Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeals of Sophie Anne Jeanne De Carteret v. *Philippe Baudains, Constable of the Parish of St. Helier, and others, and of Sophie Anne Jeanne De Carteret* v. *Thomas Gautier and Philippe Baudains, from the Royal Court of the Island of Jersey; delivered 9th April* 1886.

Present:

LORD BLACKBURN.
LORD HOBHOUSE.
SIR RICHARD COUCH.

DE CARTERET *v.* BAUDAINS and Others.

The appeal in this case is against a sentence of the Cour Royale of the 24th November 1884.

That sentence recites a previous order of 19th September 1884, by which judgement was postponed until a cause pending between the same Plaintiff and Mr. Thomas Gautier and the Connétable of the parish of St. Helier, vouched by him "appele en cause," should be disposed of, and then proceeds to say that, the last-mentioned cause having been disposed of, "the Court, in deciding "on this case, has been divided in opinion, seven "Judges being of opinion that the Plaintiff has "failed in proof of her allegation that the said "road was her private property; two of whom are "also of opinion that the parish of St. Helier has "failed in proof of its allegation to the contrary, "and three of them that the road is public to the "breadth of eight feet only. One of the Judges

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" has been of opinion that the road is the private " property of the Plaintiff. Therefore the Court " has determined that the road is parish property " for a width of eight feet, and that the parish had " no right to cause the demolition of the wall and " pillars at the western end of the road."

The Court then condemns the Connétable to pay 10*l.* damages to the Plaintiff, and condemns each party to bear half the costs.

There is also an appeal brought in the cause, in which the Connétable was vouched by Gautier.

The two appeals, though arising out of nearly the same transaction, must be decided *secundum allegata ac probata* in the two causes, which are not identical. But it is convenient to begin by making some preliminary remarks common to both appeals.

Jersey is governed by its own law.

It was a portion of the Duchy of Normandy until that duchy was lost by King John. Its law is founded apparently mainly on the old custom of Normandy, much modified by the usage in the island and by the legislation in the island. Counsel on both sides were agreed in denying to the English common law of real property any force.

There is a law of the States of the Isle of Jersey, passed on 7th July 1874 and confirmed by Her Majesty, by an Order in Council, on 25th July 1874, which is to be found in the third volume of the " Lois et Règlements " of the Isle of Jersey not comprised in the Code of 1771.

It does not seem necessary to examine the system of parochial management before this law, which is that now in force. Probably, the old system was, in a great measure, re-enacted, though in some respects altered.

There are inspectors chosen, on whom devolves the immediate execution of the repairs of public ways; but they are under the control of the "Comité des Chemins," consisting of the Connétable of the parish, three of the principal inhabitants triennially elected, and certain persons who, *ex officio*, have votes.

The 16th Article requires the Comité to receive and examine all representations made to them, and call before it those who can give information. This would seem to be for the purpose of securing that the Comité shall not inadvertently fail to support roads which really are public, nor, on the other hand, inadvertently infringe the rights of individuals.

The Comité have great powers as to roads already public, but they have no power to adjudicate as to whether a road is a public road or not. Any question between them and an individual as to whether a road is already public must be decided by the Court.

Their Lordships understand both sides to agree on the following matters common to both appeals. Part of them are embodied in the shape of a plan not in the record.

Both sides are agreed that a road to Pouquelay running nearly south to north is a public road. This road passes by what, in the sentence already quoted, is described as "the western end of the road" now in dispute.

Both sides are also agreed that a road to Vaux running from south to north-east is a public road. This latter road is to the east of the road to Pouquelaye.

The road to Vaux, in the southern part of it, runs along the bottom of a valley, on the western side of which, at about a hundred yards distant from the public way, is a steep but not precipitous ridge.

On that ridge, about 900 yards east of the road to Pouquelay and about 100 yards west of road to Vaux, is a house and gardens, which, it is not now disputed, are the house and gardens of the Plaintiff. It is not now, at least, disputed that a carriage way, eight feet wide, leading along the top of this steep but not precipitous ridge from the Plaintiff's house, and joining the public road to Vaux some way to the north-east, is the private road of the Plaintiff. But, from the south-east end of the Plaintiff's gardens, what is called a "ruelle," or lane, runs down this steep though not precipitous bank to the public road to Vaux.

A number of the inhabitants made a representation to the Comité, in substance that the road along this lane, and thence along what the Appellant alleges to be her approach to the public road to Pouquelaye, was an immemorial public road from Vaux to Pouquelet, improperly obstructed. The Comité, as by the 16th Article they were required to do, heard what was alleged on behalf of the party interested, Mme. Osmont, the Appellant, who now sues in her maiden name of De Carteret. The Comité, by a majority, at first decided that there was not sufficient evidence that the alleged road was public; but, on the 8th September 1880, it was resolved "that "the said lane," described as leading from Vaux to Pouquelaye, "has been public from time im-"memorial, and that, in future, it should be "maintained and dealt with as such by the "parish."

The two actions on which the two appeals are brought were commenced on the same day, 19th October 1880, with the obvious intention of preventing the road in dispute from being established to be a public road, and also claiming damages. This much may be considered as common to both appeals.

Their Lordships now proceed to deal with this appeal alone.

The Plaintiff sues in the Cour Royale in her maiden name of De Carteret, setting forth that, as sole heiress of Charles De Carteret, her deceased father, she was owner of a house, outbuildings, lands, and appurtenances in the parish of St. Helier, known under the name of Mont à l'Abbé Manoir. That these premises have as their principal approach the drives which lead direct from the public road called La Pouquelaye to the said house and appurtenances. That at the extremity of this drive or approach there were for many years barriers, which were thrown down on the night of the 8th or 9th September 1880, or thereabouts. That on the 22nd of September 1880 men were seen removing the remains of these barriers. On being challenged by the Plaintiff's agent they said they acted by orders of the Inspector of the Vingtain, Hubert. That on application to the Connétable François Voisin he replied that he took upon himself all the responsibility, and that in virtue of a decision of the Assemblée Paroissiale of St. Hélier the drive or approach of the Plaintiff were thenceforth to be treated as a public road, and she then claims damages against Voisin as Connétable of the parish.

On the demand of Voisin, Philippe Aubin and John Le Cronier, the then Procuréurs du Bien Public of the parish, were added as Defendants; and since that time, Voisin having ceased to be Connétable, Philip Baudains, his successor, was substituted for Voisin, and Aubin having ceased to be Procuréur du Bien Public, Coutanche, his successor, was substituted for him. The parties therefore to this action are the Appellant as Plaintiff, and the Connétable of the parish of St. Hélier and the Procureurs du Bien Public of the parish as Defendants, and no others.

The Vicomte was, on the 29th October 1881, ordered to proceed to the place in dispute to examine the state of affairs and make his reports. This he did, and it is in his report that we must look for the allegations of the parties.

The report is of considerable length. It begins at page 13 of the record and ends at page 25.

The first meeting was on the 15th September 1882. The Plaintiff (by her advocate) begins by pointing out to the Vicomte the approach or drive, having a breadth of about 16 feet. The Vicomte states that he himself ascertained the breadth at the entrance and found it to be 17 ft. 4 in. She alleges that she and her predecessors have always had the possession and enjoyment of the said approach or drive, and points out the remains of the wall which had been thrown down, and says that those who did so acted illegally, because (Record, page 13, folio 28) "the property "on which the remains of the wall and the "barriers were was not public property, but, on "the contrary, for much more than 40 years had "been in the possession of the Plaintiff and her "predecessors." From this allegation she never departs. In proof of her title she produces eight documents.

It is not so easy to say what the allegations of the Connétable and Procureurs du Bien who join in the pleadings are. Some of them seem rather frivolous, and one, which denies the pedigree of Plaintiff, is, to avoid dispute, disposed of by an amendment made (Record, p. 25), by which she produces the register of baptism of herself, on the 23rd November 1827, as daughter of Charles De Carteret and Sophie Guilde his wife, and the register of baptism of her father, Charles De Carteret, on 4th July 1796, as son of Charles De Carteret and Anne Le Fouvere, his wife.

Something is also said about the impossibility of this approach or drive being the property of

the Plaintiff and her ancestors, as Thomas Gautier, who is mentioned in the other record, owns at least one house and some property between the Plaintiff's house and the road to Pouquelaye, and it is suggested that he must have some access, which must be by this road. It may probably be that he has such an access, either by title or by sufferance, and if the demolition of the barriers were justified as done by his command and as impeding his right, it would have been necessary to inquire into that. As it is, the parish justifying only in its own right, this is irrelevant. The Plaintiff's allegation is not that she was the owner of the soil of the road from end to end, but only "that the property "on which the remains of the wall and the "barriers were was not public property, but, on the "contrary, for much more than forty years, had "been in the possession of the Plaintiff and her pre-"decessors." But from the terms in which some of the Judges express their opinion, viz., that the Plaintiff "has failed in proof of her allegation "that the *road* is her private property," they seem to have been embarrassed by this irrelevant allegation. It is alleged that the way is a public highway from time immemorial, but there is no allegation that at any time whatever was anything done by the parish to it as a public road, either by repairs, or by visiting it as a public road, or by exercising the right of *branchage*.

It is alleged that the Plaintiff and her ancestors could not by any length of prescription acquire a right against the public, but, to raise this question, it is necessary first to establish that the public right did at one time exist.

The documents given in evidence show that Philippe De Carteret purchased in 1786 what is now the nursery belonging to J. Le Cornu, described in the deed as "bounded on the south "by the road which leads to the house which

" formerly belonged to Elizabeth Guerdon, the " mother of Philippe De Carteret," a description which, though it does not conclusively show that the road was not then treated as public, is much more consistent with its being a private road.

The next document, dated 19th September 1795, is between Philippe De Carteret of the one part (which Philippe De Carteret is described as eldest son of the deceased Philippe De Carteret and Elizabeth Lempriere his wife, and principal heir of that Philippe De Carteret, his father, and another Philippe De Carteret, his grandfather), and Charles De Carteret and Hugh De Carteret of the other part, described as the younger sons of the late Philippe De Carteret and Elizabeth Lempriere his wife. It is made for the purpose of making an amicable division between them of all the heritages which have come to them by the deaths of their father and mother, and the late Philippe De Carteret, their grandfather, that they may enjoy them separately in the future. An objection was made that a partage could not give title, but no reason appears why, if possession follows, and is consistent with its terms, it should not be as good as any other instrument to show what the title was under which that possession was enjoyed.

Philippe De Carteret, the elder son, takes as part of his share the property now belonging to J. Le Cornu, then called Philippine and Du Maillier.

He agrees that, when the trees planted on the south side of the fence of the Close du Maillier shall be cut down, neither he nor his heirs shall be at liberty to replant them, and it is agreed that Philippe shall have no right, by " the said " share of Charles, to go by that way to the " Close Philippine, belonging to the said Philippe, " which is on the west side of Du Maillier."

Charles De Carteret, the second son, grand-

father of the Plaintiff, takes as his portion, amongst other things, the house of his father in the parish of St. Helier, with the offices and " with the drive or approach in front, and a road " eight feet wide from the back leading to the " public road." Notwithstanding some quibbling, it seems impossible to doubt that this house is that which has since continued in the enjoyment of the Plaintiff's grandfather, father, and herself from 1795 down to the present time; that the road eight feet wide leading to the public road is that leading to Vaux, not now alleged to be public; and that by " the drive or approach to " the front " is meant to be designated the same road as is designated in the deed of 1786 as " the " road which leads to the house which formerly " belonged to Elizabeth Gourdain," who was the grandmother of Charles, and the great-grandmother of Charles the father of the Plaintiff.

Philippe, by a deed dated 25th June 1808, conveys Du Maillier to Charles.

And by another, dated 21st October 1809, conveys, amongst other property, Philippine to David De Gruchy and his wife.

They, by a deed dated 8th February 1811, convey Philippine to Jean Syvret.

Charles De Carteret, the grandfather of the Plaintiff, by a deed dated 6th January 1816, conveys Du Maillier to the same Jean Syvret, and in it it is expressly stipulated that Syvret, the purchaser, must make for himself access through his own land, as he is to have none through the drive or approach of the vendor, Charles De Carteret.

Syvret, in 1862, conveys both Philippine and Du Maillier to J. Le Cornu, who now holds them.

Charles De Carteret, the grandfather, also takes as part of his share the Close de la Classe, which lies to the south of this road in dispute, and it is still enjoyed by the Plaintiff.

There seems therefore shown on the deeds, as clearly as it is possible to do, that those who were in possession of the house of the Plaintiff and the lands both north and south of the part of the road in question on which the alleged trespass has been done, have, at least from the beginning of this century, treated this road as the approach or drive to the Plaintiff's house.

Their Lordships do not doubt that this, though strong evidence in favour of the Plaintiff, may be rebutted by showing a counter title, or perhaps even an adverse possession during the period of prescription. But on the report of the Vicomte there appears to be nothing but an allegation that it was an immemorial public road, and no allegation of any proof of it.

On the *transport du justice* evidence was taken. It is proved clearly enough that there were no barriers during the lifetime of Charles the grandfather. On his death Charles the father did, at a time which is pretty clearly proved to be not before 1852, not yet forty years ago, cause the barriers to be erected, asking and obtaining leave from Jean Le Syvret, the owner of the land to the north, to put up one of the pillars on Syvret's land.

Before that the road was open to the west. It is proved, as far as the negative can be proved, that there was never at any time anything done to the road of that kind which ought to have been done, and probably would have been done, if it was a public road. It never was at any time visited as a public road should be, either to inspect it or to cut the branches, nor was it proved that any repairs were done by any one but the De Carterets and their farmers. It seems proved that no carriages ever went along it except to the houses of the Plaintiff and of Gautier. And there is very little, and that not very satisfactory, evidence that beasts of burden

ever went from Pouquelaye to Vaux along that road.

There is evidence no doubt that foot passengers went along it, and that Charles Carteret, the grandfather, sometimes met them and spoke civilly to them, and did not attempt to stop them. And if the law of England prevailed in Jersey, and a public right of way in the nature of an easement over the soil of another could be created by a mere dedication by the owner of the fee simple at any time, and a using of that way, so dedicated for a time, however short, it may be that this would be some scintilla of evidence of a dedication by Charles the grandfather. But this is so far from being the law of Jersey, that the doubt is whether an easement or servitude can be created by any enjoyment, even from time immemorial, without proof of title.

Their Lordships wish not to be understood as deciding a question which does not arise. It may be, or it may not be, that a forty years' possession by the parish of a way as a public way, accompanied by acts of ownership, such as repairing the road, cutting the boughs, and so forth, would prove that the soil was in the parish; or it might perhaps be sufficient title to support a servitude in the parish. On this they give no opinion. But they think that in this case the evidence is all in favour of the soil of the spot where the alleged trespasses were committed, being in the Plaintiff, and that there is no evidence at all that there ever was at any time whatever a public road of any breadth.

Their Lordships will humbly advise Her Majesty, accordingly, that the order appealed from should be reversed the Respondents to pay the costs of this appeal, and that the cause be remitted to the Cour Royale to do what is just.

DE CARTERET *v.* GAUTIER and Another.

In this case the Plaintiff sued Thomas Gautier, alleging that in her quality as sole heir of the late Charles De Carteret, her father, she is proprietor of a house, offices, lands, appurtenants, and dependencies known by the name of Mont à l'Abbé Manoir. That Gautier threw down a hedge on the kitchen garden, one of the dependencies of her house, and dug a trench there which impeded her access to her kitchen garden, and other wrongs. And claims that he be ordered to rebuild it and pay damages.

Gautier, reserving all other defences, pleads that he acted under the orders of Voisin, the Connétable, and Hubert, one of the Inspectors of the parish of St. Helier, and did no more than was necessary to restore to its ancient state a lane leading from Vaux to Pouquelaye, which, from time immemorial, had been used as a public road from Vaux to Pouquelaye, and prays that the Connétable Voisin and the Inspector Hubert should be summoned.

Voisin appeared and assumed all the responsibility, and Hubert was therefore dismissed from the suit. Subsequently, on Voisin ceasing to be Connétable, Baudain, his successor, is substituted as Appelé.

After a report by the Vicomte, and each party having produced their titles and evidences, the sentence appealed against was pronounced.

It is as follows:—

The Court is unanimously of opinion that the Plaintiff has failed in the proof of her pretence that the soil of the lane is her private property. Therefore *en suite* the Court has declared the said lane to be public for a breadth of four feet, and discharges both the Defendant and the vouchee from the action, and condemns the Plaintiff in costs.

The title on which the Plaintiff rests in support of her claim to be owner of the soil consists in showing that she, her father Charles, and her grandfather also Charles, have, from 1796, when Charles took this house and appurtenances as part of his share of the inheritance divided under the deed of partition already mentioned, a period of more than forty years, been in possession of the house, gardens, and the lands on both sides of this lane.

There is nothing in the descriptions in the deed of partage which can be construed as referring to this lane either one way or the other. But the Plaintiff has shown that she and her father and grandfather have during this long time occupied by themselves and their farmers the lands on each side of this narrow lane, as their own. This is not conclusive to show that the soil of the lane was also hers, but it makes such a case that the lane was parcel of the premises enjoyed by the Plaintiff and her ancestors, as throws a strong onus on those who assert the soil to belong to some other to show possession adverse to the Plaintiff, or a title in that other. Acts of ownership are proved on the part of the Plaintiff and of her father on the lane itself, but these are within the last forty years, and principally serve her case as throwing light on what was done before that period.

It is proved that it was not until the death of Charles the grandfather that Charles the father in 1854, within the forty years, made the alterations in the garden which the Defendant, alleging them to obstruct what he alleges to be a public way, has removed. And it is also proved that about the same time Charles the father put up two stone pillars, with an iron bar across them, at the entrance from the public road to Vaux into this lane. But it is also proved that in the time of Charles the grandfather, as early

as 1808 or 1809, a wooden bar was put up there, and this was more than forty years ago.

The evidence against this is that the lane was there, and that foot passengers used it.

Their Lordships refer to what they have said in the other appeal: such evidence is not enough to establish a public way. Whatever might be the effect of long continued treatment of the way as public by repairing it, or visiting it, or enforcing the cutting of the branches, there is no such evidence here.

Their Lordships are therefore of opinion that, in the absence of evidence that the soil in the lane belongs to any one else, the Plaintiff has proved it to be hers: and that there is no evidence that there ever, at any time whatever, was a public road of any width whatever.

They will, therefore, humbly advise Her Majesty that in this case the order appealed from should be reversed, the Respondents to pay the costs of the appeal, and that the cause be remitted to the Cour Royale to do justice therein.