Privy Council Appeals Nos. 67 and 68 *of* 1914.

Arthur John Fry Gibbons - - - - *Appellant,*

v.

Walter Vincent Lenfestey and another - *Respondents.*

Same - - - - - - - - *Appellant,*

v.

Same - - - - - - - - *Respondents.*

FROM

THE ROYAL COURT OF THE ISLAND OF GUERNSEY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD MARCH 1915.

Present at the Hearing.

LORD DUNEDIN.
SIR GEORGE FARWELL.
SIR ARTHUR CHANNELL.

[*Delivered by* LORD DUNEDIN.]

These consolidated appeals are against two judgments of the Royal Court of Guernsey which dismiss an action for an injunction and an action of damages at the instance of the Appellant Gibbons against the Respondents Lenfestey and another.

The judgment in both actions is the same and dismisses the action as irrelevant. It is not a very convenient position that when an action has been dismissed on pleading alone the actual pleadings are not before their Lordships. They

are, however, practically recited—whether textually or not—in the judgment, and there is sufficient to show that it is not in accordance with justice that the case should have been disposed of without any enquiry into the facts.

There were several amendments made but the pleadings as they finally stand are as follows :—

The appellant and respondents are co-terminous proprietors, the appellant's land being bounded on one side by the high road of Grandes Rocques. The appellant avers that his close of land is situated at a lower level than the high road but at a higher level than the close of the respondents—

"Lesquelles prémisses (the respondents) ont été tenues " de temps immémorial de recevoir les eaux de pluie et de " source des dites prémisses du dit Gibbons y compris " celles qui venant des prémisses supérieures à celles du " dit Gibbons et de la dite Grande Route s'écoulaient " pardessus les dites prémisses du dit Gibbons."

He then says that in 1872 a verbal agreement was made between all the proprietors concerned by which a regular channel was made by means of drains, gutters, and pipes which took the water from the lands of the respondents, including the water coming from the high road, across the lands of the respondents and other proprietors down to the Bay of Port Soif. The course of the waters thereafter was by a drain on the appellant's land which passed along the old dyke which was the boundary between the properties, and then coming through the dyke entered a pipe and gutter in the lands of the respondents. He then states that in 1905 he pulled down the old dyke and built a greenhouse wall in approximately the same line as the old dyke but two feet distant from his

boundary, in which wall he made a hole at a spot (subsequently altering this at the request of the respondents to another spot) so as to be exactly opposite the place where the waters had entered into the pipe and gutter on the respondents' land in the past, and that the water then ran over the strip of land intervening and into the pipe and gutter as in times past till 1910, when the respondents at their own hand blocked up the hole in the wall, with the result that the waters regurgitated and the appellant's premises were flooded. And he craved injunction against the respondents blocking the hole and damages for the damage suffered by flooding.

The action was disposed of without any enquiry into the alleged facts by the Court sustaining the following exceptions stated by the respondents :—

"(1) Que la dite cause ne précise pas suffisamment " quels ci-devant propriétaires ont fait l'accord verbal " mentionné dans la dite cause ni si le dit accord verbal " était temporaire ou permament ni les conditions que en " faisaient partie.

"(2) Qu'attendu que le dit acteur admet dans la " présente cause qu'il a changé la nature de ses prémisses " en bâtissant et faisant d'autres changements, il n'est pas " allegué qu'il avait le droit de ce faire en vertu du dit " accord verbal et d'ainsi changer et aggraver la servitude " qui existait s'il y en existait une.

"(3) Qu'un accord verbal fait entre des ci-devant " propriétaires, ne peut être obligatoire envers les présents " propriétaires qui n'y étaient pas parties attendu que tout " accord ou fait d'héritage doit être par écrit et enregistré " au Greffe."

To dispose of the case on these grounds involves a thorough misconception of the true ground of action. By the law of Guernsey a contract which is to have a binding effect as regards land in the hands of a successor in the land must be registered, and it seems to

have been therefore thought that inasmuch as the agreement was only verbal all cause of action was gone. But the true cause of action is not the agreement of 1872, it is the natural right of a superior proprietor to call on the inferior proprietor to receive the water that naturally flows from the higher to the lower level. The agreement of 1872 is nothing as regards binding force, it is merely narrative of how the natural flow of the water came to be as it was.

The law of Guernsey, differing in this respect from some other systems, does not allow of the constitution of ordinary servitude or easements except by grant. But the right of the superior proprietor to throw natural water on the lower land is not an ordinary servitude to which this rule can apply. It is a natural right inherent in property, it is a question of nomenclature whether it is or is not called a servitude. Their Lordships do not doubt that the law of Guernsey in this matter is the same as that of every other country whose jurisprudence is traceable to Roman sources. Indeed, even the countries ruled by the common law have accepted the Roman rules. It is true that the Romans designated this right as servitude, but they explained the distinction by dividing servitude into three classes—natural, legal, and conventional—and it is to the first class that this belongs. The law may be stated thus: Where two contiguous fields belong to different proprietors, one of which stands upon higher ground than the other, nature itself may be said to constitute a servitude on the inferior tenement, by which it is obliged to receive the water that falls from the superior. If the water, which would otherwise fall from the

higher grounds insensibly, without hurting the inferior tenement, should be collected into one body by the owner of the superior in the natural use of his property for draining or otherwise improving it, the owner of the inferior is, without the positive constitution of any servitude, bound to receive that body of water on his property.

It follows from this that the case of the appellant, assuming his averments to be true (which in a matter of relevancy must be assumed), in no way depends on the agreement of 1872. What happened in 1872 need not be pled as an agreement, it need only be mentioned historically as the reason of the *status quo*. It is sufficient for the appellant, *prima facie*, to show that his is the superior close and that the natural water has been cast on the respondents' close in a certain place, and that the respondents at their own hand have interfered with the *status quo*.

The right, however, of the superior proprietor is not quite absolute. The limits cannot be defined by definition, but each case must depend on its own circumstances. It would not, for instance, be within his right to introduce water which was foreign to the land, *e.g.*, by procuring a pipe-supply or draining another watershed, and then insist that all the water so brought on the land should be received by the inferior proprietor to his detriment. At the same time exception No. 2, which has been sustained, betrays a wrong view of the law, indeed, as expressed, is self-destructive. It speaks as if "changer" and "aggraver" were convertible terms, which they are not. Nor does the mere fact of building forfeit the right. No doubt a proprietor may not build on the extreme verge of his property and then

throw water off his roof on to the neighbour's land; that would require the constitution of a servitude which the Romans called *stillicidium*, and which in English law is called "eavesdrop." But if the water from the roof of a building falls on the proprietor's own grounds it does not cease to be natural water, but must be received by the lower proprietor as the water was received before the building was there.

Their Lordships do not say more because they do not wish to prejudice any defence which the respondents may have on the merits—a defence which has not yet been formulated, at least so far as discoverable from the judgment before their Lordships.

Their Lordships will humbly advise His Majesty that the judgments appealed from should be reversed and the case remitted with a declaration that the exceptions pleaded by the respondents fall to be disallowed as exceptions prejudicial to the action; that the respondents should be allowed to plead on the merits, and thereafter, after evidence is led in the event of the statements of parties not being at one, that judgment should be given in the case as shall be just. The respondents will pay the costs of this appeal. The costs in the Courts below will abide the result of the actions.

In the Privy Council.

ARTHUR JOHN FRY GIBBONS

v.

WALTER VINCENT LENFESTEY AND ANOTHER.

SAME

v.

SAME.

DELIVERED BY LORD DUNEDIN.

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