ST VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 606 OF 1997

BETWEEN:

RICHARD BARBOUR
EUNICE BARBOUR

Plaintiffs

and

LOUISE KYDD
HETTIE KYDD
EMALINE COMPTON

Defendants

Appearances:
Samuel Commissiong for the Plaintiffs
Carl Glasgow for the Defendants

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2000: September 9
2001: January 23, April 4, May 10, 21, 29, July 11, 31
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JUDGMENT

[1] MITCHELL, J: This was a land dispute between neighbours. It concerned the existence of an alleged right of way through the Plaintiffs' land at Paget Farm in the Island of Bequia in the Grenadines. The Plaintiffs sought orders preventing the Defendants from passing through their yard, while the Defendants sought orders that there was a public right of way across the property.

[2] The case commenced by a generally endorsed writ issued on 19 December 1997. After a number of interlocutory applications had intervened, the Statement of Claim was filed on 18 February 1998. By the Statement of Claim, the Plaintiff claimed that the dispute centred on a 2-foot wide path that gave access to the

home of the Plaintiffs and which path formed part of the land on which their home was built. They held that land by a deed, and they quoted the schedule to the deed describing the land. The claim was that the Defendants were neighbours of the Plaintiffs, and had other roads giving them access to their own homes; that they had been breaking down the fences and hedges of the Plaintiffs for some time; and that the Defendants claimed they had a 6-ft wide right-of-way across the land of the Plaintiffs. This claim was denied, but it was admitted that the Plaintiffs had in the past occasionally permitted the Defendants and others to pass through their yard on a temporary basis; that the Defendants and their relatives had frequently asked the Plaintiffs permission to use the land as a short-cut to their property; that the Plaintiffs once annually barred the access to preclude the possibility of a claim to prescriptive rights; that in 1996, after a number of incidents in 1962 and 1984, the 1st Defendant had started to break down the Plaintiffs' fence; that since that time the Defendants had almost on a daily basis destroyed the Plaintiffs' fence, removed the galvanize demarcation between the neighbours, used indecent language to the Plaintiffs and threatened to injure the Plaintiffs; that there had been a previous suit No 213/1996 which had lapsed while a surveyor had been surveying the property. The Plaintiffs claimed a declaration that the Defendants have no right to use the footpath which forms part of the land of the Plaintiffs, a declaration that the Defendants are trespassers on the Plaintiffs' land, a perpetual injunction restraining them from entering upon any part of the land, damages, and costs.

[3] By a Defence and Counterclaim filed on 3 March 1998, the Defendants responded to the above claim by denying that the lands of the Plaintiffs are as described in their claim. The defence was that the land of the Plaintiffs was originally two separate parcels separated by the 6ft wide access road. The Defendants denied that they had separate access roads. They admitted on occasion breaking down temporary galvanized fences erected by the 2nd Plaintiff, but only because the Plaintiffs encroached on the land of the Defendants, and on one occasion when the Plaintiffs blocked the disputed access road. It was denied that any permission

had ever been requested of the Plaintiffs to walk on the disputed road, as it was a public right of way and not a part of the land of the Plaintiffs. It was denied that the Plaintiffs had ever blocked the disputed road annually. There was an admission of an earlier incident of violence between the parties in the year 1986, which it was pleaded had resulted in one Vilna Kydd suing the Plaintiffs together with Agna Barbour in suit 216/1986 to prevent the Plaintiffs from blocking the footpath and having it declared a public right of way The Defendants counterclaimed for a declaration that there is a 6-ft wide right of way extending from the Derrick Hill Main Road to the western boundary of the lands of the Defendants, a declaration that the Defendants are entitled to the use of the road, an injunction restraining the Plaintiffs from erecting fences on the Defendants' land or from blocking the road, an injunction restraining acts of violence on the Defendants, damages, and costs.

[4] On 10 March 1998, the Plaintiffs filed their Reply and Defence to Counterclaim. Essentially, they denied that there was a 6-ft wide access road as alleged. If any such footpath had ever existed, the Plaintiffs contended that they had been in effective possession of it for a period in excess of 70 years, and the Defendants were not entitled to the reliefs they sought. The Order on the Summons for Directions was made on 24 April 1998, and the Request for Hearing was filed on 8 June 1998.

[5] On 2 December 1999 the suit came up at call-over for fixing a trial date, and the date of 4 April 2000 was assigned. On that date it was ordered by consent that Sebastian Alexander, Land Surveyor, survey the disputed lands with the disputed right of way and file his report, the parties to bear the cost of the survey in equal shares. On 27 September 2000, after several adjournments, the survey had not been filed, but the court was advised that the report was ready. It was agreed by both counsel that Mr Alexander would give his evidence and be cross-examined by both counsel.

[6] The Plaintiffs and the Defendants called a number of witnesses, and put a number of documents in evidence. The Plaintiffs called 3 witnesses, the 1st Plaintiff, the 59 year old Richard Barbour, as well as his sister the 39 year old Agna Barbour, and the 2nd Plaintiff, their 76 year old mother Eunice Barbour. Eunice Barbour is the daughter of Georgiana Grey, the ancestral owner of the Barbour rights to the lands of the Plaintiffs in question. Georgiana Grey had willed her land to the 1st Plaintiff. The Defendants called 4 witnesses, the 2nd Defendant, the 75 year old Hetty Kydd, and her brother-in-law the 80 year old Brennan Williams, and Hetty Kydd's 46 year old son Clayton Brown. Hetty Kydd is the daughter of Morgan Kydd, the ancestral owner of the Kydd lands in this case. Also giving evidence on the results of his survey was Mr Sebastian Alexander, the agreed surveyor. The 3rd Defendant was hospitalised and unavailable to give evidence.

[7] The evidence of Mr Alexander was the most helpful. His drawings and photographs clearly and vividly illuminated the situation on the ground. I find that there is no dispute over the part of the track that approaches the property of the Plaintiffs from the east. Nor is there any dispute over the part of the track that crosses the property of Morgan Kydd. The dispute relates to the part of the track that used to pass over the property of the Plaintiffs to the south of their present home, now obstructed by the newly constructed porch, and leading to the property of Morgan Kydd. An extract from the map in the Survey Department was part of Mr Alexander's exhibit. This map, it is accepted, was prepared by use of photographs taken by high-flying aeroplanes. For what it is worth, it does not show by way of the usual dotted lines the existence of a footpath either to the west or to the east of the lands in question. The Survey Department map does not help one way or the other. In his report and in his evidence, Mr Alexander came to the conclusion that a right of way in favour of the Defendants had existed previously over the lands of the Plaintiffs. That conclusion of his relates, however, to the interest in land that this court is called upon to adjudicate in this suit.

[8] The roots of title of the present Plaintiffs and Defendants to their lands are not clear. They are rather, shrouded in mystery. That is not unusual in St Vincent and the Grenadines, where there is an extremely archaic and inefficient system of land title registration by way of deeds of dubious provenance. The 1st Plaintiff's deed of assent from himself as Administrator of the estate of his grandmother, Georgiana Grey, to himself as beneficiary of her will, No 1779 of 1990, recites no earlier root of title than the Will of Georgiana Grey to which it relates. No earlier deed of any kind of Georgiana Grey was put in evidence. This does not mean that Georgiana Grey had no deed for her land. If it existed, it simply was not put in evidence. That may mean that she had no deed, or it may mean only that the draughtsman of the deed of assent was unable to locate it in the Registry of Deeds. Similarly, the Defendants produced no deeds for their lands. If Morgan Kydd or any of the Defendants had legal title to any land in that area of Derrick Hill, the court knows it only on the say-so of the Defendants. What are the boundaries of their lands is not known. Who the present owners of Morgan Kydd's lands are is not known. The reason for this failure by the Defendants to establish that they hold any legal interest in any land in the area is not clear. They or some of them may have had deeds to lands previously owned by Morgan Kydd. Their deeds, if produced, might have been helpful in describing the root of title and of any existing right of way. Morgan Kydd may have had a deed for his land referring to one or more rights of way appurtenant to his land. On the other hand, if put in evidence, the Defendants' deeds would probably have been as unhelpful as the 1st Plaintiff's deed in reciting the titles to and describing any easements or encumbrances affecting the lands to which they relate. The deeds of the Defendants, if they had been produced, like the deed of the 1st Plaintiff, would likely have recited or referred to no earlier document of title of the previous owner. They would in all probability have thrown no light on the state of the lands or of the existence of any access roads or other easements and encumbrances affecting the lands. All this is, admittedly, speculation. In the event, the Defendants' deeds and those of their predecessors in title were not produced in evidence at the trial. The result of this state of affairs is that the court must rely on the oral testimony of

the witnesses to determine the rights affecting the land in question. There is only their oral evidence that they own land in the area. The sad fact is that, despite the provisions of the statute of frauds, the resolution of land title and boundary disputes in St Vincent and the Grenadines usually depends on which of the disputants can give the most convincing story to the court. Most land titles are unregistered even by possessory titles. Oral evidence as to purchase and possession is not a satisfactory method at any time and in any place of proving land titles. It is a method almost designed to impose unnecessary costs on landowners. It is well recognised that the absence of a proper, modern system for recording land titles and interests robs the poor of a nation of the ability to deal in the one asset of any value they may own, their land.

[9] It seems likely from the evidence that it was in the early decades of the 20th century that the Plaintiffs' and Defendants' predecessors in title began to occupy the lands in question. Whether they inherited it, bought it, or squatted on it, is, as previously described, unknown. The 1st Defendant's predecessor, Morgan Kydd, went to live on his part of the mountainside first. He was followed a few years later by Georgiana Grey, the mother of Eunice Barbour, on her portion of the mountainside. The lands of the parties may be described in this way. The lands together form a rough triangle in shape. The base of the triangle is the Derrick Hill Main Road to the south. Morgan Kydd's land lies to the left, while Georgiana Grey's land lies to the right of the triangle. The Derrick Hill Main Road comes from the principal or Paget Farm Main road from the west, or left, and peters out into a network of foot tracks a short distance to the south and east beyond the land of the Plaintiff. So, the main route for the Plaintiffs and the Defendants out of the village lay to the west. That direction was the easiest way to access the Paget Farm Main Road. The Kydds built their home on their land to on the western side, up towards the apex, of the triangle described above. The Barbours built alongside them but on their land on the eastern side, also up towards the apex. There was a track that led from Morgan Kydd's home down the western side of the triangle. There was another track that led from his neighbours, the Barbours,

down the eastern side of the triangle to the eastern part of the village. The Kydds would have used the western track when they wished to go to the west or to access the Paget Farm Main Road. If they wished to go to the east, e.g. to visit relatives in the village, they found it more convenient to pass through the lands of the Barbours, and to go down the track that the Barbours used to access their home. In time, the two tracks came to be joined by a more or less recognised track across the land of the 1st Plaintiff so that they all formed one track. The Barbours appear never to have used the track to the west that was used by the Kydds. The Barbours used only the track to the east to get to the Derrick Hill Main Road and from there to the Paget Farm Main Road.

[10] The Kydds had family living in Derrick Hill village at the east and south of the Barbours. These cousins also found it more convenient when visiting Morgan Kydd's house to go directly up the Barbour track and so to access Morgan Kydd's property which lay immediately west of the Barbour's home. It would have involved them in a short diversion to have gone down to the Derrick Hill Main Road, and to have walked along it and then up the western access to the Kydds. They preferred to use the more direct access provided by the Barbours' track. That meant that they crossed the Barbour yard within a couple of feet of the Barbour home. As Morgan Kydd had been there on the mountainside first, they appear to have considered that they had a right to use whichever access over the mountainside that they preferred. In the case of the cousins, this meant using the Barbour track and crossing over the Barbour land. The Barbours at first permitted it, but in time became unhappy at this intrusion. For many years there were fights, assaults, and quarrels between the two neighbours over the Kydds using the Barbours' yard as an access to and from Morgan Kydd's property. Serious injuries were inflicted. Eventually, the Barbours stopped permitting the Kydds the use of their land as an access, and fenced in their yard. Battles ensued over the Plaintiff's gate and the fence, particularly in the year 1986. Both were torn down from time to time where they interfered with the alleged access of the Defendants and their cousins. In due course, the 1st Plaintiff extended his home by building a

porch. He built it over the area previously used by the Defendants as their preferred route when passing over the Plaintiff's land. The result was more fighting and quarrelling, and, subsequently, this suit.

[11] Mr Alexander's testimony, survey plan and photographs established to my satisfaction that a 6-ft wide physically visible track from the main road lying to the south and east of the Plaintiff's property originally crossed over the land of the Plaintiffs, passed to the south of the 1st Plaintiff's present home, where a porch to the house has now been constructed over the pathway, and this pathway continued to the boundary of the Plaintiffs and so on to the property allegedly of Morgan Kydd, the ancestor of some of the Defendants. This track where it crosses the lands of the Plaintiffs could be either a public or a private right of way, or it might have been neither. The question for the court is, out of this most unsatisfactory evidence, has the court been satisfied that there is either a public or a private right of way in favour of the Defendants over the land of the Plaintiffs. The burden of proving the existence of either rests on the Defendants. The Plaintiffs do not have to disprove the existence of either. What in St Vincent and the Grenadines is a public right of way? A public right of way or highway is created either by statute or by dedication and acceptance, i.e., dedication of the soil to public use by the owner and acceptance by use by the public. Clearly, there was no evidence of this track having been created a public right of way by statute. Nor was there any evidence that the public *qua* public ever used this track. There is nothing to suggest that the court can find either a presumption of dedication or of an acceptance by the public. The Barbour track where it crossed the Barbour land and debouched onto the Kydd land would have been used only by the Kydds and their visitors, and only occasionally. That is not use by the general public. The result is that it could, if it was a right of way at all, only have existed as a private right of way. What is a private right of way in Bequia? The traditional definition as found in Halsbury's Laws of England, 4th Edition, Vol 14, page 68, is "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." How does a private right of way come into existence in Bequia? Such a right is normally established by grant or by prescription. A grant may be any of express, implied, or presumed. Here, there was no suggestion of grant of any kind. There is no evidence from which a court could find any of an express, implied, or presumed grant. So, the right of way, if it existed, could only have come into existence as a result of prescription, either at common law or by statute. Prescription at common law is difficult to establish, and there is no evidence sufficient to begin to raise common law prescription. The Prescription Act, Cap 246, first enacted in St Vincent in 1869, provides another, easier, mechanism. It provides, in effect, for the acquiring of an easement by the enjoyment of it for a period of 20 years, or of 40 years. Enjoyment for 20 years is subject to qualification, while that for 40 years is absolute. An easement such as a private right of way, unlike a public right of way, is a right that does not belong to persons, but to land. There must be the usual dominant tenement and subservient tenement.

[12] The Defendants in this case claim to have been enjoying the right to pass over the lands of the Plaintiffs since the 1920s. The evidence of the earlier writ issued in the year 1986 in suit 216/1986 by the Kydds against the Barbours shows that the Kydds alleged that the Barbours had restricted the passage commencing in 1983, and that the Barbours had finally closed it in May 1986. The writ of the Defendants in the earlier case was issued in 1986 claiming orders to have the alleged right of way opened, but that action was discontinued. The Defendants did not claim the alleged right of way in a lawsuit again until the defence in the present suit was filed some 12 years later in this case in the year 1998. That means that the Kydds claim to have been using the access over the Barbours' land for a period of some 60 years prior to its closure in about 1983. If the Kydds had acquired the right of way by prescription, the closure of it by the Barbours since about 1983 had not been long enough prior to the commencement of this suit to extinguish the right.

[13] How is the court to view the conflicting, self-serving oral evidence produced in this case? The Plaintiffs claim that their track from the main road is not a real access at all, but a mere drain suitable only for walking in single file. Mr Alexander's photographs, however, show it to be a path at least 6 feet wide. The Plaintiffs claim to have stopped the public from using the track over their land once a year, but produced no evidence to support that claim. Those of the Defendants residing on Morgan Kydd's land deny that their real access to the main road is the more direct and obvious 6-ft pathway available to them to the west and away from the Barbour land. The Defendants who reside on Morgan Kydd's land claim, incredibly, that the clearly inconvenient passage from their land eastwards over the land of the Plaintiffs, which takes the Defendants nowhere else than to a few houses to the east of their property, is their main access to the main road. The evidence is, rather, that any passage the Defendants who reside on Morgan Kydd's land made over the land of the Plaintiffs in question was intermittent, occasional, for the purpose of visiting friends, and was enjoyed with the permission in the early days of the 1920s and onward of the Barbours, and subsequent to the year 1983 only by force. The proper and clearly more convenient access to and from the main road for the Defendants who reside on Morgan Kydd's land is the direct footpath to the west. They raise their claim to this right of way in response to the claim of the Plaintiffs for damage done to the fences and gate of the Plaintiffs by the Defendants which damage is admitted by the Defendants.

[14] Given all that has been said, the rights of the Defendants, if any, are shrouded from the court by the passage of time and the absence of any proper documentation or other independent credible evidence. I am not satisfied as to the existence and area of any dominant tenement. There is no proof of the extent of the lands alleged to be the dominant tenement. I am not satisfied as to the existence of any right in the Defendants or any of them to use the land of the

Plaintiffs as an access to their property. The counterclaim is dismissed. The claim of the Plaintiffs is, in the circumstances, established. They are entitled to:

(1) a declaration that the Defendants have no claim of right to use the footpath which forms part of the plot of land the Plaintiffs own at Derrick Hill, Paget Farm, Bequia, in Saint Vincent and the Grenadines;

(2) an injunction restraining the Defendants whether by themselves their servants and/or agents or howsoever otherwise from entering upon any part or portion of the Plaintiff's land;

(3) general damages of $5000.00;

(4) costs to be taxed if not agreed.

I D MITCHELL, QC
High Court Judge