

Privy Council Appeal No. 13 of 1951

Arthur Villeneuve Nicolle - - - - - *Appellant*

v.

Henry Frederick James Wigram and Another - - - *Respondents*

FROM

THE ROYAL COURT OF THE ISLAND OF JERSEY

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 27TH APRIL, 1954**

Present at the Hearing :

LORD PORTER

LORD MORTON OF HENRYTON

SIR JOHN BEAUMONT

[*Delivered by* LORD PORTER]

This case raises a difficult question of the law of the Island of Jersey for their Lordships' determination. The point at issue is as to the method of transference of a parcel of land from private ownership to one of the parishes of Jersey so as to make it public property. The appeal is from a judgment of the Superior Number of the Royal Court of that Island which affirmed a judgment of the Inferior Number of that Court. The facts as found by the Court of first instance can be shortly stated.

In 1810 the War Department acquired certain land and built a Rozel Barracks upon it. When erected the Barracks left a strip of land outside the North and West walls to serve as a new road in place of one enclosed within their curtilage.

In fact the War Department for many years allowed this road to be used as if it were a public road and the parish authorities treated it as such and from 1866 at least sold the sweepings, an action which was unjustified unless it was a public road.

In 1910 the Comité des Chemins of the parish of St. Martin in which the property in question is situated, visited the road the ownership of which is involved. They were accompanied by the Officer then in Command of the Royal Engineers and by a representative of the Seigneur de Rozel and passed a resolution or "Acte" that the road in question belonged to Her Majesty's Government and that the seigneur had a right of way over it. The resolution went on "Considerant 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," and then proceeded to instruct the Constable to send a copy to the Officer Commanding for the information of Her Majesty's Government.

In fulfilling the instructions the Constable wrote "You will observe that in the opinion of the Committee the site of the roadway . . . is Crown property subject to a public right of way."

In his reply of March 1st, 1911, Major Brooker who was then in Command stated that he was directed to acquiesce in the opinion of the Committee and added:—

"The War Department is prepared to transfer this road at once to the Parish Authorities, 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'échelle for repairs to that property, and way leave for any drainage water or other pipes that it may be desired to place under the road without causing permanent damage thereto."

No further steps appear to have been taken at that time but in September 1924 the War Department sold to a lady née Ross, who was then a Mrs. Rose and later in 1926 married Mr. Bayntum Roberts.

The method of transferring the ownership was that usual since 1771 and common before that date under which a "passation de Contrat" took place before the Court in the presence of the parties who acknowledged the transaction and swore to observe its terms. The contract was then inscribed in the public Register of the Island. It conveyed the land over which the road passed and contained a clause reading as follows:—

"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."

Immediately after the transfer of the property to Mrs. Rose her solicitors wrote to Mr. Pallot, the then constable, announcing the conveyance, setting out the clause just transcribed and the wording of the letter of March 1911 and 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."

The reply of the constable had better be set out in full. It is in these terms:—

"Referring to your letter of September 8th, 1924, I beg to inform you that the road North and West of Rozel Barracks has been looked after by the Parish of St. Martin for many years, therefore by so doing, I take it that the conditions as specified in the letter of March 1st, 1911 (addressed to the then Connétable of St. Martin and signed by Edward Part Brooker, Esq., Major C. R. E.) had been tacitly accepted.

At a Meeting of 'Principaux et Officiers' duly convened and held in the St. Martin's Public Hall on January 15th, 1925, I brought the above matter before the said Meeting, when by a unanimous vote it was agreed to confirm the acceptance of the offer made by Major Brooker on behalf of the War Department, and I was requested to inform you of said confirmation."

The letter and reply were duly passed on to and accepted by Mrs. Rose.

The confirmation referred to was effected by means of an "Acte" of the Comité des Chemins of the parish. The wording of the Acte is as follows:—

"Vu certaine communication de la part de Messrs. Renouf et Ereaud, en date du 8 Septembre 1924 par rapport à une lettre en

date du 1 Mars 1911, dans laquelle le Département de la Guerre offre de transférer à la paroisse de St. Martin une certaine ruelle qui longe en partie l'Ouest, ainsi que part le Nord les murs extérieurs des Casernes situées à Rozel et ledit transfert n'ayant pas été confirmé.

Vu également l'Acte du Comité des Chemins en date du 5 Décembre 1910 à ce sujet. Le Comité à l'unanimité, après délibération a décidé qu'il est dans l'intérêt public de confirmer ledit transfert et a chargé le Connétable de demander à l'Assemblée des Principaux et Officiers d'approuver ladite confirmation."

This Act was duly confirmed by the parish assembly on the 15th January, 1925.

The further facts which give rise to this litigation are that Mrs. Rose sold the barracks to the appellant on the 6th February, 1932. The conveyance purported to pass such property as Mrs. Rose purchased from the War Department with a right of way over the road in question in conformity with the terms of the Acte of the Roads Committee of the parish of the 5th December, 1910, already referred to, and of Major Brooker's letter of the 1st March, 1911.

To the west of the barracks and immediately beyond that portion of the road, now the subject matter of dispute, which runs north and south lies a house which the respondent purchased from the appellant sometime about the year 1947. Shortly afterwards with the consent of the respondent parish the respondent built six windows overlooking the road and within three feet of it and also with the like consent installed on his own property a sewage disposal plant and placed some pipes and vents belonging to this plant in the road in issue.

If the road in question is the property of the appellant both these acts were unjustified and constituted a tort as against the appellant.

As a result the appellant in June, 1948, commenced an action against the respondent complaining of the matters aforesaid and asking for an injunction and damages.

His contention was that he had purchased from Mrs. Rose such property as she owned, that this property included the road in question, that by the law of Jersey a private road or indeed any property can only be transferred by a "contrat héréditaire" passed according to the usual forms before the High Court and that neither the Government nor Mrs. Rose had followed the required procedure with the result that the soil of the road and it may be all rights over it were retained by Mrs. Rose and transferred to Mr. Nicolle.

The respondent on his part maintained that the offer contained in the letter from Mrs. Rose's solicitors in 1924 followed by the Acte of the parish in 1925 was effective to transfer the property in the road and the rights over it to the parish at any rate when combined with acts only consistent with the rights claimed by the parish.

As the rights of the parish were involved the constable Mons. Henry Ahier was later added and became a co-defendant with Mr. Wigram and claimed that by the law of Jersey a road and its soil could be effectively transferred to a parish by means of an Acte of the parish meeting which accepted an offer of the previous owner.

In their Lordships' opinion the letters which passed in 1924, coupled with the events of January, 1925, amounted to an offer by Mrs. Rose to transfer the road to the parish on the terms set out in the letter of 1st March, 1911, and an acceptance of that offer.

The sole question therefore for their Lordships' consideration is whether in law a private road can be transferred to the parish by this means.

No question of a particular custom arises: what has to be determined is what is the general law of Jersey. That such a method is ineffective to pass the property is asserted by the appellant and supported by reference to the historical incidents and growth of the law of the Island.

It is as their Lordships think common ground that prior to the year 1562 the ordinary if not the only method of transfer was by audience of the parish (ouïe de paroisse) i.e. the conveyance was pronounced before the parish in the churchyard. At that time no writing nor apparently any formal act of the parishioners was required. This informality led to a number of abuses and frauds and accordingly certain royal Commissioners were appointed for the affairs of Jersey who with the advice of the local authorities framed certain ordinances; those relative to the transfer of land providing that: "Henceforth all hereditary contracts bargains or conveyances . . . shall be passed before the Court or in a place which bears record or otherwise the true copy thereof shall remain for record in the hand and custody of the Court for and to the end that in time to come if any one loses his title or evidencies he may easily recover them."

Later on it is ordered that "henceforth no contract or conveyance of heritage . . . shall be made in churchyards save publicly on a solemn day at the end of Divine service."

The ordinance went on to provide that to bear witness of the bargain at least six men of standing should bear witness of the deed previously put in writing to which they should set their marks and further "that the bargain or contract should be duly proved within 40 days".

These provisions were followed by the enactment in 1602 that all transfers or hereditary contracts which in future were passed before the Court should be registered in the prescribed manner.

Nearly two centuries later, in 1771, the Code of the Laws of Jersey was agreed upon by the States of the Island of Jersey and approved by His Majesty. This Code re-enacted the provisions of the Act of 1602 and declared that all hereditary contracts which should be passed before the Court should be written out in full in the Register and after registration the contracts should be produced before the Court in order that they might be compared with the entry in the Register and later returned to the parties.

The usual procedure for the conveyance of land is perhaps best described in the Report of the Commissioners presented to Parliament in 1861: they say at page xviii under the side note "Conveyances":—

"All conveyances of real property, whether lands or rentes, take place by matter of record. A short and very simple deed (or contract, as it is called) is drawn up, containing the names of the parties, the consideration, a description of the property and the nature of the interest conveyed and a warranty of the title by the conveying party. This contract is passed before the Royal Court consisting of the Bailiff and two Jurats, who sign it and cause it to be sealed with the seal of the Bailiwick; it is then registered, being transcribed verbatim and at length in the Register of Contracts. It is so completely a record of the Court that the parties do not even sign it: they merely appear, and having been sworn, express their assent to it. It expresses on the face of it that the parties appear before the Court (devant justice), and at the end of the document they are condemned by the Court to fulfil its conditions."

This method, the appellant maintains, is the only means by which a conveyance of land can be made and adds that the enjoyment of a right of way can only be gained by a conveyance of the soil since in the words of Lord Davey when delivering the judgment of the Board in *Godfray v. Constables of the Island of Sark* [1902] A.C. 534 at p. 538.

"In the Channel Islands the doctrine of dedication to the public is unknown, and the public, like a private individual, must make out their title to a right of way by grant or prescription." Some qualification of these observations is made by the statement that a forty years' possession by the parish as a public way accompanied by acts of ownership might (or might not) support a servitude in the parish, but no such claim is made in the present case.

Apart from the laws which have been mentioned, the appellant's advisers support his case by reference to the text book writers upon the laws of Jersey.

In addition to the matters already set out they point to Le Quesne's Constitutional History of Jersey [1856] pages 185 and 186, page 359, and from page 565 set out the form of a contract for sale of a rent of the year 1465.

It is to be observed that whilst the mode of transfer of land after 1602 is stated to be according to the method prescribed in 1602 and confirmed in 1771, it is assumed that in earlier times heritable property was accustomed to pass by proclamation in the churchyard even without writing.

Similarly in his Coutumes Reformée Poingdestre says:—

"Nous observons que nulle promesse héréditaire n'est valable, si elle n'est passée par devant le Bailly et Jurés et enregistrée. Anciennement il falloit qu'elle fût audience à ouïe de Paroisse. Mais par le present n'usons plus gueres de Lectures de Lettres depuis l'Etablissement de Registre public. En quoi nous ne faisons pas bien."

A statement which seems to imply that the customary method of conveying land in the seventeenth century was by registration. But the author in this passage is dealing with the transfer to descendants and the word "promesse" may be limited to such a transfer.

Havet writes to the same effect when he says: "Aucun contrat n'est valable en justice s'il n'est passé sous sceau de la baillie." He goes on to point out that in Edward the first's time only verbal agreements could be made in the Island as there was no means of passing a written deed.

So too Le Geyt in Lois et Coutumes de l'Isle de Jersey which apparently reached its final form about the beginning of the last century says in Title I, Article 17, that all contracts of sale ought to be passed under oath before the "Bailly et 2 Jurez", and in Title IX, Article 5, repeats this statement and adds that assignments of "rente" and exchanges agreed upon between the parties which are presented to and read publicly in Court pass without oath and are enrolled in the records of the Court in order that they may have continuing effect.

Furthermore, it is pointed out on behalf of the appellant that none of the writers or writings referred to suggest that any exception exists in the case of the transference of a road to the parish.

Their Lordships have set out these authorities since they present a formidable case on behalf of the appellant and if they apply to the transfer of roads to a parish would seem to show that the road in question had never been effectively transferred to the parish.

The respondents on their part rely upon the letters which passed between Mr. Roberts' representatives and the Constable in 1924 and 1925 together with the "Actes" of the Comite des Chemins and of the Parish Assembly on the 9th of January in the latter year as a renewal of the Government's offer in March, 1911, and its acceptance in 1925. This contention was accepted by both Courts in Jersey. They say that Mrs. Ross "renouvela . . . l'offre faite le 1 mars, 1911" and "L'assemblée des Principaux et Officiers de ladite Paroisse, le 15 janvier 1925, accepta ladite offre." As they have indicated their Lordships are of opinion that this is the effect of those letters coupled with the "Actes" and consequently it has to be determined whether the road in question could in law so pass to the parish and become public.

The Courts in Jersey held that it did and expressed their views by saying:—

“ Considerant que par la coutume de cette île 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 ; ”

In the respondents’ contention the method of transferring a road to a parish is not confined to one way only.

In their submission it is essential to consider what steps have been taken from at least 1817 to the present time to transfer roads to parishes in Jersey and they rely upon decisions of the Courts of Jersey as showing that offer and acceptance by “ Acte ” of the parish at any rate if followed by the taking over of the road by the parish is a valid method of transfer.

By way of supporting their thesis the respondents have produced a list of some 63 cases of the transfer of roads to a parish, in none of which has there been any registration in the public register though in some six cases the transfer has been registered in the books of the Royal Court, and point out that throughout this period the two law officers were members of the Council of the parish in which they lived and that it is unlikely in all instances they were ignorant of what was going on. The appellant’s advisers on their part however have called attention to a number of instances where the formal method of “ contrat ” and registration has been followed, to the fact that the respondent’s list is confined to two parishes and that there are only four examples taken from one of these two so that in substance the instances are confined to St. Helier which was rapidly growing and they suggest may have neglected the prescribed forms.

Such an argument might prevail if the instances taken were either few in number or confined to a short period of time but they extend over 120 years and having regard to their frequency it is difficult to envisage that the provisions of the law were neglected in so many cases especially as it appears from page LXI of the Report of the Commissioners in 1861 that the parochial assembly was composed of persons of position and importance and is a public body. Moreover the existence of a certain number of cases in which the formal method of transfer has been used is far from conclusive in proving that no other method was possible.

But examples in which property has been passed to a parish in the more informal way are not confined to mere instances in which the steps asserted as necessary by the appellant have not been carried out

Two decisions which support this practice are quoted in the case presented by the respondents.

In the first instituted in 1825 by Edouard Nicolle Constable of the Parish of St. Helier against Messieurs Poignand and Durell who had offered to transfer two roads to the parish the Constable complained that behind the back of the parish the lower Court of Jersey had declared the roads public although the offer had never been accepted. When the case came on for appeal it was contended that according to ancient usage every proprietor of a private road who wishes to make it public must apply to the Assembly of the parish to accept the ownership and that when the Assembly does accept the offer it makes an Acte which the Constable presents to the Royal Court that it may be registered in the Court Rolls. Nevertheless the Supreme Court rejected the Constable’s submission condemned him in costs and discharged the defendants from the action. It is true that this result was only arrived at by the casting vote of the Chief Magistrate but it is a decision of the Superior Court and goes further in its informality than is claimed

in the present case. If a registerable contract was necessary it is difficult to see why its absence was not relied upon as it would have constituted an incontrovertible plea on behalf of the Constable.

Similarly in 1865 in an action by the Procureur General and Constable of the Parish of St. Lawrence against Elizabeth Poingdestre where the lady claimed under a contract duly passed before the Court whereas the title of the parish was an "Acte" of the Roads Committee it was held, it is true, that the lady's title prevailed. But the ground of the decision was that the "Acte" of the parish had not been followed by the taking of possession and without such taking the "Acte" was insufficient to pass the title. Here again if a registered contract was necessary in their Lordships' view a plea to that effect must have been asserted and prevailed.

Moreover in Le Gros' book on the Droit Coutumier de Jersey at p. 336 two cases are referred to in which "Actes" of the parish were read in the Royal Court accepting an offer of two roads as public streets whereupon the Court declared them public. There was, it is true in these cases, at least a public reading in Court but there is no suggestion of the necessity of the registration of a contract. Offer and acceptance and the Court's approval were held to be enough.

In their Lordships' opinion approval by or registration in the records of the Courts in the case of a gift of roads to a parish is directory and not mandatory. This view is they think borne out by Article 7 of the Reglement sur l'élargissement des Chemins public of 1869 relating to "Chemins Ruraux" under which an agreement made between the parties (i.e. the proprietor and the parish) shall be enrolled in the book of the Actes of the "Comité des Chemins" of the parish and may be ("pourra") at the instance of the Constable entered in the Public Register. In this phraseology the use of the word "pourra" and not "devra" is significant.

Nor indeed is the respondent's contention inconsistent with the various measures which have been referred to and in particular it is not inconsistent with the Code of 1771, which at p. 276 says:—

"tous les Contrats héréditaires qui seront passés par devant Justice seront enregistrés selon les Ordres des Commissionaires" and at p. 277 under the heading Registres it is stated:—

"Tous contrats ou passemens qui seront faits par devant le Bailly ou son Lieutenant, et deux ou trois Jurés Justiers seront écrits en lettres formelles, et seront delivrés audit Enregistreur."

Wording which at any rate in terms does not apply to all such contracts but only to those which are brought before the Court.

Finally their Lordships cannot fail to be impressed by the fact that neither those acting for Mrs. Rose nor the members of two Courts in Jersey found difficulty in reaching the conclusion that a private road could validly pass from private to public ownership by an offer duly accepted or implemented by an act of the parochial assembly.

Their Lordships agree with this conclusion and will humbly advise Her Majesty to affirm the judgment of the Courts of Jersey.

The appellant must pay the costs of both respondents of the appeal to their Lordships' Board.

In the Privy Council

ARTHUR VILLENEUVE NICOLLE

v.

HENRY FREDERICK JAMES WIGRAM

[DELIVERED BY LORD PORTER]