

17, 1954

In the Privy Council.

ON APPEAL

FROM THE ROYAL COURT OF THE ISLAND OF JERSEY.

37696

BETWEEN

ARTHUR VILLENEUVE NICOLLE (*Plaintiff*) . . . *Appellant*

AND

HENRY FREDERICK JAMES WIGRAM (*Defendant*)

HENRY AHIER, Connetable of the Parish of
St. Martin (*Cited*)

Respondents. 24 FEB 1955

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UNIVERSITY OF LONDON
W.C.1.
INSTITUTE OF ADVANCED
LEGAL STUDIES

Case for the Respondent

HENRY FREDERICK JAMES WIGRAM.

RECORD.

1. In this case, unless there is something in the subject or context inconsistent therewith—

“ Contract ” means a deed of transfer of real estate in Jersey duly acknowledged by the parties thereto before the Royal Court of the Island of Jersey and duly registered in the Registry of Deeds (‘ Registre Public ’) of such Island ;

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“ passing contract ” means the act of the parties to such deed as aforesaid in acknowledging same before such Court ;

“ Roads Committee ” means the ‘ Comite des Chemins ’ of any Parish in the said Island ;

“ Assembly ” means the Assembly of Principals and Officers (‘ Assemblée des Principaux et Officers ’) of any such Parish ;

“ the Respondent ” means Henry Frederick James Wigram ;

“ the Respondent Parish ” means the Parish of St. Martin ;

“ Mrs. Bayntum-Roberts ” means Mrs. Elizabeth Grant Bayntum-Roberts, formerly Mrs. Elizabeth Grant Rose (nee Ross) ;

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“ the Royal Court ” means the Royal Court of the Island of Jersey ;

“ Parish ” or “ Parishes ” means a Parish or Parishes in such Island.

2. This is an appeal from a judgment dated the 19th October, 1950, p. 33. of the “ Samedi ” Division (Superior Number) of the Royal Court of the

p. 26.

Island of Jersey, unanimously affirming the judgment dated the 13th April, 1950, of the "Samedi" Division (Inferior Number) of such Court. The question for decision in this appeal is whether a certain roadway in the Parish of St. Martin adjoining property of this Respondent known as "La Chaire Annexe" is the property of the Appellant (subject to public rights of way thereover) or is vested in the Parish of St. Martin as a public road.

The Appellant contends that the roadway is his property (subject as aforesaid) never having been effectively transferred to the said Parish, and that consequently this Respondent was not entitled without the Appellant's permission to make in his boundary wall windows overlooking the said roadway or to lay pipes for drainage of his premises in and under the soil thereof. This Respondent contends that the said roadway was effectively transferred to the said Parish in 1925 by Mrs. Bayntum-Roberts the predecessor in title of the Appellant and that consequently he was entitled to do the acts complained of without the Appellant's permission. The correctness of these contentions depends upon whether events which took place in 1924 and 1925 culminating in an Act of the Roads Committee of the said Parish dated 9th January, 1925, and a confirmatory Act of the Parish Assembly dated the 15th January, 1925, can operate in Jersey law as an effective transfer of the soil of the said roadway, there being in relation thereto no "contract" as above defined.

p. 1.

3. The Appellant started the present action on the 26th June, 1948, and claimed therein that this Respondent should be ordered to remove and fill in certain windows opened by him in his wall, to remove a certain ventilation pipe and drain pipes protruding from his wall, to dig up and remove certain drain pipes in and under the said roadway and make good the same, and to pay to the Appellant £500 for damages and expenses.

p. 3.

p. 70.

4. This Respondent is the owner of a certain house called "La Chaire Annexe" which is an annexe of the Respondent's hotel "La Chaire Hotel." This Respondent purchased both "La Chaire Annexe" and "La Chaire Hotel" from the Appellant by contract dated the 4th January, 1947. "La Chaire Annexe" (being the seventh corpus fundi mentioned in the said contract dated the 4th January, 1947) abuts as therein described on the east and south sides a road terminating at the seashore, which road is hereinafter called "the road in issue."

5. This Respondent in the year 1948, or about that time, built six windows in the east wall of "La Chaire Annexe." These windows are less than three feet from the road in issue. By Jersey law, no person is allowed to build windows ("pratiquer des fenetres") which are nearer than three feet to his neighbour's property. If therefore, the road in issue were the property of the Appellant (which is denied) then this Respondent would, by Jersey Law, have committed a tort against the Appellant by so building the windows as aforesaid. This Respondent, in or about the same year, also installed on "La Chaire Annexe" a "Tuke and Bell" sewage disposal plant. Various pipes of such plant were placed in the off-set ('relief') of "La Chaire Annexe" as well as in the road

in issue. By so placing these pipes, this Respondent would have committed a further tort against the Appellant, if the road in issue belonged to the Appellant.

6. Before building such windows, and before installing such plant and pipes, this Respondent sought and obtained the consent of the Respondent Parish of St. Martin to whom the Respondents contend the road in issue belongs. Such Respondent Parish, acting by its Roads Committee, gave permission to this Respondent:—(A) to build such windows; (B) to instal such plant; and (C) to place such pipes both in the off-set ('relief') of "La Chaire Annexe" and in the road in issue.

7. Since all the acts of which the Appellant complained in his original action of the 26th June, 1948, had been sanctioned by the Respondent Parish, such Parish by its Connetable was made a party to the present cause ('appelee en cause') at the request of this Respondent and with the consent of the Appellant.

8. The Appellant can only succeed in the present cause if he can prove that the road in issue is his property.

9. The road in issue is situate in the Parish of St. Martin, starts from the main road leading from Rozel to Trinity, goes east up to the main entrance of "Rozel Barracks" (being the property of the Appellant) then, skirting the outside walls of "Rozel Barracks," goes north, then east until it reaches the seashore. Such road was originally an appurtenance of "Rozel Barracks." The language of a contract dated 6th February, 1932, whereby Mrs. Bayntum-Roberts sold "Rozel Barracks" to the Appellant would have operated to transfer the ownership of the road in issue to the Appellant unless the said road was already the property of the Parish. p. 66.

10. The following facts were found on the evidence by the Court of First Instance whose reasons and judgment were upheld by the Appellate Court:— p. 23.

30 (I) In 1810 the War Department acquired certain land to build thereon Rozel Barracks (now the Appellant's property). At that time a roadway crossed the land so acquired starting from what is to-day the main entrance of Rozel Barracks going east up to the seashore and then north. After the erection of the Barracks the said roadway became enclosed within the barrack walls.

40 (II) The Barracks were so built as to leave on the land so acquired as aforesaid a strip of land outside the west and north walls of the Barracks to serve as a new road in substitution for the enclosed road; such new road starting from the main entrance of Rozel Barracks going north and then east to the seashore. Such new road is the road in issue.

(III) The War Department allowed the public for many years to use the road in issue as if it had been a public road, and for its part the Respondent Parish the competent authority in relation to by-roads within its boundaries for many years treated the road

in issue as if it had been a public road having in particular since at least 1866 sold the "Bannelais" (earth and dust sweepings) therefrom, an act which a Parish has no right to do unless the "Bannelais" has been swept from a public road.

p. 37.

(iv) On 5th December, 1910, as appears from an Acte of the Roads Committee of the Respondent Parish, that Committee visited the road in issue and acknowledged that the soil of the road in issue was the property of the War Department, but considered that inasmuch as the road in issue was also used by the public it would be proper for the road in issue to be maintained as a public road 10 by the Respondent Parish. The Connetable forwarded a copy of that Acte to the local Commander for information with a covering letter dated 7th December, 1910, stating that, in the opinion of the Roads Committee the soil of the road in issue was Crown property subject to a public right of way and asking whether the War Department acquiesced in that view.

p. 38.

p. 39.

(v) By letter dated 1st March, 1911, the local commander (Major Brooker) acquiesced in that view on behalf of the War Department, and further stated that the War Department was "prepared to transfer this road at once to the Parish Authorities, 20 "provided the Department is put to no expense for such transfer: "that the road be maintained as a public road: and that the "Department, or future owner of Rozel Barracks, be secured all "frontage rights and the tour d'echelle (ladder space) for repairs "to that property, and wayleave for any drainage water or other "pipes that it may be desired to place under the road without "causing permanent damage thereto."

p. 67.

(vi) On 16th July, 1924, Rozel Barracks was bought at auction by Mrs. Bayntum-Roberts. Her legal advisers were of the opinion that notwithstanding the events of 1910 and 1911 the soil of the 30 road in issue was still the property of the War Department and should be included in the contract and accordingly the contract dated 6th September, 1924, subjected the purchaser and her heirs to a right of road and passage at all times for the public over the road in issue conformably with the terms of the said Acte of the Roads Committee of the Respondent Parish of the 5th December, 1910, and of the said letter of 1st March, 1911, of Major Brooker relative to the use of the road in issue by the public.

p. 40.

(vii) On 3rd September, 1924, the legal advisers of Mrs. Bayntum-Roberts sent to her the draft contract relating to 40 Rozel Barracks and copies of the said Acte of the Roads Committee the said letter dated 7th December, 1910, of the Parish constable and Major Brooker's said letter. They drew her attention to the fact that by the draft "effect is given to the decision arrived at "in 1910-11, so that the said roadway will pass into your ownership "subject to public . . . rights of way." By the same letter they suggested to her that "in order to relieve yourself of the cost and "trouble of the maintenance of this public roadway you should "as soon as the Conveyance is effected, ask the Parish of St. Martin "to confirm the reservations made in Major Brooker's letter . . ." 50

(VIII) By letter dated 8th September, 1924, the legal advisers of Mrs. Bayntum-Roberts wrote to the Parish Connetable on her behalf, informing him of the Conveyance to her of Rozel Barracks and in particular of the reference therein to the public rights of way, quoting from the said letter of 1st March, 1911, from Major Brooker as to the transfer of the road in issue to the Parish on the conditions therein mentioned, and stating that "as there seems to have been no written confirmation of this from the Constable of St. Martin we take it that these conditions were tacitly accepted and now operate. We would be glad to have your written confirmation."

(IX) The Roads Committee of the Respondent Parish subsequently visited the road in issue and on 9th January, 1925, the Roads Committee adopted an Act of that date stating that, in view of the said letter of 8th September, 1924, relating to the said letter of the 1st March, 1911, in which the War Department offered to transfer to the Respondent Parish the road in issue and that transfer not having been confirmed, and in view also of the said Act of the Roads Committee of 5th December, 1910, on this subject, the Roads Committee unanimously decided that it was in the public interest to confirm the said transfer and instructed the Connetable to ask of the Parish Assembly approval of that confirmation.

(x) By an Acte of the Assembly of the Respondent Parish dated 15th January, 1925, that Assembly unanimously approved and confirmed the said Act of the Roads Committee dated 9th January, 1925.

(xi) By letter dated 23rd January, 1925, the Connetable of the Respondent Parish wrote to the legal advisers of Mrs. Bayntum-Roberts with reference to their said letter dated 8th September, 1924, stating that inasmuch as the road in issue had been looked after by the Respondent Parish for many years he took it that thereby the conditions specified in Major Brooker's said letter had been tacitly accepted, and informing them that the Parish Assembly had unanimously decided on 15th January, 1925, to confirm the acceptance of the offer made by Major Brooker on behalf of the War Department.

(xii) By letter dated 26th January, 1925, Mrs. Bayntum-Roberts' legal advisers enclosed copies of their said letter to her dated 3rd September, 1924, and of their said letter to the Parish Connetable dated 8th September, 1924, and reported to her that by the said letter dated 23rd January, 1925, the Connetable had informed them that the Parish Assembly had given its approval. By letter dated 28th January, 1925, Mrs. Bayntum-Roberts acknowledging the said letter from her legal advisers dated 26th January, 1925, said "this seems to be quite in order now."

11. Additionally it was found by the Court of First Instance that Mr. E. L. Bayntum-Roberts acted as the Agent of Mrs. Bayntum-Roberts, and the evidence showed that he was present when the Roads Committee visited the road in issue as stated in paragraph 10 (IX) of this Case and the

p. 22. Roads Committee then confirmed to him that they would be pleased to take it over, that Mrs. Bayntum-Roberts agreed with him in wishing to get rid of the road in issue and that it should be transferred to the Parish, and that after the said visit the Roads Committee went with Mr. Bayntum-Roberts to his house Mrs. Bayntum-Roberts knowing what they had come about.

p. 31.
p. 33. 12. It was accordingly adjudged by the Court of First Instance (and confirmed by the Court of Appeal) that Mrs. Bayntum-Roberts, acting both through her legal advisers and through Mr. Bayntum-Roberts her agent, renewed voluntarily and with full knowledge of the matter the offer made for and in the name of the War Department her predecessor in title on 1st March, 1911, to transfer the road in issue to the Respondent Parish, and that the Assembly of the Respondent Parish on the 15th January, 1925, accepted that offer with the result that it became a public road subject to the reservations in favour of the proprietor of Rozel Barracks mentioned in the said letter of 1st March, 1911. It was further so held that the Conveyance of Rozel Barracks to the Appellant on 6th February, 1932, did not transfer to the Appellant the soil of the road in issue inasmuch as Mrs. Bayntum-Roberts the Vendor was then no longer the owner of such soil, and that consequently the Appellant, not being owner of the soil thereof, had no right of action against this Respondent. 10

p. 31. 13. It was further found by the Court of First Instance (and confirmed by the Court of Appeal) that by the law and custom of the Island a Parish Assembly was able to accept the offer of the proprietor of a private road within the Parish to transfer it to the Parish to be kept up as a public road, without the need for a contract of transfer (as defined above), and that from the moment of the said Act of the Parish Assembly dated 15th January, 1925, the private road (the road in issue) became in the full sense a public road.

14. The Appellant's contention with regard to the transfer of the road in issue to the Respondent Parish by the two Actes dated the 9th and 15th January, 1925, can be summarised as follows :— 30

(A) Realty in Jersey cannot be transferred otherwise than by contract.

(B) Mrs. Bayntum-Roberts never offered the road in issue to the Respondent Parish.

(C) The Respondent Parish did not accept the offer (if any) of Mrs. Bayntum-Roberts.

15. By the common Law of Jersey an existing private roadway can lawfully be transferred to the Parish on whose territory it is situate by the owner of such road offering the same to such Parish and by such Parish accepting such offer by means of " Actes " of its Roads Committee and Assembly ; and in such a case the transfer of such road to such Parish need not be effected by means of a contract. There is no case reported in the Rolls of the Royal Court of Jersey which directly supports the above proposition of Law. But this Respondent will contend that it is a 40

proper inference from the two cases hereinafter mentioned (as well as from the facts later in this Case mentioned) that no contract is in fact needed to transfer a private roadway to a Parish as aforesaid :—

10 (A) On the 2nd December, 1825, the suit instituted by *Edouard Nicolle, Connetable of the Parish of St. Helier*, against *Messieurs Louis Poignand, Junior, and William Le Vavas seur dit Durell* was heard and determined by the Appellate Court of Jersey (Nombre Superieur or Corps de Cour) (Samedi Division). The Plaintiff Connetable stated that the Defendants Poignand and Durell had offered to transfer to the said Parish as public roads the two roads referred to in that case, but that the Parish of St. Helier had deferred accepting that offer. The Connetable complained that, notwithstanding the fact that the said offer had not been accepted by the Parish, the Defendants had, behind the back of the Parish, applied to the Nombre Inferieur of the Royal Court for an order declaring the two said roads public roads. The Nombre Inferieur had granted the application of the said Defendants and had declared the two said roads public. Whereupon the Connetable instituted the aforesaid suit against the Defendants. Had it been the Law of Jersey that a contract was at that date required for the purpose of effectively transferring to the said Parish as public roads the two said roads, the Connetable Plaintiff could easily have pleaded in his Remonstrance (Petition) that no such contract had in fact been passed. Such plea would have been the obvious plea to make in the circumstances of that suit. But no such plea was in fact made by the said Connetable Plaintiff. This Respondent will therefore contend that it is a proper inference to be drawn from the pleadings in the said suit that no such contract was in fact required for the purposes aforesaid.

30 (B) On the 27th October, 1865, the said Appellate Court of Jersey (Samedi Division) gave Judgment in the suit by and between the "*Procureur General*" of the Queen and the Connetable of the Parish of St. Lawrence versus *Elizabeth Poingdestre*. The said Court found that the title of the said Parish to the land which formed the subject-matter of the dispute between the parties was an "Acte" of the Roads Committee of the said Parish, whereas the title of the Defendant to the same land was a contract duly passed before Court. The said Court also found that the said Parish had not taken possession of the said land within a reasonable time after the making of the "Acte" of the Roads Committee. The said Court ruled that the "Acte" of the Roads Committee could not give the said Parish a good title to the said land as against the Defendant unless such Acte were followed by a taking of possession. This Judgment was rendered before the passing of the Law of 1869 on "Chemins Ruraux" (Country Roads) hereinafter mentioned.

40 This Respondent will therefore contend that it is a proper inference to be drawn from this Judgment that no Contract would have been required effectively to transfer the said land to the said Parish if such Parish had taken possession of the said land within a reasonable time after the making of the "Acte" of the Roads Committee.

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p. 34.

pp. 77, 78.

16. Moreover there are very many instances in Jersey of private roads being acquired by Parishes as public roads without a contract being passed but by acceptance of an offer by the owners of such private roads and by an Acte of the Parish Assembly, and fifty-seven examples of this are given in an admitted Schedule produced in the Court below. Such examples are admitted by the Appellant but only as cases in which the relevant Parishes purported to acquire the relevant roads without a contract, and it is implicit in the case of the Appellant that the ownership of all these roads remained private at least in so far as no public title thereto by forty years' prescription has been since acquired. The fact that there may be many examples of acquisition by Parishes of private roads as and for public roads by contract does not support the suggestion that no other method of acquisition is possible. It should be presumed that the method of transfer adopted in the above-mentioned fifty-seven instances, having been adopted and acted upon as valid and effective by the former owners and by the Parishes and the public, were valid and effective and in accordance with the Law of Jersey. 10

17. Neither the Ordinance of the States of Jersey dated the 24th July, 1602, nor the " Code " of 1771 lay down that all transfers of land must be effected by means of a contract, and though there may be cases in which it has been stated as a general proposition that a contract is required for the transfer of land such statements are *obiter dicta* so far as concerns a transfer of the character now in question, and there has been no case in the Jersey Courts which has decided or stated that a contract is required for a transfer of such a character. 20

18. The practice of transferring roads to Parishes without passing a contract but simply by means of Actes of Roads Committees and Assemblies following an offer is a survival in modern form of the ancient practice of passing contracts " a l'ouie de Paroisse." Such ancient practice, though now disused, has never been abolished, and was a recognised method of conveyancing in Jersey before the Public Registry was established in 1602. There is moreover good reason why a transfer of the character now in question should be treated differently in Jersey law from an ordinary transfer of land between individuals, in that the publicity and notoriety achieved by passing contract is achieved in this particular case by the facts of a public Acte of the Parish and of the consequences attendant upon the transfer of a private road to the public. 30

19. Article 7 of the Law of 1869 on " Chemins Ruraux " (country roads) which applied to the Parish of St. Martin makes the agreement of the parties in cases where land is acquired for the purposes of widening an existing road by the Parish registrable in the Public Register at the option of the Constable. Such Law of 1869 although abolished in 1941 was in full force in 1925 when Mrs. Bayntum-Roberts transferred the road in issue to the Respondent Parish. If no registration was needed when a Parish acquired land to widen a road, there is no logical reason why a contract should be needed when a Parish acquired a whole road—the legal principle involved in either case being the same, namely, the acquisition of land for the purpose of a public road without a contract. 40

20. The Respondent therefore humbly submits that the judgment of the 19th October, 1950, of the Samedi Division (Superior Number) ought to be affirmed and this appeal dismissed with costs for the following amongst other

REASONS

- 10 (1) BECAUSE there are concurrent findings of fact that Mrs. Bayntum-Roberts offered to transfer the soil of the road in issue to the Parish upon conditions and that the Parish by its Actes of 9th and 15th January, 1925, accepted such offer upon such conditions and such findings of fact were correct.
- (2) BECAUSE such offer and acceptance operated effectively to transfer the ownership of the soil of the road in issue to the Respondent Parish and it is the property of the Parish and not of the Appellant.
- 20 (3) BECAUSE by the customary Law of Jersey (Droit et Coutume de L'Ile de Jersey) the Assembly of a Parish on whose territory a private roadway is situate, can lawfully accept the offer of the proprietor of such roadway to transfer the same to such Parish with a view thereafter to such roadway being maintained as a Public Road ; and in such case no contract is required in order to effect a legal transfer of such road to such Parish. And with effect from the date of the Acte of the Assembly by which such offer is accepted by such Parish, the former private roadway becomes in Law a Public Road and becomes the property of such Parish to whom it has been so transferred.
- 30 (4) BECAUSE the said judgment of the 19th October, 1950, is right.
- (5) ALTERNATIVELY this Respondent will contend that no mandatory or other injunction should be granted in this case (or alternatively that no injunction should be granted in relation to such of the acts complained of as relate to acts on this Respondent's own property) on the ground that damages would constitute an adequate and proper remedy for the Appellant having regard to the admitted rights of the public over the roadway in question.

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CHARLES RUSSELL.

P. H. GIFFARD.

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Case for the Respondent

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CHARLES RUSSELL & CO.,
37 Norfolk Street,
Strand, W.C.2,
Solicitors for the Respondent
H. F. J. Wigram.