

la voie publique. Le premier est une servitude légale, qui n'a besoin d'être justifiée par aucun titre. Son titre est dans la loi, dans le fait prouvé de l'enclavé et de la nécessité. "En passant sur l'héritage voisin pour se rendre à la voie publique, le propriétaire du fonds enclavé ne fait qu'user de son droit; il l'exerce *pro suo* et un pareil passage ne peut jamais être réputé précaire, quand même le fonds servant ne serait pas clos; car un passage fondé par la loi et sur la nécessité ne peut pas être réputé de simple tolérance."

The judgment rendered by Chief Justice Bowen, Mr Justice Day, and Mr Justice Short, in the Court below, on the 23rd October last, was in the following terms:

"The Court having heard the parties by their respective Counsel, and having seen and examined the pleadings, evidence and proceedings of record, and on the whole deliberated, considering that the Plaintiff has proved the material allegations in his declaration in this cause filed, and that the allegations in the several exceptions pleaded by the said Defendant in this cause, have not been proved, doth dismiss the said exceptions, maintain said Plaintiff in the possession of the parcel of land described in the Plaintiff's declaration, enjoin said Defendant to desist henceforward from trespassing on said land, or otherwise disturbing or troubling him, said Plaintiff, in the possession thereof, and condemn said Defendant to pay to said Plaintiff for his loss and damages, twenty shillings Currency, with costs, distraction of which is awarded to Thomas W. Ritchie, the Plaintiff's Attorney, hereby reserving, however, to said Defendant his legal recourse to enforce any right of way on and over said land."

Appellant maintains that the said judgment is erroneous—

1. Because the action was not in proper form to have Respondent's land declared free of a servitude, which was the only correct issue that could be raised between Appellant and Respondent;
2. Because the judgment erroneously maintains Respondent's action with costs as a real action, as if there were a *trouble* of the nature of a usurpation of possession by Appellant, while no such *trouble* was proved.
3. Because said judgment is erroneously predicated upon the necessity of Appellant to prove his title as if directly put in issue, while it was only necessary in this action to prove *possession annale* of servitude, under a claim or color of title.
4. Because the judgment erroneously declares that Appellant failed to establish his title to the servitude in question.
5. Because Appellant proved that his land was *enclavé*, and that he had used and enjoyed the right of way more than a year prior to the institution of Respondent's action and had a right to be maintained in the possession of his servitude, and the only claim of Respondent was a demand for indemnity.
6. Because Respondent did not prove his possession *annale* of the land where the servitude was exercised.
7. Because Appellant proved possession of the servitude 16 years and more *entre presens* under title prior to the institution of Respondent's action.
8. Because said passage had been open to, and used by, the public for more than 10 years, and was thereby established as a road by the Lower Canada and Municipal Road Act.

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