Delivered at St. Vincent on 3rd February 1975 pursuant to s.80(1) of the West Indies Associated States Supreme Court (Montserrat) Ordinance 1 of 1968.

(sgd.) P. Cecil Lewis
Ag. Chief Justice

IN THE COURT OF APPEAL

MONTSERRAT

CIVIL APPEAL NO.1 of 1972

BETWEEN	REBECCA GALLOWAY	Appellant
	and	
	HAULDA ROGERS	Respondent

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

C.E. Francis and K.M. Forde for appellant
J. Kelsick for respondent.

1974, December 9
1975,

J U D G M E N T

CECIL LEWIS C.J.(Ag.)

This is an appeal from an order of Louisy J. dismissing the plaintiff/appellant's claims for a declaration, an injunction and damages against the respondent.

The subject matter of this appeal is an alley which is said to connect George and Harney Streets in Plymouth in this island. A plan of the area in dispute was supplied to the Court at its request and thereon the alley is delineated in red. At the George Street entrance to the alley, the respondent's property is shown on the west of the alley. Directly opposite the respondent's property is the property of one R.E. Osborne. A wall which separates the respondent's property from the Osborne property runs parallel to the alley on its eastern side and joins up with another property at the back of the aforesaid R.E. Osborne's property. This property, marked on the plan 'Mr. Osborne", was originally owned by R.E. Osborne. He conveyed the land in 1953 to the appellant but she had apparently erected a house thereon between the years 1949 and 1950. This property is now owned by the appellant and it is in relation thereto that her claims have been made.

The appellant contends that the alley in question is either a public right of way or alternatively that she has acquired an easement over the same to use the alley for the purpose of entering and leaving her premises. The respondent on the other hand contends that the alley is a part of her property and that no rights exist over it in favour either of members of the public or of the respondent.

The appellant's claims are set out in paragraphs 1, 2, 3, 4 and 6 of her statement of claim and are as reproduced hereunder:

"1. The plaintiff is and was at all material times the freehold owner in possession and beneficial enjoyment of her lands and premises situate at George Street in the town of Plymouth, in the Island of Montserrat, and the defendant is in occupation of a parcel of land situate west of the plaintiff's property in George Street aforesaid.

2. The said properties mentioned in paragraph 1 hereof are parts of a parcel of land which was formerly in the occupation of one George Irish and extended from Harney Street to Parliament Street situate between George Street and Harney Street.

3. Upwards of 70 years last past, the said lands were sub-divided by the said George Irish and a series of parallel alley ways or roads were made and, in due course, became dedicated to public use.

4. One of the said such alley ways or roads is situate between the properties owned by the plaintiff and the defendant and is of the extent of about 6 feet in width. The said alley way provides the ingress and egress from the plaintiff's property and her adjoining neighbours who live off George Street in the immediate vicinity of her said property.

6. Alternatively, the plaintiff contends that on the alienation of parts of the property by one original owner George Irish the said alley ways which then existed as quasi-easements ripened into full fledged easements and

were appended or appurtenant to the plaintiff's said property and were so beneficially used and enjoyed without lawful interruption for upwards of 60 years last past by her and her predecessors in title."

It should be stated at once that there is not an iota of evidence that the appellant's and respondent's properties were originally part of a larger parcel of land formerly occupied by George Irish as pleaded. There is also no evidence that the said George Irish sub-divided this land and made parallel alleys, ways or roads over the same. It is however claimed that the alley in question "in due course became dedicated to public use". This was one of the questions which the trial judge had to decide and he found against the plaintiff on this issue and also on the alternative issue that the plaintiff had acquired an easement in the nature of a right of way over the said alley. In relation to the trial judge's second finding, it was stated in ground 2 of the reasons for appeal that he had "failed to deal with the issue of easement as pleaded by the plaintiff and having disposed of the issue of the road being a public highway he treated the issue as being at an end."

It is appropriate at this stage to deal with the allegation that the issue of easement was ignored by the trial judge. This statement is erroneous. The claim that the appellant had an easement in the nature of a right of way over the alley is based on paragraph 6 of her statement of claim which predicates the following: (a) occupation by George Irish of an area of land which originally included the property respectively owned by the appellant and the respondent; (b) alienation by George Irish of the said area of land to divers persons including the predecessors in title of the appellant and respondent; (c) the existence of alleys as quasi-easements when the various alienations were made; (d) the subsequent ripening of these quasi-easements into full fledged easements; (e) that as a result of the alienations the alley in question in this appeal became appendant and appurtenant to the appellant's property and was used by her and her predecessors in title without lawful interruption for 60 years and upwards. The trial judge rightly held that this claim was not substantiated. He said at page 56 of the record as follows:

"The evidence does not support the allegations set out in paragraphs 2,3,4 and 6 of the statement of claim."

This finding in my opinion cannot be faulted for nowhere in the evidence is there any mention at all of occupation by George Irish of any land or any alienation by him to the predecessors in title of either the appellant or the respondent. Indeed, far from not considering this claim, as the appellant alleges, the trial judge was at pains to point out that it had no support in the evidence. It therefore failed for lack of evidence.

In so far as the first issue is concerned, namely that the alley is a public way, the trial judge after marshalling the evidence made certain findings of fact with which I agree. He said at Pages 56 and 57 of the record

"What the evidence reveals however is that the property owned by the plaintiff formed part of the property bought by R.E.D. Osborne from John Joseph Eid on 27th June 1940. As far back as 1912 the western boundary of the property has been the Rogers' property. It was not until 1953 by Deed of Conveyance dated 7th May of part of this property that the western boundary is described as being a "public footpath".
As to the evidence on the footpath, I accept the evidence that there was a footpath which was used by Jame Mannix's yard, that it was used by persons going into the defendant's yard, used by persons who lived on the south side of Osborne's property and persons who wished to go from George Street to Cherry Village through Mannix's yard and later to Harney Street. That there was a small gate across the footpath in George Street kept closed at night but opened in the day. That the defendant and her mother on occasions stopped people using the footpath. That the footpath was about 2 feet wide. That although the boundary of the defendant's property to the east was Osborne's property, there was a fence erected about 2 feet away from Osborne's property

stated above for 50 years or more.

The defendant's house was destroyed by fire in July 1966, she rebuilt it the same year and replaced a gate which she stated was in the George Street entrance, she also laid down a septic tank in the footpath and in 1969 built the southern wall which blocks the footpath at the south end.

On that evidence can it be said that there exists a public right of way and that the plaintiff is entitled as of right to have use, access and egress to her property over the footpath?

A public right of way is the right enjoyed by all members of the public at large to pass and repass along the way for the purpose of legitimate travel. It is not proprietary in nature. Unlike an easement, its existence is not dependent upon the ownership of dominant land, but upon whether or not the right has been validly created."

The trial judge then went on to consider the manner in which claims to a public right of way may be created and to make certain findings of fact on the evidence. He said at pages 57 et seq. of the record as follows:

"I refer to Halsbury's Laws of England 3rd Ed.19, page 43, paragraph 60, the relevant part is as follows:

"A claim to a public right of way may be based upon either dedication and acceptance, or upon statute."

Clearly creation by statute is not applicable in the instant case and has not been pleaded.

In order to find that a public right of way has been created by dedication it must be shown:

(a) that the owner of the land being competent to dedicate that land as a highway, intended to dedicate it as such, and in fact did dedicate it for the use and enjoyment of the public at large for the purpose of legitimate travel.

(b) that the public accepted the land intended for dedication as a highway.

As so often happens, the facts of the case do not disclose any express dedication of the footpath as a highway.

I refer to Halsbury's Laws of England, Vol.19, page 49, paragraphs 70 and 71, they are as follows:

"70. Presumption from user. The fact that a way has been used by the public so long and in such a manner that the owner of the land, whoever he was, must have been aware that the public believed that the way had been dedicated, and has taken no steps to disabuse them of that belief, is evidence (but not conclusive evidence) from which a court or jury may infer a dedication by the owner. The test is whether the owner has so acted as to induce a reasonable belief on the part of the public that the way is public. The weight to be attached to evidence of user depends upon a number of circumstances."

"71. From nature of locus in quo. The nature of the locus in quo is material. If a man builds a row of houses with a road in front opening into an old highway at each end, and sells or lets them, the slightest evidence of public user will suffice. On the other hand, stronger evidence is necessary in the case of a country path, and the weight to be attached to user must depend somewhat upon whether the land is cultivated or rough and unproductive. An inference of dedication may be drawn in the case of a cul-de-sac, for a highway need not be a thoroughfare, and in towns many squares, courts and passages with an entrance at one end only are highways. The fact that a way leads to nowhere is, however, a point for consideration; and it is difficult to establish a public right of way over a cul-de-sac by evidence of user alone, without proof that public money has been spent upon it. Although there can be no public right, except by statute, in the nature of a jus spatiandi, where two highways debouch at points on

wander across it, although by varying and undefined routes, may indicate the existence of a highway running straight across from point to point. It would seem that in a country district it is necessary in order to establish a public right of way by proof of user alone to show that such way leads from one public terminus to another; if both termini are not public places, for example, if one is on private property and is merely a place of interest or a place that has a fine view, mere user only justifies the inference of a licence to the public to visit the spot in question. In such a case dedication may be inferred if the owner has allowed the public to spend money in improving the road; but, where this is not the case, an inference unfavourable to him ought not to be drawn from the fact that the public have been freely permitted to derive enjoyment from access to private property."

Is there any evidence from the situation of the land from which it can be presumed that the path is a public right of way?

The footpath leads to Jane Mannix's yard and ends there. while the Pentecostal Church was in Jane Mannix's yard, persons travelled along the footpath through Jane Mannix's yard to the church. The Church was not a public place, and in fact the path to Jane Mannix's yard is now cut off. I find that there was no footpath from Jane Mannix's yard to Cherry Village but that certain members of the public passed through Jane Mannix's yard to go to Cherry Village. It is difficult to establish a public right of way over a path that leads to nowhere merely by showing user alone; proof that public money has been spent upon it is generally required.

Is there any evidence of user as of right by the public?

The evidence for the plaintiff as given by Reginald Osborne is that the footpath was there in 1942 when he acquired the property, that the defendant had a pit almost in the alley, that the defendant claimed the path to be her property and

blocked the alley with a wall.

There is evidence that people used to travel along the footpath and that the defendant's mother and herself asserted ownership of the land; that there was a gate at the northern end of the footpath which was closed at nights. The gate was replaced by another one after fire.

In this regard the Deed of Conveyance dated the 24th June 1940 is significant. By that Deed, Reginald Osborne, the Plaintiff's predecessor in title, acquired the property and the western boundary of the property is there shown to be the lands of Rogers, the defendant's predecessor in title. It seems somewhat strange that the plaintiff's predecessor in title accepted the description of his property as being bounded on the west by lands of Rogers when he knew that it ought properly to have been described as being bounded by a public right of way or footpath. It can only be inferred that up to 1940 there was no dedication and acceptance of the footpath as a public right of way by the Rogers' or their predecessors in title.

Since that date the defendant has asserted ownership of the land.

Consequently, there can be no presumption of either intention to dedicate or actual dedication of the land as a public right of way by reason of user as of right or from the situation of the public.

In view of what I have stated above, the plaintiff's claim fails."

In short, the trial judge found that, although persons had used the alley for 50 years or more, there was no dedication and acceptance of the footpath as a public right of way by the Rogers family or their predecessors in title up to the year 1940 and since that date the defendant had asserted her ownership of the land. The defendant's mother from whom she obtained the land had also previously asserted her claim to the ownership of the land unad as a footpath by preventing members of the public from using it. There was a gate at the northern end of the alley which the respondent

maintained in a state of repair and kept closed at nights, thus effectively preventing user of the alley by the public during these hours. There was thus a nightly act of interruption of user which absolutely negatived any intention to dedicate the alley to the public.

In the light of these findings which are maintainable on the evidence, I am of the opinion that the trial judge was right in rejecting the appellant's claims and I would accordingly dismiss the appeal with costs here and in the court below.

CECIL LEWIS
ACTING CHIEF JUSTICE

PETERKIN J.A.(Ag.)

This is an appeal against the decision of the trial judge dismissing the appellant's claim for a declaration that the alley way west of the appellant's house, situate in George Street in the town of Plymouth, is a public right of way, and for an injunction restraining the defendant/respondent from placing or allowing to be placed thereon anything restricting or interfering with the reasonable enjoyment of the right of way claimed.

The grounds of appeal are as follows:

1) That the learned trial judge arrived at wrong conclusions of facts and applied wrong principles of law to the facts of the case;

2) that the decision is unreasonable and cannot be supported having regard to the evidence.

The further particulars stated in relation to the grounds of appeal are:

a) that the learned trial judge was wrong in holding that the path had not been dedicated to public use as it provided a road from Henry Street to George Street and had been used by the public for upwards of sixty years continuously, and

b) that the learned trial judge failed to deal with the issue of easement as pleaded by the plaintiff, and, having disposed of the issue of the road being a public highway

he treated the issue as being at an end.

I shall deal with these allegations in inverse order. In the first instance, the issue of easement stated at (b) above does not appear in the indorsement of claim as shown on the writ. It appeared for the first time in the alternative at paragraph 6 of the appellant's statement of claim. There it was pleaded as follows:

> "Alternatively, the plaintiff contends that on the alienation of parts of the property by one original owner, George Irish, the said alley ways which then existed as quasi-easements ripened into full fledged easements and were appended or appurtenant to the plaintiff's said property."

Now there is no evidence whatever of any occupation by George Irish or of any alienation by him to the predecessors in title of either the appellant or the respondent. Further to this, it is incorrect to state that the trial judge failed to deal with the issue. Not only did he advert to it, but after reviewing the evidence it is a matter of little surprise that he dismissed it quite summarily in his judgment at page 56 of the record in the following terms:

> "The evidence does not support the allegations set out in paragraphs 2, 3, 4 and 6."

In my view it was a reasonable finding on his part with which I entirely agree.

I turn now to the issue of the public right of way referred to in the particulars stated at (a) above.

The learning on this aspect of the matter is to be found in Halsbury's Laws of England, Volume 19, at pages 44, 45 etc. First of all, whether in any particular case there has been a dedication and acceptance for such purposes by the public is a question of fact and not of law. The learned author in dealing with the intention to dedicate states as follows at paragraph 61:

> "Dedication necessarily presupposes an intention to dedicate: there must be animus dedicandi. The intention may be openly expressed in words or writing, but, as a rule, it is a matter of inference; and it is for a court

> or jury to say whether the intention is to be inferred from the evidence as to the acts and behaviour of the landowner when viewed in the light of all the surrounding circumstances."

The test is whether the owner has so acted as to induce a reasonable belief on the part of the public that the way is public. Further to this, it has been held that, even if an express intention to dedicate is proved, it is necessary to prove also that the way has been in fact thrown open to the public and used by them.

In the instant matter the learned trial judge has in his judgment reviewed carefully all of the facts and circumstances before relating them to the law as cited by him therein. With regard to the footpath it is recorded as follows at page 56 of the record.

> "As to the evidence of the footpath, I accept the evidence that there was a footpath which was used by Jane Mermix's yard, that it was used by persons going into the defendant's yard, used by persons who lived on the south side of Osborne's property and persons who wished to go from George Street to Cherry Village through Mermix's yard and later to Harney Street. That there was a small gate across the footpath in George Street kept closed at night but opened in the day. That the defendant and her mother on occasions stopped people using the footpath. That the footpath was about 2 feet wide."

And again at page 62 of the record:

> "In this regard the deed of conveyance dated 24th June 1940 is significant. By that deed Reginald Osborne, the plaintiff's predecessor in title, acquired the property, and the western boundary of the property is there shown to be the lands of Rogers, the defendant's predecessor in title. It seems somewhat strange that the plaintiff's predecessor in title accepted the description of his property as being

that it ought properly to have been described as being bounded by a public right of way or footpath."

The learned trial judge in applying the law stated to the facts and circumstances as he found them concluded as follows:

"It can only be inferred that up to 1940 there was no dedication and acceptance of the footpath as a public right of way by the Rogers or their predecessors in title. Since that date the defendant has asserted ownership of the land. Consequently, there can be no presumption of either intention to dedicate or actual dedication of the land as a public right of way by reason of user as of right or from the situation of the public."

I am of the opinion that his findings and conclusions are reasonable and that he arrived at the right conclusions of fact and applied the correct principles of law to the facts as found.

Accordingly I would agree that this appeal should be dismissed with costs to the respondent.

N. PETERKIN
JUSTICE OF APPEAL (AG.)

ST. BERNARD J.A.

I agree.

E.L. ST. BERNARD
JUSTICE OF APPEAL