 56, [1952] 4 D.L.R. 449 at p. 455, Kellock, J., summarized the law thus:

> With respect to the nature and extent of the easement granted, it is to be observed that the grant is one of a right-of-way simpliciter with no express restriction as to use. Just as the circumstances existing at the time of the grant may be looked at for the purpose of ascertaining the intention of the parties as to the dominant tenement and as to the location and termini of the way, the circumstances may also be looked at for the purpose of construing the conveyance as to the nature and extent of the rights conveyed.

At any rate, for the foregoing and other reasons I admitted evidence showing the facts and circumstances surrounding the making of the agreement of purchase and sale of May 10th and the execution of the deed of May 15, 1968. These circumstances, however, in my view do not assist the defendants in the first action who may be described as the Birch Island developers. There were very important differences in the testimony given by Messrs. Robertson and Burnett and the evidence of Mr. and Mrs. Gamble. There were also very startling discrepancies between the evidence given by the defendant Robertson, who may be regarded as the chief promoter of the Birch Island development, and his replies to similar questions asked him on his examinations for discovery. I do not believe that Mr. Robertson was completely frank with the Court, and, wherever his evidence does differ from that of the plaintiff Gamble, I accept the latter's testimony, making allowance only for occasional lapses of memory on his part. I am satisfied that when Messrs. Robertson and Burnett called on the Gambles for the first time on May l0th, having already obtained a right to acquire Birch Island, they were determined to conceal this fact from Mr. Gamble; and Mr. Robertson himself was forced to admit that at no time in the negotiations did he

directly indicate that the right of way was to be used for the convenience of persons wishing to go to Birch Island. He did contend that there was some references made to buying gravel and fill from Mr. Gamble to be used in the causeway, but any such references were mostly incidental and, indeed, appear to have been made by Mr. Burnett rather than by Mr. Robertson, although Burnett admitted that Robertson was doing all the talking and was in fact doing the negotiating. Undoubtedly, rumours concerning possible future uses of Birch Island had reached the ears of Robert Gamble. But I accept his evidence as to what transpired on May 10th at the opening of the conversation. He testified that Robertson opened the conversation by saying, "I see you have some surveyed lots for sale." Gamble said that he replied: "If you figure on anything to do with Birch Island, I won't sell you one." Gamble then testified that Robertson replied: "I just want a cottage with a place for the kids to bathe. I don't want anything to do with Birch Island." Again, he was asked: "Did you enquire as to whether Robertson or Burnett had anything to do with Birch Island?" His answer was:

"I told them if they were figuring anything to do with Birch Island I wouldn't sell." Mr. Gamble further testified that the first time he learned that plans were being made to use the right of way as a passage to Birch Island was when Robertson returned to see him in September, 1968, in the hope that he, Robertson, could make an agreement for the purchase of gravel and fill which he proposed to use in the construction of the causeway.

On his cross-examination some of the questions and answers are reproduced as follows:

> Q. I'm asking if he is saying -- if there is any difference between his testimony to-day and what he said on Discovery?

A. It would appear so.

Q. That there is a difference?

A. From the things you read and what I intended.

Q. I'm just reading what you said, Mr. Robertson. It is not my language, but Mr. Robertson, let me come back to my question. You seem to have difficulty answering. I say if you were telling the truth on Discovery you say there was no mention of causeway. You don't say anything about any condition about selling fill for a causeway and the next time you saw Mr. Gamble was in early September. That would be the first time that you mentioned to him about the causeway going to the island?

A. I did not discuss with him the causeway going to the island. I have already told you that.

Q. All right. I'm suggesting to you that you have told us in this discovery here there was no conversation about the causeway on May 10th. Is that right or isn't it?

A. About the causeway?

Q. Yes?

A. Only the material.

Q. You don't have -- you don't say anything about the material for the causeway on May 10th?

A. No, I didn't.

Q. No. All right.

A little later on the question was put:

Q. That when you came to see Mr. Gamble in September and you told him that you were going to take this road to the island that would be the first time that you had told him that the causeway was going to the island?

A. That I was building a causeway to Birch Island?

Q. Yes.

A. Truthfully, I never made that statement to him that I was. We asked him about the prices of the material.

Q. Not May 10th you didn't according to your Discovery?

A. We asked him.

Q. Just according to your Discovery you didn't?

A. Maybe not.

Q. And it was in September, wasn't it, after you told Mr. Gamble about the causeway going to Birch Island that he got mad and the trouble began?

A. Mr. Gamble and I had the best of relations until his son come on the scene. That's the only time there was problems.

Q. When it was realized that the causeway was going to the island?

A. Mr. Gamble knew I was going to Birch Island.

In his evidence Mr. Burnett went even further than Mr. Robertson had testified, claiming that in their conversations Mr. Gamble had agreed "for us to put a road from the lot to the island". Mr. Burnett contended that some of the conversation which he personally had with Gamble occurred when the two of them were alone examining the property and walking over the proposed right of way to the cottage lot. He even contended that Mr. Gamble had asked him if he had anything to do with Birch Island

and, "I told Mr. Gamble we had purchased Birch Island the previous day." This, too, was markedly different from Mr. Robertson's testimony. I do not believe that either Mr. Robertson or Mr. Burnett were completely frank or completely truthful to the Court; and since I accept the evidence given by Mr. Gamble, corroborated by his wife who was present for at least part of the time, I am satisfied that the written agreement of May 10th set out all the terms that had been agreed upon and that there was no agreement or understanding whatever reached as to Birch Island, except when Mr. Robertson made it very definitely clear that he was not selling any property in connection with Birch Island, and I am satisfied that there was no collateral agreement entered into and that all the terms which had been settled were incorporated in the offer to purchase of May 10th, subsequently adopted into the completed deed of May 15th.

It is of some slight significance that in the agreement of purchase and sale dated May 10, 1968, reference is made to the purchase of "one cottage lot", although it is quite evidence that Robertson had no intention of constructing a cottage on the property.

In any event it must be borne in mind that chief attention must be focussed upon the deed itself. As was said in Leggott v. Barrett (1880), 15 Ch. D. 306 at pp. 309-10, by James, L.J.:

> . . . I cannot help saying that I think it is very important, according to my view of the law of contracts, both at Common Law and in Equity, that if parties have made an executory contract which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and that you have no right whatever to look at the contract, although it is recited in the deed, except for the purpose of construing the deed itself. You have no right to look at the contract either for the purpose of enlarging or diminishing or modifying the contract which is to be found in the deed itself. A recital of the agreement in such deed would have the same effect as an ordinary preamble to an Act of Parliament, or any other instrument, as shewing what the object of the parties was, and what they were about to do, so as to afford a guide in the construction of their words; but you have no right for any other purpose to look at anything but the deed itself, unless there be a suit for rescinding the deed on the ground of fraud, or for altering it on the ground of mistake.

In short, I find nothing in the deed or in the contract leading up to the deed or in the extrinsic circumstances surrounding the execution of the contract and the deed to

enable me to enlarge the proposed user of the right of way so as to extend it to the occupants from time to time of the lots on Birch Island. Indeed, the extrinsic circumstances fortify Mr. Gamble's claim that he was misled and deceived by these real estate speculators and that he never at any time agreed verbally or in writing to permit such a right of way as the Birch Island group contemplated. Upon a consideration of all the evidence, therefore, I find that the right of way is sufficiently clearly described as to constitute a right of ingress and egress to and from the lot one on the mainland described in the deed of May 15th.

It now remains to consider whether the law will permit the extension of the user of the right of way to additional property acquired by the grantee or its successors in title. This branch of the law appears to be well established. In Gale on Easements, 13th ed. (1959), p. 265, one finds this language:

> "If a right of way be granted for the enjoyment of close A, the grantee, because he owns or acquires close B, cannot use the way in substance for passing over close A to close B." Romer L.J., Harris v. Flower & Sons (1905) 74 L.J.Ch. 127. It need hardly be said that the mere fact that the grantee uses the way to enter close A does not make close B incapable of access from A; the question must always be whether the ostensible use of the way for the purposes of the dominant tenement is genuine or colourable. If land is granted with a right of way, the fact that the way is expressed to be to a particular point or place in the land does not necessarily or usually prevent the right from being annexed to all the land.

In Callard v. Beeney, [1930] 1 K.B. 353 at p. 359, Talbot, J., expressed the law in this language:

> The statement will be found in text books of repute that a right of way to Blackacre does not include a right of way to a place beyond Blackacre. If this means, as I think it does, that a right appurtenant to Blackacre does not include a right to use the way really and substantially as a way through Blackacre to a place beyond, that is undoubtedly the law. The right to go to Blackacre and the right to go through Blackacre to Whiteacre are different rights.

Again, Mulock, C.J.Ex., in the Ontario Court of Appeal, in Miller v. Tipling (1918), 1918 CanLII 464 (ON CA), 43 O.L.R. 88 at p. 95, 43 D.L.R. 469 at p. 475, expressed the rule in this language:

> The law is well-established that a right of way appurtenant to a particular close must not be used colourably for the real purpose of reaching a different adjoining close. This does not mean that where the way has been used in accordance with the terms of the grant for the benefit of the land to which it is appurtenant, the party having thus used it must retrace his steps. Having lawfully reached the dominant tenement, he may proceed therefrom to adjoining premises to which the way is not appurtenant; but, if his object is merely to pass over the dominant tenement in order to reach other premises, that would be an unlawful user of the way . . .

In Harris v. Flower & Sons (1904), 91 L.T. 816 at p. 819, Vaughan Williams, L.J., said this:

> A right of way of this sort restricts the owner of the dominant tenement to the legitimate user of his right, and the court will not allow that which is in its nature a burden on the owner of the servient tenement to be increased without his consent and beyond the terms of the grant . . . The burden imposed on the servient tenement must not be increased by allowing the owner of the dominant tenement to make a use of the way in excess of the grant. There can be no doubt in the present case that, if this building is used as a factory, heavy and frequent traffic will arise which has not arisen before . . . At present all we shall do is to make a declaration that the defendants are not entitled to use the land of the plaintiff as a passage or way to or from the piece of land in the rear of the public-house . . .

Again, Romer, L.J., at p. 819:

> The law really is not in dispute. If a right of way be granted for the enjoyment of close A, the grantee, because he owns or acquires close B, cannot use the way in substance for passing over close A to close B.

My conclusion, therefore, is simply this, that the conveyance of May 15th from Gamble to Robertson is to be interpreted by an examination of the document itself,

viewed in the light of the circumstances which existed at the time of the conveyance. Having so considered the matter, it is abundantly clear to me that all that has been conveyed is the grant of a lot on the mainland with a right of way leading to this lot over Mr. Gamble's farm. That being so, the Birch Island group, and the purchaser of lots on Birch Island, are not entitled to use the right of way over Mr. Gamble's farm to reach their own property.

It is now necessary to consider the claims advanced by Mr. Gamble against Robertson and the other members of the Birch Island group as well as the company itself for damages for trespass through his lands, which occurred during the time that the right of way was being constructed and the causeway being built. Similarly, it is necessary to consider the claims brought in the second action by the Birch Island company, by the persons comprising the company and by the contracting company engaged in building the right of way and the causeway against Mr. Gamble and his son for damages claimed to have been caused by increase in the cost of their operations and interfering in their construction work. The evidence indicates that all the parties had come to an agreement as to the course which the right of way would follow, in order to keep the way diverted from Mr. Gamble's house and farm buildings and thus to interfere as little as possible with his farming activities. However, in constructing the right of way Robertson and his servants and agents, in a very arrogant and overbearing manner, departed from the agreed upon right of way and trespassed continually on Mr. Gamble's remaining property, causing great disturbance and annoyance to him. Thus, the evidence indicated that gates were left open which were required to enclose the cattle, that locks on gates were torn off, that "No Trespassing" signs were destroyed, that farm machinery was pushed out of the way and that continuous threats were made against Mr. Gamble with the result that, for a period of time, he suffered abuse and insults and actually lived in fear of Robertson. No actual monetary loss resulting from these trespasses was proved but I am entitled to consider the element of punitive damages, and it is my view that the sum of $1,000 should be allowed to Mr. Gamble under this general heading. In my view all of this trespass was caused by Mr. Robertson or employees working directly under him, and I do not think that the other defendants in the first action can be held responsible. In respect of this claim, therefore, judgment should go in favour of Robert W. Gamble against Ralph Edmund Robertson in the sum of $1,000.

In my view the claims made against Mr. Gamble and his son in the second action are completely without merit. Mr. Gamble was entitled to protect his property and to require Mr. Robertson and the others to adhere to the property which had been agreed upon as constituting the right of way. Any delays which they were caused in the construction of their work were due entirely to their own overbearing attitude which

was completely disregardful of Mr. Gamble's rights. This action will therefore be dismissed. Since the two actions were in effect tried as one, I propose to allow Robert W. Gamble one set of costs against the defendants in the first action.

In the result, the plaintiff Robert W. Gamble is entitled to an injunction restraining the defendants, that is, Birch Island Estates Ltd., John Raphael McMahon, Alfred Roger Appleton and Ralph Edmund Robertson, their heirs, successors, assigns, servants and agents, from using or permitting the use of a right of way over Mr. Gamble's property as a passageway of any kind for the purpose of either going to or coming from any of the defendants' lands on Birch Island or any lands on Birch Island conveyed from the defendants to other persons. The plaintiff Robert W. Gamble is also entitled to judgment in the sum of $1,000 against Ralph Edmund Robertson, being damages for trespass of his property. The plaintiff Robert W. Gamble is entitled to the costs of the action against the defendants in the first action, the second action being dismissed without costs. If counsel are unable to agree as to the form of the judgment, I may be spoken to.

As requested by counsel, there will be a stay of execution for a period of 30 days from the date hereof.

Judgment accordingly.