

GAG 57

17,1954

No. 13 of 1951.

In the Privy Council.

37895

ON APPEAL  
FROM THE ROYAL COURT OF THE ISLAND OF JERSEY.

BETWEEN ARTHUR VILLENEUVE NICOLLE (*Plaintiff*) APPELLANT

AND

HENRY FREDERICK JAMES WIGRAM  
(*Defendant*)

HENRY AHIER, Constable of the Parish

of St. Martin (cited)

RESPONDENTS

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UNIVERSITY OF LONDON  
W.C.  
24 FEB 1955  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

**CASE FOR THE APPELLANT.**

RECORD.

1. This an Appeal from a decision of the Superior Number of the Royal Court of Jersey dated 19th day of October 1950 affirming a judgment of the Inferior Number (Samedi Division) of the same Court dated the 13th day of April 1950.

2. The Appellant commenced the present action by an Ordre de Justice dated the 21st June 1948 claiming that the Respondent Wigram be ordered to block up certain windows in the eastern wall of the latter's property, to remove rainwater pipes from the said wall and to remove also a drain and a vent pipe (connected with a Tuke and Bell Sewage Disposal plant) which he had laid or placed in or upon a road claimed by the Appellant (hereinafter described as the "chemin") and situate at Rozel in the Parish of St. Martin in the Island of Jersey. pp. 1-3.

3. The issue of the action depends upon the question whether the chemin is a private road (chemin particulier) belonging to the Appellant or a public road (chemin public) belonging to the Parish of St. Martin.

RECORD.

4. If the chemin is the property of the Appellant the Respondent Wigram is not entitled to make openings for or to build the said windows in the said wall or to attach the said rainwater pipes to the said wall or to lay or place the said drain or vent pipe in or upon the said road without the consent of the Appellant by contrat passed before the Royal Court and the Respondent Wigram did not obtain such consent or such a contrat. At the request of the Respondent (Wigram) the Constable of the said Parish was added as a party (appelé en cause) by order of the Court dated 26th June 1948. The Constable is the Civil Head of the Parish.

p. 4, ll. 6—8 and  
ll. 15—16.

5. In the year 1810 the War Department acquired land at Rozel for the purpose of erecting Barracks. The area of land thus acquired was delimited by the placing of Boundary stones bearing the mark of Her Majesty's Government. The Barracks were constructed in such a way as to leave within the boundary stones a road extending first in a northerly and then in an easterly direction from the Barrack Entrance to the foreshore at the north-eastern corner of the Barracks and skirting part of the western and the whole of the northern walls of the Barracks. This road is the above-mentioned chemin. The lay-out plan included in the Record shows both the Barracks and the chemin, and also another road connecting the Barracks' entrance with the public road known as the Grande Route du bas du Mont de Rozel, which runs southwards from near the Harbour of Rozel in the Parish of Trinity to the ancient public road to the South West of the Barracks in the Parish of St. Martin.

pp. 68—69 and  
p. 76, ll. 6—12  
and ll. 25—27.

(In folder A.G.)

6. On the 5th December 1910 the Roads Committee of the Parish of St. Martin accompanied by the Officer commanding the Royal Engineers in the Island and the representative of the Seigneur of Rozel visited the site of the chemin and took official cognisance of four of the aforesaid boundary stones stamped with the mark of Her Majesty's Government, which were and are still to be seen alongside the chemin. A resolution (Acte) of the Roads Committee was then passed in the following terms, viz. :—

pp. 37—38.

“ Paraisant que le fond dudit chemin conduisant de ladite Grande Route du bas du Mont de Rozel à l'entrée principale des Casernes est propriété publique et que le reste dudit chemin à partir des bornes en allant Nord (au pourportant de la propriété de l'héritier de feu Charles Arthur Fletcher Ecr.) et Sud (? Est) en passant en devant de la propriété dudit Reginald Raoul Lemprière Ecr. Seigneur comme dit est appartient au Gouvernement de Sa Majesté et que ledit Seigneur y a droit de chemin et passage toutes fois et quantes et à tous usages.

p. 38, ll. 16—29.

Considérant que ledit chemin sert également à l'usage du Public et qu'il y a lieu de le maintenir à l'avenir comme chemin public à la charge de la Paroisse.

Le Comité en a décidé ainsi et a chargé le Connétable de transmettre copie du présent acte audit Major Brooker Commandant comme dit est pour l'information du Gouvernement de Sa Majesté ”.

7. The Constable of St. Martin duly communicated the Acte to Major Brooker. In his reply on the 1st March 1911 Major Brooker stated that the chemin, which he described as “ the road coloured yellow on the enclosed plan ”, was the property of the War Department subject to a public right of way. He also stated that the War Department was prepared to transfer the road at once to the Parish of St. Martin, subject to the following reservations, viz. :—“ Provided that 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'échelle 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 ”. No agreement as to transfer was concluded at that time and the chemin was not transferred to the Parish.

8. On 6th September 1924, the War Department sold to Elizabeth Grant Ross the Barracks with all the land, buildings, and walls and appurtenances which belonged thereto and generally all such property as belonged to the War Department in that locality without any reserve. The purchaser was Mrs. Bayntum Roberts (she was in 1924 the widow of Mr. Rose who died in 1917 and she married Captain Bayntum Roberts in 1926) but in accordance with legal usage in Jersey she is described in the document by her maiden name, Dlle. Elizabeth Grant Ross and she is so described in this case also. The method by which the sale of the property was effected has long been customary in the Island. It is part of the law of Jersey contained in the Code of 1771 and it existed before that date. A “ passation de contrat ” took place before the Court in the presence of the parties when they had acknowledged the transaction and took oath to observe its terms and the contrat was then inscribed in the Registre Public of the Island. The chemin, i.e., the land (“ le fonds ”) on which the chemin is situated, was conveyed by the contrat as well as the Barracks. The contrat contained the following clause :

“ Et souffriront ladite Preneuse et Acquéreuse et ses hoirs droit de chemin et passage toutes fois et quantes pour l'usage du Public par sur certain chemin ou ruelle qui longe en partie par l'Ouest ainsi que par le Nord les murs extérieurs desdites casernes et ce conformément aux termes tant de certain Acte du Comité des Chemins de la paroisse de St. Martin en date du cinquième jour de Décembre mil neuf cent dix que de certaine lettre datée du premier jour de Mars mil neuf cent onze signée par Edward Part Brooker Ecr. alors Major Commandant le Génie Royale en cette Ile pour et au nom du Département de la

Guerre de Sa Majesté au Connétable de ladite Paroisse de St. Martin relativement à l'usage dudit chemin par le public, recours à iceux, et ce en outre tels titres spéciaux comme peuvent exister à ce sujet ”.

p. 41.

9. On the 8th September 1924 the legal advisers of Dlle. Elizabeth Grant Ross wrote to Mr. John Pallot, who was then Constable of St. Martin, referring to the offer which the War Department had made in the above-mentioned letter of 1st March 1911 to transfer the chemin to the Parish on certain conditions. They added “ As there seems to have been no written confirmation of this from the then 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 for purposes of record ”.

p. 39.

pp. 20—22.

10. Captain Bayntum Roberts stated in his evidence that at the end of 1924 and the beginning of 1925 he was acting as agent of Dlle. Elizabeth Grant Ross and that he had some conversation with the Constable about the chemin. The following words in his evidence apparently relate to something said by him in that conversation, viz. : “ If it (i.e., the chemin) belonged to the Barracks, I was quite pleased to get rid of it ”. He also stated that “ The Roads Committee then came down and confirmed that they would be pleased to take it over ”, and he says that Mrs. Rose (as she was then) agreed to transfer the road. Evidence about this meeting of the Roads Committee was also given by Mr. J. W. Messervy, who was a member of the Roads Committee at the time. Neither Capt. Bayntum Roberts nor Mr. Messervy gave evidence of any reference to the reservations which are mentioned in paragraph 7 above.

p. 21, ll. 27—28.

p. 21, ll. 28—29.  
p. 22, ll. 3—4.

pp. 23—24.

p. 44.

11. On the 9th January 1925 a meeting of the Roads Committee of the Parish was held consisting of the Constable, the Rector, the said Mr. J. W. Messervy and Mr. W. G. Renouf. The Committee passed an Acte relating to the chemin. In that Acte they mentioned the said letter of the 8th September 1924 from the legal advisers of Dlle. Elizabeth Grant Ross to the Constable which referred to the said letter of the 1st March 1911 from Major Brooker to Mr. Charles Perchard, who was then the Constable of St. Martin : they mentioned also the offer contained in the said letter of the 1st March 1911 to transfer the chemin to the Parish : they then added the words “ et ledit transfert n'ayant pas été confirmé ” : they then mentioned their own above-mentioned Acte of 5 December 1910, and they decided unanimously “ qu'il est dans l'intéret public de confirmer ledit transfert ” and instructed the Constable “ de demander à l'Assemblée des Principaux et Officiers d'approuver ladite confirmation ”.

p. 41.

p. 39.

p. 44, ll. 14—15.  
pp. 37—38.

p. 44, ll. 17—20.

p. 44, ll. 21—28.

12. The Constable of St. Martin then convened a Meeting of the Principaux et Officiers of the Parish which was held on the 15th January 1925 and at this Meeting it was agreed by a unanimous vote to confirm the above-

mentioned Acte of the Roads Committee of 9th January 1925. The Constable informed the legal advisers of Elizabeth Grant Ross of the decision of the Parish Meeting by letter dated 23rd January 1925. p. 42, ll. 1—20.

13. On the 6th February 1932 Dlle. Elizabeth Grant Ross sold the Barracks to the Appellant. The sale was effected by contrat in the method already described in paragraph 8 of this Case. The Contrat purported to convey the Barracks “ avec le terrain qui en appartient ou en dépend étant généralement tout et autant de propriété comme ladite Bailleresse et Venderesse en prit et acquit à fin d’héritage des Autorisés du Département de la Guerre de Sa Majesté par contrat en date du six Septembre mil neuf cent vingt-quatre ”. It contained also the clause set out in paragraph 8 above regarding a public right of way. It purported to transfer the chemin to the Appellant or (to quote the judgment of the Jersey Courts) “ il prétendit transférer à l’acteur (i.e., the Appellant) “ le fonds ” of the chemin, and the Appellant submits that it effected such transfer. pp. 66—67.  
p. 66, ll. 24—28.  
p. 66, l. 34—p. 67, l. 5.

14. The Respondent claims that by custom a Parish in Jersey can acquire the fonds of a chemin not by a passation de contrat, but by a resolution (Acte) to that effect passed by the Parish Assembly. The Jersey Courts have found such a custom and have defined it in the following terms :—

20 “ CONSIDERANT que par la coutume de cette Ile l’Assemblée des Principaux et Officiers d’une Paroisse sur le territoire de laquelle se trouve un chemin particulier peut accepter l’offre du propriétaire de tel chemin particulier de le transférer à la Paroisse, pour être maintenu à l’avenir comme chemin public, sans qu’il soit nécessaire qu’un contrat héréditaire translatif de tel chemin particulier par son propriétaire à la Paroisse soit passé devant Justice, et qu’à partir de la date de l’Acte de l’Assemblée par lequel telle offre est acceptée le ci-devant chemin particulier devient de plein droit chemin public ”. p. 31, ll. 21—29.

30 On the basis of such custom the Jersey Courts have held that the Parish acquired the chemin when the above-mentioned resolution of the Parochial Assembly was passed on 15th January 1925. p. 31, l. 39.  
p. 44.

15. The Appellant submits that no custom as alleged has been proved and none exists. No recognition of its existence was cited from any book which deals with Jersey law or is commonly cited in the Jersey Courts.

Documents referring to entries contained in the Registre Public or the Rolls of the Royal Court or the parochial Records and also extracts from the Registre Public were put in evidence in relation to the acquisition of chemins or of land to be used as part of a chemin but the Appellant submits that the true conclusion upon this documentary evidence is that it does not establish the alleged custom. The Appellant also relies on the fact that the earliest entry put in by the Respondent is dated 1817. pp. 34—36 and pp. 50—63.  
p. 34, l. 8.

RECORD.

Further the alleged custom is bad for uncertainty, e.g., it is not clear whether it is or is not confined to chemins which are transferred gratuitously to a parish. It is uncertain too whether the fonds of the chemin is or is not transferred by the alleged custom immediately upon the passing of the Acte of the Parish Assembly and also whether the alleged custom requires an entry of the transfer to be made in the Minutes of the Parish Assembly. The rules relating to realty conveyed by passation de contrat devant Justice require, not only that the transaction shall be registered, but also that it shall be registered in the Registre Public, which the public in general have a right to inspect.

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Further the alleged custom is unreasonable in that it does not require that the transferor of the chemin to the Parish or someone representing him should be present at the Parish Assembly at which the offer is to be submitted or that the offer should be put into writing and signed by or on behalf of the transferor for the purpose of being read to the Parish Assembly.

Furthermore even if the custom exists as stated by the Jersey Courts, the transaction here in question does not fall within it, because the Acte of the Parochial Assembly of 15th January 1925 by confirming the above-mentioned Acte of the Roads Committee of 9th January 1925 purports to accept an offer of the chemin by the War Department in 1911, whereas the War Department had ceased to be the owner of the chemin in 1924, and it does not refer specifically to the conditions of the said offer, and further in any event an offer made by the War Department in 1911 must be deemed to have lapsed before 1925.

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p. 44, ll. 21—28.  
p. 44, ll. 1—20.  
p. 39, ll. 11—36.

16. The Appellant humbly submits that the judgments of the Royal Court of Jersey should be reversed and judgment should be entered against the Respondent in accordance with the claim of the Appellant set out in paragraph 2 hereof, for the following amongst other

## REASONS

- (1) Because the Appellant is the owner of the chemin.
- (2) Because the alleged custom has not been proved.
- (3) Because the alleged custom is uncertain and unreasonable and contrary to the law of the Island.
- (4) Because, even if the alleged custom does exist, the offer and the acceptance which are alleged do not satisfy it.
- (5) Because the judgments of the Jersey Courts are wrong and should be reversed and judgment should be entered for the Appellant.

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C. T. LE QUESNE.

L. V. BAILHACHE.

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BETWEEN  
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*(Plaintiff)*  
APPELLANT

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**HENRY FREDERICK JAMES**  
**WIGRAM - - - -** *(Defendant)*  
**HENRY AHIER, Constable of the**  
**Parish of St. Martin (cited)** RESPONDENTS

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**CASE FOR THE APPELLANT.**

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