

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Deal & Rand v. Palmeter & George, 2004 NSSC 190

Date: 20040928
Docket: S.K. 216779
Registry: Kentville

Between:

Allan Jeffrey Deal & Heather Jeanette Rand

Plaintiffs

v.

Katherine F. Palmeter & Ellen Wanda George

Defendants

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Judge: The Honourable Justice Gregory M. Warner

Heard: July 18 & 19, 2004 in Kentville, N.S.

Subject: Real Property - Prescriptive Easement - Way of Necessity

Issues:

1. Whether a way of necessity existed?
2. Whether a servient owner has an equitable right to relocate a way of necessity.?

Summary: The Palmeters sold from their farm, small cottage lots on the Minas Basin without deeded rights of way. The cottagers used for forty years driveway that crossed the farm. In 2003, a Palmeter (granddaughter) proposed to build a cottage on the last remaining lot, but could not do so because the plaintiffs' driveway to their cottage crossed this lot. She made proposals to build the plaintiffs a new driveway to their satisfaction; the plaintiffs refused. She unilaterally constructed such a driveway and blocked the plaintiffs' driveway with a large rock. The new driveway significantly improved access to the plaintiffs' cottage. The plaintiffs sued for an injunction and damages.

Result: On the facts, the defendants' claim, that the use of the driveway was consensual and not adverse, was rejected and the court found the plaintiffs had acquired a prescriptive easement.

Respecting the right to relocate, the English, South African and American law was reviewed . The court preferred the more equitable and flexible approach applied in a case of the Missouri Court of Appeal and described in the American Restatement of the Law of Property, but felt constrained by the common law established in the English cases of **Pearson v. Spencer** and **Deacon v. South Eastern Railway**, which had been adopted in Canada and in Nova Scotia in **Wells v. Wells**. The court reluctantly approved the injunction but rejected the claim for damages because the defendant's action did not interfere with the plaintiffs' access to their cottage.

Note: This area of the law would be appropriate for review by the Law Reform Commission.

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