

In the Supreme Court of the Hawaiian Islands.

JUNE TERM, 1893.

LULIA KALAEKOA VS. C. KEAWA.

BEFORE JUDD, C. J., BICKERTON AND FREAR, JJ.

A way of necessity by implied grant or reservation created over one lot of land in favor of another, upon the conveyance of one by the former owner of both, the only means of access to one being over the other. At the time of, and for many years before and after the conveyance, an apparent and continuous way wide enough for carriages was in actual use and was appropriate for the use of the dominant estate. Held, the way impliedly granted or reserved was the way actually used and could not be cut down to a foot or horse way by the owner of the servient estate without the consent of the owner of the dominant estate.

OPINION OF THE COURT BY FREAR, J.

This is an appeal from the Commissioner of Private Ways and Water Rights for the District of Honolulu. The question involved is the width of a private way claimed by the defendant over land belonging to the plaintiff. The way is a so-called way of necessity, the lands (covered by Royal Patents 2597 and 2677) of the plaintiff and defendant having formerly belonged to the same person, one Waiala, who conveyed them at different times to the grantors of the present owners, and the only way of access to the defendant's land being over the plaintiff's land. It does not appear, nor is it material, which land was conveyed first. The plaintiff admits the existence of a way, but contends that, being a way of necessity, it is limited as to its width by the necessity, which in this case it is contended requires only a foot and horse way. The defendant claims a carriage way. The Commissioner decided that the defendant was entitled to a carriage way at least eight feet wide by prescription. We are of opinion that the conclusion of the Commissioner is correct, but for different reasons from those upon which it was based.

A way can be acquired by prescription only by adverse user for not less than twenty years. In the present case the two lands in question were owned by the same person, Waiala, up to a time less than twenty years ago. And, although for many years prior to his conveyances he used the way now claimed, over one part of his land for the benefit of the other part, such user was not adverse, for no one can hold adversely to himself.

A way of necessity so-called is, strictly speaking, not created by necessity. It is created by grant or reservation. Ways are commonly said to be created by grant, by prescription or by necessity. But these distinctions relate to the mode of their proof rather than to the mode of their creation. It would be more correct to say that ways are created by express grant, by presumed grant and by implied grant—or reservation, as the case may be. In every instance the way is created by grant, or reservation, the difference being merely in the mode of proof. The question as to what is granted or reserved is a question of intention to be shown by competent evidence. In the case of an express grant the intention is proved generally by the terms of the instrument alone. In the case of a presumed grant it is proved by an adverse user for twenty years. In the case of an implied grant it is proved by all the circumstances of the case, and especially by the condition of the property at the time of the conveyance.

A way of necessity is merely a way created by an implied grant or reservation, the necessity being only evidence of the intention of the parties to make the grant or reservation. If it is not in the power of the grantor to create a way, no necessity however strict or absolute, can be evidence of an intention to do so, as where the only means of access to the land is over the land of a stranger. But if it is in the power of the grantor, strict necessity alone is sufficient evidence—as where the only means of access is over the land conveyed or reserved by the grantor. And even where there is not a strict, but only a reasonable necessity, as where some other way is possible though very difficult or expensive, this, if coupled with additional evidence of a way actually used and which is apparent and of a continuous nature, has been held to be sufficient evidence of an intention to grant or reserve the way.

The same rules which apply to the existence of a way apply equally to its location, direction, width and the purposes for which it may be used. The question is merely one of intention, to be proved by competent evidence.

An appeal only lies from a final judgment or some decree affecting substantial rights and equivalent thereto. I Am. & Eng. Encycl. of Law, p. 617 and cases cited. "An appeal like a writ of error is generally confined to a final judgment. It cannot be taken, unless expressly authorized by statute, from a judgment merely interlocutory or provisional." Hillard New Trials, p. 568 and cases cited. It has been the unquestioned practice for years not to allow appeals of the character of the one now before us and we prefer to adhere to it. We therefore dismiss the appeal and send the case back to the District Court for further proceedings. Attorney-General W. O. Smith for the prosecution; A. S. Hartwell for defendant. Honolulu, July 17th, 1893. The Daily ADVERTISER is delivered by carriers for 50 cents a month. Ring up Telephone 88. Now is the time to subscribe.

of the existence of the way but also of its direction, width, and uses, as where the way is one of strict necessity and there has been no apparent way in use before the conveyance and none by selection or acquiescence of the parties afterwards. But where, as in the present case, the existence of the way is a matter of necessity and the way in question had been used for many years prior to the conveyance of the lands and was apparent and of a continuous nature, and has been used for nearly twenty years after the severance of the lands and has ever since about 1860 been of the present width and most of that time traveled over with carriages, and is a continuation of another private way of about the same width which leads from the public highway to the boundary of the plaintiff's land, and the opening through that boundary which is a stone wall is and ever since the wall was built many years ago has been of the same width as the way, and a carriage way, if not absolutely necessary, is at least as appropriate and natural for the use of the dominant tenement as a foot or horse way would be, the conclusion is almost irresistible that the intention was to grant or reserve a way of the width which has so long been in actual use. The foregoing reasoning is fully sustained by the following cases. Nichols vs. Luce, 24 Pick. 109; Bichsel vs. Hale, 18 S. W. (Tenn.), 245; Atkins vs. Borden, 2 Met. 466; Lampman vs. Mills, 21 N. Y., 505; Pearson vs. Spencer, 1 B. & S., 585; Colt vs. Redfield, 59 Conn., 432; J. H. M. L. Ins. Co. vs. Patterson, 103 Ind., 586; Whittier vs. Winkley, 62 N. H., 338; Phillips vs. Phillips, 48 Pa. St., 185; Bannan vs. Angier, 2 Allen, 129; Smith vs. Lee, 14 Gray, 473; Jennison vs. Walker, 11 Gray, 426; Bass vs. Edwards, 126 Mass., 449; Salisbury vs. Andrews, 19 Pick., 258; Warner vs. Railroad Co., 39 Oh. St., 79; Galloway vs. Bonesteel, 65 Wis., 79; Cihak vs. Klekr, 117 Ill., 653; Cane vs. Crafts, 53 Cal., 135; Collins vs. Frontice, 15 Conn., 43. The appeal is dismissed, the plaintiff to pay the costs. W. A. Kinney for plaintiff; J. K. Kanila and J. M. Kaneakua for defendant. Honolulu, July 14th, 1893.

OPINION OF THE COURT BY FREAR, J.

This is an appeal from the Commissioner of Private Ways and Water Rights for the District of Honolulu. The question involved is the width of a private way claimed by the defendant over land belonging to the plaintiff. The way is a so-called way of necessity, the lands (covered by Royal Patents 2597 and 2677) of the plaintiff and defendant having formerly belonged to the same person, one Waiala, who conveyed them at different times to the grantors of the present owners, and the only way of access to the defendant's land being over the plaintiff's land. It does not appear, nor is it material, which land was conveyed first. The plaintiff admits the existence of a way, but contends that, being a way of necessity, it is limited as to its width by the necessity, which in this case it is contended requires only a foot and horse way. The defendant claims a carriage way. The Commissioner decided that the defendant was entitled to a carriage way at least eight feet wide by prescription. We are of opinion that the conclusion of the Commissioner is correct, but for different reasons from those upon which it was based.

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OPINION OF THE COURT BY JUDD, C. J.

The defendant in this case was charged in the District Court of Honolulu with the offense of conducting a lottery, which is within the summary jurisdiction of that Court. He pleaded not guilty, and then moved to be discharged on the ground that the law under which he was charged was not in force when the act was alleged to have been committed. The Magistrate denied the motion, and without further proceedings the defendant appealed to this Court. The matter was submitted to us on briefs. The Attorney-General contends that as no final judgment was rendered by the Magistrate, an appeal does not lie to this Court on the points of law raised. We believe this contention is right. We cannot find any authority in our statutes or in reason for allowing appeals from interlocutory or provisional rulings of a District Court. It would be intolerable to allow such a procedure. For then a party in any case, civil or criminal, could take an appeal on one ruling upon the first plea which might be made, and the case would be tied up till it could be heard by the Supreme Court. If the judgment of the Supreme Court should be adverse to the appellant the case would go back to the District Court where decisions upon further pleas or motions or objections to the introduction of evidence might be made the subject of further appeals to be heard seriatim by the Supreme Court and thus the case vibrates back and forth between the Courts and the proceedings are interminable.

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