JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 78/84

BEFORE: The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Downer, J.A. (Ag.)

BETWEEN	EVERAD CROOKS VINCENT THOMPSON	DEFENDANTS/APPELLANTS
AND	CHARLES BROWNE JOYCE BROWNE	PLAINTIFFS/RESPONDENTS

H.G. Edwards, Q.C., for defendants/appellants

Dr. Lloyd Barnett and Richard Ashenheim for plaintiffs/respondents

October 1-2 & November 27, 1986

WHITE, J.A.:

This was an appeal from the judgment of the late Alexander, J., in which he declared by an order dated 14th November, 1984 that, with respect to the land in question, the elements of an easement of necessity were in existence. This was consequent on his findings that firstly "the evidence clearly shows that the one acre portion of land was not part of the original agreement and subsequently became the subject matter of subsequent negotiations which never materialised. Plaintiff therefore has an equitable right to a re-transfer and therefore, a repossession of that portion of the property", and further that, "that portion clearly is land-locked and therefore for purposes of ingress and egress must be the beneficiary of an easement."

That judgment was occasioned on the hearing of an originating summons brought by Charles Browne and Joyce Browne, now the respondents, against Everad Crooks, the first defendant, and Vincent Thompson, the second defendant, the present appellants. By that originating summons the plaintiffs sought the determination of the Court on the following questions:

> "1. Whether the Plaintiffs are entitled to a right of way over the parcel of land sold by the Plaintiffs to the first defendant by a written agreement for sale executed by the Plaintiffs and the First Defendant in the year 1977.
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> 2. If it is found that no right of way was expressly or impliedly reserved or intended to be reserved over the parcel of land sold by the Plaintiffs to the First Defendant; whether the Plaintiffs are entitled to a right of way of necessity over the said parcel of land by the Plaintiffs to the First defendant.
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> 3. If such right of way exists, does the burden thereof pass to the Second Defendant as a successor in title of the First Defendant?
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> 4. If a right of way exists, has the same been defined? and if not, are the Plaintiffs now entitled to select or define the actual portion of the servient tenement over which the right of way is to be exercised?
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> 5. What is the nature and extent of the right of way to be used by the Plaintiffs?"

In support of the originating summons, Charles Adolphus Browne, filed an affidavit setting out the history of the land in question. Therein he deponed that this land was originally owned by the plaintiffs' predecessor in title, Lady Pamela Bird, who in the year 1956, surveyed the land part of Reading Pen in the parish of St. James containing by survey a total of five acres, two roods, thirty-three perches and ninety-seven hundreths of a perch, and being land comprised in the Certificate of Title, registered at Volume 381

Folio 89 of the Register Book of Titles. When Lady Pamela Bird surveyed the land it was her intention to sub-divide it into two lots. The sub-division plan was prepared by Mr. T.R.B. Vermont, a Commissioned Land Surveyor. The plaintiff exhibited to his affidavit a photo-copy of a sub-division plan dated the 6th of August, 1956, bearing Survey Department Examination Number 29811. This plan shows the parcel of land containing by measurement one acre and .75 of a Perch which his predecessor in title, the said Lady Pamela Bird, intended to cut off from the lands above-mentioned as being registered by Certificate of Title Volume 381 Folio 89 of the Register Book of Titles.

Attached also to the affidavit was a photo-copy of a certified copy of a resolution passed by the St. James Parish Council on or about the 28th day of August, 1958, in which the St. James Parish Council gave its approval for the proposed sub-division aforesaid. Lady Pamela Bird apparently did not complete the sub-division before selling the entire land to the respondents on or about the 26th day of May, 1959. Nor did they pursue the sub-division of the said lands. However, in about the month of July 1977, the respondents entered into a contract with the first appellant for the sale to him for the sum of $30,000.00, "of all that parcel of land described as part of Reading Pen in the parish of St. James, shown as '2' in red crayon on the sub-division plan prepared by Mr. T.R.B Vermont being part of the land registered at Volume 381 Folio 89 of the Register Book of Title together with the dwelling house and appurtenances thereto." This contract in writing was undated but was signed by the respondents as well as the first appellant.

The affidavit of the first respondent asserted that the

contract for sale expressly excluded from the land sold to the first appellant, the area of land containing by survey one acre and .75 of a Perch of the land earlier referred to as Volume 381 Folio 89 of the Register Book of Titles, and corresponds with the land surveyed and referred to in the Plan of the Survey Department Examination Number 29811 mentioned above. In the year 1978 the respondents executed a transfer to the first appellant of the entire parcel of land comprised in the Certificate of Title registered at Volume 381 Folio 89 of the Register Book of Titles, and thereupon the first appellant became the registered proprietor of all the lands comprised therein, including the parcel of land containing by survey one acre and .75 of a Perch.

The respondent also asserted that from the contract of sale it was an express term of the contract between the respondents and the first appellant that the cost of surveying the parcel of land to be excluded from the sale, together with the cost of obtaining sub-division approval ("if survey necessary") were to be borne by the respondents and the first appellant in equal shares. There was the further condition that for the respondents agreeing to execute and register an instrument of transfer covering the entire parcel of land to the first appellant in 1978, the first appellant would - (i) make available to them on demand the duplicate Certificate of Title registered at Volume 381 Folio 89, and (ii) execute a re-transfer to them of the land excluded from the contract for sale in order to enable the respondents to obtain a separate registered title for the parcel of land retained by them.

At this stage, it must be pointed out that from the sub-division plan it appears that the parcel of land in

question which was excluded from the contract for sale to the first appellant is completely land-locked, being bounded on the north byllands owned by Dennis Cooke, on the north-west, by lands owned by Nina Brown, on the south, and south-west, by lands owned by the Estate Austin Crichton, deceased, and on the east by the parcel of land sold to the first defendant in 1977. And it was the contention of the respondents that on the said sub-division plan, which was referred to in the contract of sale, there is clearly marked a reserved road over the parcel of land sold to the first appellant. This reserved road is 24 feet wide, and extends along the entire northern boundary of the land sold to the first appellant in 1977, extending from the point where the land joins the main road from Montego Bay to Anchovy, to the boundary between the land sold to the first appellant and the land retained by the respondents.

In view of the issues which were raised, it is important to note that on or about the 18th day of August, 1980, Messrs Edsel Keith, DeLisser & Lindo, attorneys-at-law for the respondents, received a letter from Mrs. E.H. Williams, attorney-at-law acting for the appellants, by which she advised that the appellant, Vincent Thompson, had agreed to purchase the said parcel of land in the parish of St. James from the other appellant, Crooks. Interestingly enough, Thompson, through Mrs. Williams, repeatedly offered to the respondents to purchase from them the parcel of land retained by them. In the event, Crooks had refused to execute a re-transfer to the respondents of the land described above, which the respondents contended were excluded from the sale to the first appellant. The second appellant, in effect, as it appears from his affidavit, is also opposing the re-transfer.

It was because the appellants unreasonably refused to re-transfer to the respondents the said land, and/or unreasonably refusing, by the respondents so they say, to recognise the existence of a right of way from the said land over the land sold to the first appellant in 1977, that the respondents applied to the Court in the terms of the originating summons.

Looking now at the affidavits by the first and second appellants the first appellant admits that there were negotiations for the purchase of this parcel of land at Reading Pen in the parish of St. James, which resulted in the undated agreement for sale mentioned and exhibited by the first respondent, and the payment of an agreed deposit; he admits being let into possession of what he described as the said four acres more or less. He put forward this claim "that in or about the month of June 1978 on conclusion of the said sale an oral agreement was reached giving me the option to purchase the remaining one acre more or less for $8,000.00." It is not straying too far from the facts to suggest at this stage, that there was some agreement between the parties that at a certain point of their discussions 'the one acre more or less'," to use the words of the first appellant, "was excluded from the final arrangements about the land." When one looks at the two affidavits together up to this point, it becomes quite clear that although the entire parcel of land was transferred to the first defendant by transfer No. 362608 dated the 20th of June, 1978, this was subject to what he says was an oral option to purchase the small parcel of land. It is quite clear that on both accounts the portion of land was excepted from the contract. The first appellant said that there was never any discussion, at the time of agreeing or at any time, of the reservation of a right of way to the said one

acre more or less of land, and there were no marks on earth or anything to indicate that the right of way had ever been separately enjoyed by this parcel of land over the remainder of the land. The second appellant swore in his affidavit that he had visited the lands on several occasions and noted that there were no marks on earth showing that there was any right of way across the four acre piece of land to lead into the one acre parcel of land. Furthermore, at no time was he informed by the first appellant or by anyone that there was a right of passage over the four acre parcel to or from the one acre parcel.

As far as the first appellant was concerned, in his recollection of the matter, he decided in 1980 to exercise the option to purchase the remaining parcel of land referred to earlier. Through his attorney-at-law he made a firm offer to the respondents' attorney-at-law. He proposed to sell to the second Defendant the following:

1. the afore-mentioned parcel of land comprising four acres more or less;

2. the afore-mentioned parcel of land comprising one acre more or less referred to at paragraph 10 above for the said $8,000.00.

His offer to purchase the smaller lot of land was not accepted and he declared that he has remained ready, willing and able to purchase the said parcel of land the subject of the option. Mr. Thompson, the second appellant, supports the fact that there were negotiations between himself and the first appellant who had told him that -"1. he had purchased 4 acres of land more or less from the Plaintiffs at Reading Pen; 2. he had an option to purchase from the Plaintiffs the remaining 1 acre more or less for the price of $8,000.00; 3. he would exercise his said option to purchase."

In common with the first appellant, the second appellant stated in his affidavit that he would not have bought the land had he known of the existence of this road way, a right of passage over the four acre parcel to the one acre parcel; and in fact, the existence of that right of passage was detrimental to his enjoyment of the larger piece of land and would depreciate the value of the land which he had bought from the first defendant. Their plea was that the respondents should be made to honour their obligations by acceding to the exercise of the option by the first appellant.

There is evidence provided by letters between the attorneys-at-law for the respective parties that efforts were made to find the original agreement for sale but to no avail. It should be pointed out, however, that Mr. Browne did exhibit his copy of the contract of sale in which it is stated as follows:

> "PROPERTY SOLD: ALL THAT parcel of land part of Reading Pen in the parish of St. James shown as '2' in red crayon on sub-division plan prepared by T.R.B. Vermont, Esq., Commissioned Land Surveyor, a photo-copy of which said plan is hereunto annexed (but EXCLUDING the area of land shown as '1' in red crayon on the said plan which contains by survey 1 ACRE AND .75 OF A PERCH) being part of the land contained in the certificate of title at Volume 381 Folio 89 of the Register Book of Titles TOGETHER WITH the dwelling house and appurtenances thereto erected on the said area of land shown as '2' aforesaid."

On appeal, the following grounds were posited:

> "The learned trial judge erred in granting to the Plaintiffs an easement in equity, namely, a right of way to the would-be dominant tenement because -
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> 1. The Plaintiffs had no right of entry thereto, either in law or equity, and
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> 2. If (sic) violated the rights of the Second Defendant, a bona fide purchaser for value without notice, whose equity should have been preferred to the Plaintiff Vendors."

Mr. Horace Edwards, Q.C., who appeared for the appellants argued strongly that the entire land which was conveyed to the defendants, and for which a certificate of title was issued, was legally a transfer of the land including that which was excluded. He said that preferential and prior rights in respect of the whole land were defeated in favour of the registered proprietor, namely, Everad Crooks, and the title is one free from all incumbrances. This first appellant thus became in law the strict legal owner of the land. He asked this Court to consider as applicable the terms of Section 70 of the Registration of Titles Act:

> "70. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the operation of this Act shall, except in case of fraud, hold the same as the same may be described or identified in the certificate of title, subject to any qualification that may be specified in the certificate, and to such incumbrances as may be notified on the folium of the Register Book constituted by his certificate of title, but absolutely free from all other incumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the certificate of title or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser.
>
> Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to the reservations, exceptions, conditions and powers (if any), contained in the patent thereof, and to any rights acquired over such land since the same was brought under the operation of this Act under any statute of limitations, and to any public rights of way, and to any easement acquired by enjoyment or user, or subsisting over or upon or affecting such land, and to any unpaid rates and assessments, quit rents or

> "taxes, that have accrued due since the land was brought under the operation of this Act, and also to the interests of any tenant of the land for a term not exceeding three years, notwithstanding the same respectively may not be specially notified as incumbrances in such certificate or instrument."

He also referred to Section 68 of the Registration of Titles Act:

> "68. No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issue under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or as such power."

Although he conceded that there is no doubt that Mr. Crooks purchased only a portion of the land, he insisted that as all the land was conveyed, his title being registered under the Registration of Titles Act is indefeasible. Furthermore, an easement could not attach because, there must be relevant lands, and Mr. Browne did not have any land which could be regarded as the dominant land.

This is certainly a case in which this Court should consider all material facts at the time of the execution of the agreement for sale, and the transfer of the land. See Johnstone v. Holdway [1963] 1 Q.B. 601 per Upjohn, L.J., page 612. It is clear that at those material times both parties knew of the existence of the diagram of the subdivision plan prepared by T.R.B. Vermont. Indeed, in her

letter dated 16th April, 1982 to Messrs. Millholland, Ashenheim & Stone, attorneys-at-law for the respondents, Mrs. E.H. Williams informed them that "the diagram and the Contract for Sale are attached to the Title" which latter she asserted was with Messrs. Livingstone, Alexander & Levy, with whose clients, Island Life Insurance Company Limited, Mr. Crooks had a mortgage. In passing, it should be noted that in that letter she agreed that 'the contract refers to a sub-division plan', but she denies that any roadway was reserved by that plan, 'and no easement included in the agreement with Mr. Crooks." In the penultimate paragraph she mentioned that "the already signed sales agreement only permits Mr. Crooks to pass on the five acre less the one acre plus to be transferred to Mr. Browne." Following on the insistence of the attorneys for the respondents, by letter dated the 9th November, 1982, she forwarded a copy of "Mr. Crooks' contract showing facts of the agreement between Mr. Crooks and Mr. Browne. Its contents are self-explanatory and you will see that no where in that contract there is a reserved road over Mr. Crooks' property." Nevertheless, in the same letter she identifies "the bit of land which Mr. Crooks said he had an option to purchase at a later date reserved by Mr. Browne." At the same time as she conveys the thinking of the first appellant that he had an option to purchase this reserved bit of land, she states "He believed the one acre had some other outlet and it was after he was in possession for sometime it dawned on him that the land had no other outlet." This realization must have had some relevance to the subsequent offers by both appellants to purchase the reserved lot of land from the respondents. Noteworthy is the fact that the agreement was signed in 1977

but the alleged oral agreement giving the option to purchase the remaining one acre more or less for $8,000.00 was given in about June 1978 on completion of the said sale. Significantly, by a letter dated the 26th September, 1980 Messrs. Edsel Keith, DeLisser and Lindo, the then attorneys-at-law for the respondents, informed Mrs. Williams "... we hereby confirm with our client, Mr. Browne, is prepared to sell his acre of land at Friendship to your client for $8,000.00. This is the price which was fixed in 1977 by Mr. Crooks, when he purchased from Mr. Browne, and this price appears in the Contract between Mr. Browne and Mr. Crooks."

All this, therefore, clearly accords with the ownership of this smaller land-locked parcel of land in the respondents, and it is to be regarded as being held on trust by the first appellant in favour of the respondents whose rights have to be protected on a sale to the second appellant. The desire for the re-transfer of the land to the respondents has been refused by the appellants. This being the position, we do not agree with Mr. Edwards that the only right the respondents have is to claim by legal action for breach of contract for failure to sell the land to them. The fact that the certificate of title does not have the right of way delineated thereon, does not at all preclude the claim of the respondents that, in the first place, the first appellant held the land-locked parcel in virtue of an implied grant, as well as by virtue of implication of a right of way for ingress and egress into and from the excepted portion. We are not satisfied that the sections of the Registration of Titles Act to which we were adverted has the complete and precluding effect argued for by Mr. Edwards.

We were adverted to a passage in a standard text book "The Law of Property", by Megarry and Wade (4th Ed.) at page 831, where the learned authors discuss the implied reservation of Easements of Necessity. The text reads:

> "(1) Necessity: If a grantor grants a plot of land in such circumstances as to cut himself off completely from some other part of his own land (e.g. if a plot retained in the middle is completely surrounded by the part granted), there is implied in favour of the part retained a way of necessity over the part granted, for otherwise there would be no means of access to the land retained. Whether the former owner of both plots of land retains or parts with the land-locked close, he may select the particular way to be enjoyed, provided it's a convenient way, and once selected, the route cannot subsequently be changed. A way of necessity will be implied even if some of the surrounding land belongs to third parties; but it is essential that the necessity should exist at the time of the grant and not merely arise subsequently."

These desiderata have, in our view, been attained in this case, as is cogently indicated by the history of the matter. We do not accept that there was any option to purchase given to the first appellant. From the beginning it is undeniable that he knew of the existence of the land-locked land, and by force of the facts, there was this way of necessity delineated on the Diagram of Survey which was annexed to the undated contract which was signed both by Mr. Crooks and by Mr. Browne. This being so, the sale of the larger portion of four acres more or less to the second appellant must be subject to those facts.

The proviso to s. 70 is an important factor in the conclusion, in that, although the preferential and prior rights are normally defeated in favour of the Registered proprietor, there are incumbrances to which the Certificate of Title is subject, viz., the reservations, exceptions, conditions and powers, as stated in the proviso to s. 70 of the Registration of Titles Act which was quoted above.

And, recalling the principles laid down in Wheeldon v. Burrowes [1874-1880] 1 All E.R. Rep. 669, it has to be recorded that a right of way of necessity is an exception to the second principle enunciated by Thesiger, L.J., on page 672G, even though the grantor of land must expressly reserve in his favour any easement over land which he has granted to another.

As to his second point regarding the non-registration of the right of way, we think that the omission to record the easement, the right of way, on the Certificate of Title held by the appellants is no bar to the claim of the respondents: see James v. Stevenson [1893] A.C. 162, at pages 168-169.

The omission to indicate the land-locked parcel of land and the proposed right of way on the Certificate of Title is not conclusive against a way of necessity arising. This view is supported by the judgments in Dabbs v. Seaman [1925] 36 C.L.R. 538, in which there was a transfer of land upon which the Certificate of Title was issued. The land was described as abutting on a lane, which lane was on the transferor's land. The question was whether the appellant, Emily Dabbs, had a right of way over this land and along that lane. In greater detail the facts are set out in the headnote as follows:

> "On a subdivision by J. of her land, which was under the Real Property Act 1900 (N.S.W.), the respondent purchased a block which was bounded on the south by a public road. The respondent subdivided the southern portion of his block into two one-acre lots, each fronting the road, and showed a 20 ft. strip along the east side of the eastern lot which he meant to afford access from the road to the rest of his land. The respondent sold the eastern lot to X, and by the respondent's direction J. transferred it to X. In the transfer and in the certificate of title issued to X the lot was described by reference

> "to a plan thereon, which showed the 20 ft. strip with the words '20 ft. lane' upon it. Neither in the transfer nor in the certificate was there any mention of an easement. X having died, his representative sold and transferred to the appellant the lot which was described in the transfer by reference to X's certificate without any mention of an easement. The transfer was endorsed on X's certificate.
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> Held, by Isaacs and Starke JJ. (Higgins J. dissenting), that the appellant was entitled to have the 20 ft. strip for her use as a lane, with a right of way over it."

Introductory to his judgment, Isaacs J., stated the following proposition at pages 541-2:

> 'Where A, a registered proprietor of land under the Real Property Act, transfers to B a part of his land described by a plan indicating that the transferred land is bounded on one side by a 20 ft. lane situated on the other part of the transferor's land and the transfer is duly registered, then, in the absence of either a provision to the contrary on B's certificate of title or some subsequent personal legal or equitable relation to the contrary between B and the owner of the adjoining land, B, as long as he remains registered proprietor of the land so transferred and described, is entitled (1) to have the land marked 'twenty feet lane' preserved as such, and (2) to a right of way over the lane."

It is true that the Court in that case was reasserting the indefeasibility and safety of titles under the Real Property Act governing the issue of certificates of title upon transfers of land in New South Wales, and therefore the Court was concerned to ensure that as between adjoining land owners each having acquired parcels of land which had been in common ownership, the fact of the Certificate of Title, was important in determining whether the right of way which had undoubtedly existed for some years, was a mere private right of way in the respondents, or was such a right of way as must necessarily enure for the benefit of the appellant's land. Isaacs, J., was careful to point out two essential

points of the case, namely, "(1) that the appellant's certificate which is earlier in point of date, shows her land is bounded on the east by the 20 ft. lane; and (2) that it was the respondent who in subdividing his own land transferred to the appellant her land as it appears on the certificate." (page 542)

Although the principle of the indefeasibility of title is recognised, Isaacs, J., opined that it is subject only to such qualifications as the Act itself declares.

Noticeably, His Honour was further of the opinion, according to the circumstances of the case, that "The construction being established that, as an essential part of the transaction and the certificate the land is described as fronting a 20 ft. lane on land belonging to Jenkins or Seaman and now to Seaman, it is not permissible to Seaman to contradict or impugn the conventional state of facts." And in view of the official approval of the local authority of the plan of subdivision, His Honour observed at page 554:

> 'It necessarily appears, therefore, (1) that a 'lane' was intended by Seaman to be opened upon his land lot 1; (2) that it was to be used as a means of access to two or more parcels of land, for otherwise, as appears by sec. 99, sub-sec. 1, consent of the Council was unnecessary; and (3) that consequently it could not have been intended merely for his one retained portion of the north which itself was not subdivided."

The impact of this case, not only from the judgment quoted but also upon a careful perusal of the other two judgments, is that the Court should not and will not accord indefeasibility when to apply that principle would be to defeat the intention of any obligations entered into, by the parties. "This is entirely consonant with the existence of special personal obligations" which means, by reference to the case of Barry v. Heider [1914] 19 C.L.R. 97 at pages 213-214,

"not in any way destroying the fundamental doctrines by which Courts of Equity have enforced as against registered proprietors, conscientious obligations, entered into by them."

In the light of the contract of sale with the attached plan, one can apply the phrase of Isaacs, J., and say that the "inherent characteristic of the land in question" is not only that it is still in the ownership of the respondent, but it is land-locked; as such the respondent could neither use nor occupy the reserved close nor derive any benefit from it without the implication of a way of necessity. That the land-locked parcel of land still belonged to the respondent, there can be no doubt. If not, why then should the first appellant be so anxious to assert an option to buy, albeit it was not evidenced in writing, or that the second appellant was himself willing to offer the sum of "Nine Thousand, Five Hundred Dollars ($9,500.00) for the purchase of the land belonging to Mr. Charles Browne, which is still not severed from Mr. Crooks' title", quoting from the letter by Mrs. E.H. Williams, dated 19th March, 1981 to Edsel Keith, McPherson & Company.

Inescapably, this Court is supported in its conclusions on this appeal by the decision of the English Court of Appeal in Johnstone v. Holdway [1963] 1 Q.B. 601 which is summarised in the headnote at page 602:

> "Held, (1) that on the grant of a legal easement by deed the dominant tenement need not be specified in the deed and that, if not so specified, extrinsic evidence was admissible to identify it; in the present case it was clear from the known facts at the date of the conveyance that the quarry was intended to be the dominant tenement."

Importantly, Megarry J., in St. Edmundsbury v. Clarke (No. 2) [1973] 1 W.L.R. at page 159 commented that

Johnstone v. Holdway in effect, laid down that a reservation of an easement by an equitable owner could and did give him a legal easement and that the reservation operated by way of a regrant. Although there was no express reservation of a right of way in this case, we accept that the ratio of Johnstone v. Holdway can be applied to the facts of this case.

Accordingly, we hold that there is implied in favour of the respondents a right of way in favour of the one acre parcel and .75 Perch of land reserved by the undated contract of sale between the parties, otherwise there would be no means of access to the land retained. The right of way was defined as long ago as in 1956, and did not arise subsequently thereto.

In the circumstances, we dismissed the appeal and confirmed the order of the Court below with costs to the respondents.