Hon. Mr Justice Peterkin

IN THE COURT OF APPEAL

ST. VINCENT

CIVIL APPEAL NO.6 of 1973

BETWEEN: CYRIL McSMITH MITCHELL Appellant/Defendant

and

GUSTAV HERMAN KOVAN Respondent/Plaintiff

Before: The Honourable the Acting Chief Justice
The Honourable Mr. Justice E.L. St. Bernard
The Honourable Mr. Justice N. Peterkin

E.F. Adams for appellant
E.A.C. Hughes for respondent.

September 18 19, 20, &
December , 1974

J U D G M E N T

LEWIS C.J.(Ag.)

Two questions arise in this appeal. They are (1) what is the correct line of demarcation between the land of the appellant and that of the respondent? (2) has the appellant established that he had a right of way over the respondent's land by means of the Camel Road?

The following background facts to this appeal are taken from the judgment of the trial judge: the appellant's father, James F. Mitchell deceased, was the owner of 223 acres of land more or less known as the Hope Estate in the Island of Bequia. He disposed of this estate as follows: He made a deed of gift of 23 acres 2 roods 30 poles to his daughters Ethel Ollivierre and Seline Gooding in 1952; he conveyed 66 acres 2 roods 26 poles to his son the appellant by deed of conveyance no.21 of 1943 (exhibit C.2); he further conveyed 130 acres more or less in trust for Adeline Edwards, Ethel Ollivierre and Seline Gooding, his daughters by deed of conveyance no.154 of 1952 and finally he sold 5 acres 2 roods 7 poles to Ralph Leslie. By deed of conveyance no.1061 of 1965 (exhibit E.O.4) the owners of the 130 acres conveyed the same to the respondent for the sum of thirty thousand dollars.

The respondent's land is situate to the north of the appellant's land. Both portions of land are contiguous in that the southern boundary of

the respondent's land abuts the northern boundary of the appellant's land. The line of demarcation which is in dispute runs east-west along the common boundary. The respondent had erected a fence along the boundary which he claimed was his own land and during the month of August 1968 the appellant by himself his servants and agents broke down and destroyed the fence and removed notices which the respondent had erected. He also cut a chain which had been placed across the Camel Road to bar access thereto and removed the said chain from its location. The appellant admits these acts and says in so far as the wire fence and the notices were concerned that they had been erected on his property, and he was entitled to remove them in exercise of his rights as owner of the land in question. In so far as the removal of the chain from the Camel Road was concerned, the appellant pleaded that he had a right of way over the said road. The trial judge found against him on both issues. He granted a declaration to the respondent that the land on which the wire fence was erected was his property, made an order restraining the appellant from entering the respondent's land along the Camel Road and further ordered the appellant to pay the respondent $3,000 damages and costs. He also dismissed the appellant's counterclaim.

When the appellant purchased his land in 1943 from his father, he had it surveyed by one Charles F. Richardson whose plan of survey is attached to the deed of conveyance (exhibit C.2) filed in the Registry of Deeds of this State. This plan, marked GRI/4, and dated 12th January 1943, will be referred to as "the Richardson plan" and was admitted at the trial as exhibit C.W.i. The trial judge said in reference to this plan at page 30 of the record as follows:-

> "Counsel for the plaintiff at one stage put to Surveyor Campbell four photostat copies of Richardson's plan GRl/4, including the exhibit before the Court and each one differed in one respect or another from that attached to the defendant's deed filed in the Registry.
>
> It is unnecessary to detail the several differences in copies of the plan and I will confine myself to the monument or beach marker which is to be found at the north-eastern corner of the defendant's

plan lodged in the Registry but which does not appear on the other copies of that plan or on other plans for the production of which it was used."

The trial judge apparently used the version of the Richardson plan filed in the Registry of Deeds with the consent of the parties to determine the issue relating to the disputed boundary line as this was obviously the most authentic copy of the survey plan in question. There are three other plans dealing with the boundary line. These are:(1) plan GR116 drawn by Clifford Williams, Chief Government Land Surveyor, which is marked exhibit C.W.2 and approved and lodged at the Surveys Office on December 5th, 1967. This plan will be referred to as "the Williams plan."; (2) A plan of the respondent's land drawn up by Stinson Campbell (GR118) approved and lodged on April 22nd, 1968, and admitted at the trial as exhibit C.W.3.; (3) A plan of the appellant's land drawn up by the said Stinson Campbell (GR164) which was approved and lodged at the Surveys Office on January 18th, 1972 and admitted in evidence at the trial as exhibit C.W.4. This plan shows the alleged line of dispute in an inset thereon and records that the area is 3 roods 34 poles in extent.

It is common ground that there is no dispute as to the south-eastern, south-western or north-western boundaries of the appellant's land as shown in the Richardson plan exhibit C.W.1. The only dispute is in relation to the location of the north-eastern boundary mark.

The version of the Richardson plan attached to the appellant's deed of conveyance filed in the Registry of Deeds differs from the other versions produced at the trial in that it shows a monument or beach marker at the north-eastern corner which does not appear on the other versions of this plan. The surveyor Clifford Williams conducted a survey for the respondent in 1967 in order to try and clear up the boundary dispute. His plan of this survey exhibit C.W.2, shows at the south-eastern corner of the respondent's land which is of course the north-eastern corner of the appellant's land a point marked "A" and the words 'Mark on beach". In the legend to this plan there is also a surveyor's sign which indicates that this mark or monument was <u>found</u> (in contradistinction to <u>put</u>) during the survey. In his evidence the surveyor

Williams said concerning this mark as follows:-

> "The mark on the beach was pointed out to me by one Ralph Leslie. I examined it. It was concreted and about two feet square and certainly more than three feet into the ground.
>
> This is the mark appearing on plans GR116 and GR118 as the boundary mark between the parties.
>
> This mark also appears on plan GR164."

Later on in his evidence at page 51 of the record he said:-

> "The mark "A" was the mark shown to me by Mr. Leslie and the plaintiff and this was the said mark which Campbell found and built up and which was used to run the line. Campbell accepted it in plan GR118."

Ralph Leslie also said in relation to this mark on page 70 of the record as follows:-

> "Defendant put me in charge of his part of the property and showed me his boundary mark on the beach told me it was the boundary between him and his father. He showed me no other marks."

Then also on page 71 of the record, he said:-

> "I spoke to Ethel Ollivierre and her husband and I went to look for a pillar on the beach the same one defendant showed me when he bought the land. The pillar had got covered by "Janet" the hurricane. We got a bit of wire searched for it until it butt up and sent to call Campbell. After that the same day I saw where the mark was cleared. It is about 4 ft. 4" under the sand. Next day I was present when Campbell and men put up another monument over the old one. Defendant was not there when monument was found."

The appellant and his surveyor Stinson Campbell both denied the existence of a marker at point "A" on exhibit C.W.2 but the trial judge did

not accept their denials. When Campbell conducted the survey of the respondent's land in December 1967, his plan C.W.3 showed his boundary line between the parties' lands as corresponding to that shown on Williams' plan C.W.2; but when in September and October 1971 he surveyed for the appellant his plan of survey exhibit C.W.4 showed a different boundary line. This came about because he carried the point shown as "W" in the inset on exhibit C.W.4 (which point is the north-western boundary mark of the appellant's land) further north for a distance of 25 feet 7 inches although there was never any dispute about this point. In other words he had reconstructed the boundary line at this point. He sought to explain the discrepancy between his two survey plans, exhibits C.W.3 and C.W.4, by saying that when he signed his plan GR118 (exhibit C.W.3) he knew that the southern boundary was incorrect. In these circumstances it is not surprising that the trial judge did not accept his evidence.

The trial judge found certain facts in relation to the beach marker which was the point in dispute in this case and the existence of which the appellant and his witness Stinson Campbell both denied.

His findings appear on pages 30 and 31 of the record as follows:-

"(i) that the marker existed prior to the year 1955 when it was completely covered over to the extent of 4 feet or more following the visitation of Hurricane "Janet".

(ii) that the marker was, after some effort on the part of Ralph Leslie found by him.

(iii) that the marker is that which Leslie alleges the defendant showed him as forming the boundary of his land when he, Leslie, previously worked with the defendant.

(iv) that the marker was subsequently enclosed in concrete at the directions of Surveyor Campbell.

(v) that the defendant confirmed to the plaintiff the marker was in practically the same spot as that which Ethel

Ollivierre had pointed out to the plaintiff.

(vi) that the plan GR1/4 was used by Surveyor Campbell in order to determine the boundary between the parties.

(vii) that the most north-easterly point on the Richardson plan, GR1/4 as filed in the Registry represents the marker.

(viii) that the boundary line appearing in Williams' plan GR.116 is accordingly accurate and consequently the plaintiff's fence fell within a foot of his boundary with the defendant."

There was an abundance of evidence on which the trial judge could come to these conclusions. The issue as to the existence and location of the disputed beach marker was a question of fact to be determined by him depending on what view he took of the credibility of the witnesses giving evidence. In my judgment the trial judge was entitled to come to these conclusions on the evidence before him and I would not disturb his findings.

The second question which falls to be considered is the appellant's claim to have a right of way over the respondent's land by means of the Camel Road. In 1943 when the appellant purchased part of the Hope Estate from his father, there was in existence a road known as the Camel Road which passed through the Hope Estate and led to the sea. On February 9th, 1943, when the appellant's father acknowledged his signature to the conveyance (exhibit C2) the appellant on that same date signed a document witnessed by Charles Dopwell who also witnessed exhibit C.2. The document is in the following terms:

"

Kingstown St. Vincent.
9th February 1943

I hereby certify that the roads to enter my lands on the Hope Estate, Bequia, is the Buck Road and nowhere else.

/s/ C.M. Mitchell

Witness - Chas. I. Dopwell."

The appellant when asked to explain why he signed this document, said

that he could not say why his father made him sign it but admitted that his father was trying to stop him from using any road but the Buck Road to enter his land. The explanation for this document might well be that the appellant's father anticipated that the appellant might in future put forward the very type of claim which he put forward at the trial and wanted it to be on record that the appellant's only entry to his land was by the road mentioned in the conveyance exhibit C.2 as being "shown and delineated" on the Richardson plan attached to the conveyance. A reference to the Richardson plan (exhibit C.W.1) shows a right of way marked thereon. This, both sides admit, is the right of way over the road described in exhibit E.O.1 as Buck Road. No other road is shown on this plan and in particular there is no reference to the Camel Road on the said plan. The appellant however contends that he is entitled to use the Camel Road:-

(i) by virtue of certain words contained in his deed of conveyance exhibit C.2;

(ii) by virtue of section 2 of the Prescription Act 1869, Cap.90;

(iii) by virtue of the provisions of section 4 of the Three Chains Ordinance, Cap.81.

The words referred to by counsel for the appellant in the conveyance (exhibit C.2) as supporting his claim are:

> "Together with all buildings fences hedges ditches ways waters watercourses liberties privileges easements and appurtenances whatsoever to the said piece or parcel of land belonging or in any wise appertaining or usually held or occupied therewith or reputed to belong or be appurtenant thereto."

It was submitted by counsel for the appellant that by virtue of these words the Camel Road became appurtenant to the land sold to the appellant by his father in 1943. I am unable to accept this submission. What these words in fact mean is if there were any rights or privileges actually enjoyed in connexion with the appellant's land or reputed to belong or be appurtenant thereto then these rights and privileges would pass with the land on a conveyance. But in my view the rights and privileges must be in existence when the conveyance took effect. Obviously no such right in the nature of a right of way existed over the Camel Road when the appellant's father sold a

portion of the Hope Estate to him as a man cannot have an easement over his own land. The matter is put this in Megarry & Wade's "The Law of Real Property", 3rd edition, page 806, where the learned authors say this in paragraph 3:-

> "An easement is essentially a right in alieno solo (in the soil of another). A man cannot have an easement over his own land. When the owner of Whiteacre and Blackacre passes over the former to Blackacre he is not exercising a right of way in respect of Blackacre; he is merely making use of his own land to get from one part of it to another. As this observation implies the same person must not only own both tenements but also occupy both of them before the existence of an easement is rendered impossible."

At the time when the appellant's father sold a portion of the Hope Estate to him, the Camel Road was being used by the father to get from one portion of the estate to another and consequently no easement could thereby be created which could become appurtenant to the portion of land sold to the appellant. Moreover, there was an express grant of a right of way to the appellant which permitted him to use Buck Road, and this in my opinion had the effect by necessary implication of excluding the grant of any other right of way. There clearly never was any intention on the part of the appellant's father to grant him any right of way other than in relation to the Buck Road and the document exhibit E.O.1 makes this abundantly clear. I hold therefore that the appellant's claim, based on his conveyance to a right of way over the Camel Road fails.

The claim under the Prescription Act was based on two grounds. The first was that the appellant had exercised a right over the Camel Road in excess of 20 years. This claim was abandoned by counsel for the appellant as he admitted that the appellant had sought and obtained permission to use this road in 1956 which permission was subsequently withdrawn. The second limb of this claim was based on custom and it was submitted that members of the public used the Camel Road as a public way for over 40 years. In support of this claim, reliance was placed on the evidence of the witnesses Vincent Glynn,

Miriam Simmons, and Dillon Quashie. A summary of Glynn's evidence in examination in chief is to the effect that he is 54 years of age, that he had used the Camel Road since he was 14 or 15 to travel to the beach and he always did so without asking for permission from the owner of the land. However, in cross-examination he said "in the time of old Mitchell (i.e. the appellant's father) I used the old cart road (another name for the Camel Road) to get to the beach. He never stopped me. He could have but he never did."

Having admitted that the appellant's father was entitled to stop him from using the road it follows that he and other members of the public were not entitled to use the road as of right and so could not establish a right of way over the same. Miriam Simmons 60 years of age and a daughter of the appellant's father says her father never stopped anyone from using the road. In cross-examination she said her father had animals and workers on the estate and other people who used the road went to her father on business. Finally she said she did not know if her father could have stopped them. Her evidence is not only confused but unhelpful. Dillon Quashie a retired stockman 61 years of age said he knew the Hope Estate and used to go there and help his mother to work her garden. He was then about 14 or 15 years of age. The garden was on old Mitchell's land. To get to the garden he would start on the Camel Road and go right down to the estate and also down to the beach. He said that no-one ever stopped him from using the land and he never asked old Mitchell's permission. In cross-examination he said that his mother worked on the share system for old James Mitchell. It is thus quite clear from the evidence of this witness that his mother was a sharecropper on the appellant's father's estate and he used the road when he went to the estate to help his mother cultivate the lands and it was in capacity as an assistant to his mother that he used the Camel Road.

The trial judge rejected the evidence of these witnesses as being unreliable and in my opinion he was justified in so doing. The evidence adduced in support of the claim to the use of Camel Road by custom is vague and unsatisfactory and falls far short of the standard required to establish a claim of this nature.

Finally, there is the claim under the Three Chains Ordinance. The

question was put to the appellant as to whether the Three Chains Ordinance applied to the island of Bequia due to the fact that the recitals to the Ordinance refer to the "island of Saint Vincent" and also stated that the strip or belt of land of three chains in breadth running inwards from the highwater mark had been reserved around the coast of the "said island". Counsel contended that the Ordinance did apply to Bequia and quoted the Interpretation Ordinance, Cap.72, in section 2 paragraph (q), of which the following occurs:-

> "St. Vincent", "this island", "this Colony" and "the Colony", shall mean St. Vincent and its dependencies, and all British waters adjacent thereto."

So it was contended that as Bequia was a dependency of St. Vincent it was included in the definition of "this island". However I am unable to accept this contention. The introductory words to section 2 of the Ordinance make it quite clear that the terms and expressions defined therein have the meanings ascribed to them "unless there be something repugnant in the subject or context." In my view there is something repugnant in the context in this case, because it is abundantly clear from the first recital to the Three Chains Ordinance that the territory specified therein was the island of St. Vincent simpliciter, and it would be absurd to say that land reserved around the coast of St. Vincent could include land reserved around the coast of Bequia. Apart however from this conclusion another reason why the claim under this Ordinance fails is because section 4 on which the appellant relies does no more than preserve all the rights of way through the said Three Chains which were in existence when the Ordinance was passed in 1887. It creates no new rights of way. In effect what the appellant is seeking to say is that, because the public may have had rights of way over the Three Chains, they were entitled to pass through the respondent's land in order to exercise these rights. Such a contention is untenable.

For the reasons given I am of the opinion that the trial judge was right in rejecting the appellant's claim to exercise a right of way over the Camel Road. I would therefore dismiss the appeal with costs and confirm the order of the Court below.

CECIL LEWIS Acting Chief Justice

ST. BERNARD J.A.

This appeal arises out of a dispute as to the correct northern boundary of the appellant's land and also in respect of a right of way over a road known as the Camel Road on the Hope Estate in Bequia.

James Mitchell Sr. owned the Hope Estate containing approximately 223 acres. In 1943 he conveyed 23 acres 2 roods 30 poles in trust for his infant daughters Ethel and Seline and further conveyed 66 acres, 2 roods 26 poles to the appellant, his son. In 1952 he conveyed 130 acres more or less to Eitel Bonfield in trust for his daughters Adeline Ethel and Seline and sold 5 acres, 2 roods 7 poles to Ralph Leslie. By deed of conveyance no.1061 of 1965 the daughters Adeline, Ethel and Seline transferred the 130 acres to the respondent. On the same date the conveyance to the appellant was executed he signed a document witnessed by one Charles Dopwell as follows:-

"I hereby certify that the road to enter my lands on the Hope Estate, Bequia is the Buck Road and no where else.

C.M. Mitchell.

Witness :- Chas. I. Dopwell."

In 1956 the appellant sought and obtained the permission of Adeline Edwards for the use of the Camel Road for his servants and himself. He then wrote to the other two sisters and enclosed a copy of the written permission.

The letters are as follows:-

"

Mrs. Adeline Edwards,
Belmont Bequia.

2nd January 1956

Mr. Cyril M. Mitchell,

Port Elizabeth, Bequia.

Dear Sir

I acknowledge the receipt of your letter of even date requesting my permission for you and your servants to walk or use the road leading from Camel to your lands at the Hope Works.

Your request is granted until further notice.

Yours truly

(signed) Adeline Edwards."

"

Mr. Cyril M. Mitchell

Port Elizabeth

Bequia.

2nd January 1956

Messrs. Ethel & Selene Mitchell

Belmont, Bequia.

Madames

Referring to your consistent acts of preventing my servants from using the road leading from Camel to my lands at Hope Works, I am enclosing herewith a copy of Mrs. Edwards' letter to me.

To avoid legal unpleasantness kindly advise your brother Nathaniel Adams to keep his ferocious dogs tied.

Yours truly

(signed)C.Mc.S. Mitchell."

In 1956 after the respondent entered into possession of the 130 acres, the appellant sought and received oral permission to use the Camel Road. This permission was withdrawn by letter dated the 15th day of October 1968 with effect from the 15th day of November 1968 at 6 o'clock in the forenoon (Exhibit C.3).

During the month of August 1968 the appellant by himself, his servants and/or agents, entered on the respondent's land and broke and destroyed a wire fence and removed notices therefrom. On the 18th November 1968 the appellant entered a part of the Camel Road and cut and removed a chain therefrom.

The trial judge found for the respondent on both issues and dismissed the appellant's counterclaim.

The issues for consideration before this Court are two namely -

(a) what is the northern boundary between the appellant's land and the respondent's?

(b) is the appellant entitled to the use of the Camel Road as of right?

In regard to the first issue there are four plans which purport to show the boundary line in dispute. They are: (a) Richardson's plan exhibit C.W.1 dated 12th January 1943, (b) Williams' plan exhibit C.W.2 dated 5th December 1967, (c) Campbell's plan of respondent's land exhibit C.W.3 dated 22nd April 1968, and (d) Campbell's plan of appellant's land exhibit C.W.4 dated 18th January 1972.

Counsel on both sides accepted the boundary line shown on Richardson's plan, exhibit C.W.1 as the correct one. Counsel for the appellant, however submitted that the trial judge was wrong in his finding in respect of Richardson's plan and that Campbell's plan, exhibit C.W.4, which showed a reconstruction of the northern boundary of Richardson's line was the correct plan to follow. He further contended that, because the length of the line on the eastern boundary of Richardson's plan measured 858 feet and the length of the same line as shown on Williams' plan measured 836 feet therefore Williams' plan was incorrect. Richardson's plan attached to the appellant's deed filed in the Registry differs from the other copies produced at the trial in that it shows a monument or beach marker at the north-eastern corner which does not appear on the other copies of the plan.

The evidence shows that on exhibit C.W.2 Williams' plan, the north-eastern boundary mark of the appellant's land is marked "monument found". Williams stated that he found the monument there when he surveyed for the appellant in 1967 and also another monument on the south-eastern boundary. A straight line drawn from these two points according to Williams' calculations is 836 feet and not 858 feet. Ralph Leslie stated that he was placed in charge of the appellant's land and was shown the beach marker by the appellant who told him it was the boundary mark between his father's land and his own. He also stated that he pointed out this north-eastern boundary mark to Campbell. Campbell's plan exhibit C.W.3 shows the exact boundary line as that of Williams' plan Exhibit C.W.2 but when Campbell surveyed for the appellant in 1971 he plotted a different boundary line and ignored the monument or beach marker. He altered the point shown as "W" at the western end which was never in dispute and plotted a point 25.7 feet to the north of it as the inset shows. At the trial he explained these discrepancies in his two plans exhibits C.W.3 and C.W.4 by stating that when he signed C.W.3 and lodged it he knew that

the southern boundary of the respondent's land was incorrect.

The trial judge made the following findings of fact -

(i) that the marker existed prior to the year 1955, when it was completely covered over to the extent of 4 feet or more following the visitation of Hurricane "Janet";

(ii) that the marker was, after some effort on the part of Ralph Leslie, found by him;

(iii) that the marker is that which Leslie alleges the defendant showed him as forming the boundary of his land when he Leslie, previously worked with the defendant;

(iv) that the marker was subsequently enclosed in concrete at the directions of Surveyor Campbell;

(v) that the defendant confirmed to the plaintiff the marker was in practically the same spot as that which Ethel Ollivierre had pointed out to the plaintiff;

(vi) that the plan GR1/4 was used by Surveyor Campbell in order to determine the boundary between the parties;

(vii) that the most north-easterly point on Richardson's plan, GR1/4 as filed in the Registry, represents the marker;

(viii) that the boundary line appearing in Williams' plan GR 116 is according accurate and consequently the plaintiff's fence fell within a foot of his boundary with the defendant.

On the above findings of fact which are proper and reasonable on the evidence, in my view, the appellant's contention must fail.

In the respect of the second issue, counsel for the appellant conceded that the appellant's claim to a right of user for twenty years failed as he had permission in 1956, but went on to submit that by the common law he had a right by custom as a member of the public to use the Camel Road.

The appellant relied upon the same witnesses who gave evidence to establish the prescriptive rights in order to establish the local customary rights of the people in that area to use the Camel Road. The trial judge rejected them as being unreliable. In my view in addition to this finding no local customary rights were proved in order to establish a claim such as the one in issue.

Counsel further contended that by the "habendum" in deed no.21 of 1943 the user of the Camel Road passed to the appellant on execution of that deed. He referred to the following passage:-

> "TOGETHER with all buildings fences hedges ditches ways watercourses liberties privileges easements and appurtenances whatsoever to the said piece or parcel of land belonging or in any way appertaining or usually held or occupied therewith or reputed to belong or to be appurtenant thereto..."

The answer to this submission is that on the execution of the deed James Mitchell Sr. was owner of the Hope Estate and the Camel Road was a road passing through the Hope Estate and used for the enjoyment of this estate. There were no dominant and servient tenements and as such there were no easements appurtenant to the land which could pass on transfer. Further, the vendor expressly conveyed to the appellant by the same deed the user of the Buck Road as the road to his land. This submission must also fail.

The last submission made by counsel on this issue was that by section 4 of the Three Chains Ordinance (Cap.81) of the Laws of St. Vincent, the public had a right of user of the Camel Road. Section 4 of this Ordinance reads as follows:-

> "The Public shall continue to have and enjoy all rights of way through the said Three Chains as now and heretofore used or enjoyed."

In my view all that this section does is to preserve the existing rights of way as they existed at the time of the passing of the Ordinance in 1887. It does not create a general right of way for the public to use as they desire. For the reasons stated herein, I would dismiss the appeal with costs.

E.L. ST. BERNARD, JUSTICE OF APPEAL

PETERKIN, J.A.(Ag.)

This is an appeal against the decision of the trial judge dismissing the appellant's counterclaim and entering judgment in favour of the plaintiff respondent in the following terms:-

(a) general damages in the sum of $3,000.00;

(b) a declaration that the appellant is not entitled to enter and/or cross the plaintiff/respondent's land along the Camel Road or at all;

(c) an injunction to restrain the appellant whether by himself or by his servants or agents or otherwise from entering or crossing the plaintiff/respondent's land.

The facts and circumstances are as already set out and referred to in the previous judgments read.

It is common ground that the two points at issue are (1) the disputed line between the respective lands, and (2) the Camel Road.

As regards the line in dispute, four plans all by land surveyors, were adduced in evidence at the trial one by Richardson in 1943 (exhibit C.W.1) one by Williams dated December 1967 (exhibit C.W.2) and two by Campbell dated April 1968 and January 1972 (exhibits C.W.3 and C.W.4 respectively). For the appellant it is conceded that Richardson's plan is correct and it is contended that Campbell's second plan (exhibit C.W.4) should prevail. Richardson's plan attached to the appellant's deed filed in the Registry differs from the other copies produced at the trial in that it shows a monument or beach marker at the north-eastern corner which does not appear on the other copies of that plan. Concerning this marker, Williams stated as follows at the trial:-

"The mark "A" is the mark shown to me by Mr. Leslie and the plaintiff, and this was the said mark which Campbell found and built up and which was used to run the line. Campbell accepted it in plan GR118."

In preparing his second plan GR164 (exhibit C.W.4), Campbell ignored it. He also altered the point shown as "W" at the western end which was never in dispute. He went 25.7 feet to the north of it as the inset shows. At the

trial he sought to explain away the discrepancies in his two plans C.W.3 and C.W.4 by stating that when he signed GR118 (exhibit C.W.3) and lodged it, he knew that the southern boundary was incorrect.

On a view of all the evidence before him the learned trial judge made a number of findings relevant to this aspect of the matter. He has listed them in his judgment. They are numbered (iii), (iv), (vii) and (viii) respectively, and are to be found at page 31 of the record. They are as follows:

(iii) that the marker is that which Leslie alleges the defendant showed him as forming the boundary of his land when he, Leslie, previously worked with the defendant;

(iv) that the marker was subsequently enclosed in concrete at the directions of Surveyor Campbell;

(vii) that the most north-easterly point on Richardson's plan, GR1/4, as filed in the Registry, represents the marker;

(viii) that the boundary line appearing in Williams' plan GR116 is accordingly accurate and consequently the plaintiff's fence fell within a foot of his boundary with the defendant.

There was a great deal of evidence before the trial judge on which he could have so found. In my opinion his findings are reasonable and the appeal on this issue should accordingly fail.

In adumbrating the appellant's case on the issue of the Camel Road, the following four points were raised by learned counsel:-

(i) he contended that the Camel Road passed with the land as it was appurtenant to it at the time of the conveyance, i.e. in 1943;

(ii) he referred to the Prescription Act of 1869 (Chapter 90, section 2) and submitted that there had been a right of user for over twenty years;

(iii) he referred to the Three Chains Ordinance (Chapter 81) and submitted that it related to Bequia also and consequently applied in the instant case;

(iv) he submitted that by common law the appellant had a right by custom as a member of the public, to the use of the road.

With regard to (ii) above, counsel conceded that the appellant's claim would fail here because the evidence showed that he had applied for and had been granted permission to use the road.

The argument relating to the Three Chains Ordinance fails for the reason that the Ordinance merely provides in section 4 for the preservation of all existing rights of way. It does not create a general right of way.

The contention that the right to use the road passed with the conveyance fails to take account of the fact that heretofore all of the lands involved were the property of the vendor. He certainly could not have prescribed against himself, and there was simply no right to pass on in relation to this road.

Finally there is the submission that the appellant had a right by custom, as a member of the public, to the use of the road. It was pleaded at paragraph 6 of the appellant's defence and counterclaim as follows:-

"that the road in dispute has been continuously used as of right for over 40 years by the public as a footpath."

Two aspects come immediately to mind. The first has been mentioned in the judgment of the trial judge at page 41 of the record. After stating the relevant authority (R.P.C. Holdings Ltd. v. Rogers (1953) 1 All E.R.1028 Ch.Div.), he went on, quite rightly in my opinion, to state that in any event the use of the road in the manner proposed is an unjustifiable increase in the burden of the easement and would constitute a trespass. The second aspect concerns the absence of the road on the first three plans admitted to evidence. It appears for the first time on Campbell's plan lodged on 18th January 1972.

At the trial the appellant relied on the same witnesses to establish his prescriptive rights as to establish the local customary rights alleged, but the trial judge rejected them as being unreliable. His findings were in my opinion reasonable and they were consistent with the appellant's attitude in seeking permission at one stage to use the road and with his having signed

the letter to Government at a later stage (exhibit E.O.3) requesting that they take over this road which he now alleges was already a public right of way.

I am accordingly of the view that this appeal should fail, and that it should be dismissed with costs to the plaintiff/respondent.

N. PETERKIN
JUSTICE OF APPEAL (Ag.)