No. 29 of 1970

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL (CIVIL DIVISION)
GUERNSEY

BETWEEN:

ADOLPHUS HENRY VAUDIN — Appellant

AND

ADOLPHUS JOHN HAMON and
ALAN JAMES MESNEY and
DOROTHY LUCIEN MESNEY
(nee Price) his wife — Respondents

CASE FOR THE RESPONDENTS

RECORD

1. This is an Appeal, by leave of the Court of Appeal (Civil Division) of Guernsey, from an Order of that Court (Sir Robert Le Masurier, D.C.S., Bailiff of Jersey, Mr. J. G. le Quesne, Q.C., and Mr. P.H.R. Bristow, Q.C.) dated the 11th March, 1970, allowing an appeal by the Respondents from an Order of the Royal Court of Guernsey (Ordinary Division) dated the 21st January, 1969, allowing an appeal by the Appellant, the Plaintiff in the Action, from an Order of the Seneschal of Sark dated the 23rd November, 1968, dismissing the Appellant's Action on the preliminary ground that it was barred by lapse of time. p.160 p.59 p.1

2. The Action was instituted by the Appellant against the Respondents by the presentation in the Court of the Seneschal of Sark of a Petition dated the 23rd August, 1968. By his petition the Appellant claimed thst he was the legal heir of one Marie Elizabeth Vaudin, who had died on the 19th September, 1938, and that accordingly he was the rightful owner of landed p.1

property in the Island of Sark known as Le Port a la Jument, to which the said Marie Elizabeth Vaudin was entitled at the date of her death.

3. The issue in the Action was whether the legal heir of the said Marie Elizabeth Vaudin, in whom the said property vested on her death, she having been the daughter and only descendant of the eldest son of Thomas Jean Vaudin, was

(a) John Vaudin Hamon, the father of the first Respondent who was a descendant, through his mother, from the second son of the said Thomas Jean Vaudin, or

(b) the Appellant, as he claimed, who was a descendant through an unbroken succession of males, from a younger son of the said Thomas Jean Vaudin

If the Appellant's claim to be the legal heir was well founded, a second issue would have arisen, whether the Respondents had acquired a good title to the property by "acquisitive prescription".

4. In accordance with the normal practice in the Court of the Seneschal, no written pleadings were delivered. At the hearing, the Respondents raised the preliminary objection that the Appellant's cause of action was barred by the passage of time ("extinctive prescription"). No evidence was tendered, but after hearing argument the Seneschal upheld the Respondents' objection and dismissed the Action.

5. The issue on this Appeal is whether, on the admitted or assumed facts, the Appellant's cause of action was barred by lapse of time.

6. In all three Courts, the case was argued on the following admitted or assumed facts :-

(a) that the said Marie Elizabeth Vaudin was the owner (in accordance with Sark Law) of the property at the date of her death, the 19th September, 1938;

(b) that the said John Vaudin Hamon, the Father of the First Respondent, entered into

possession of the property shortly after her death, that is to say in 1938 or at the latest at some time in 1939;

(c) that he remained in possession without interruption until his death in August, 1964;

(d) that on his death his son and legal heir, the First Respondent, entered into possession of the property;

(e) that by a Deed dated the 24th October, 1964, the First Respondent sold and conveyed the property to the Second and Third Respondents;

(f) that the Second and Third Respondents thereupon entered into possession of the property and remained in such possession continuously thereafter.

By Order 12 (3) of the Court of Appeal (Civil Division) (Guernsey) Rules 1964 the Court of Appeal has power to draw inferences of fact and to give any judgment or make any order which ought to have been given or made

7. By the law of Sark there is no testamentary power over immovable property. On the death of the owner it vests automatically in the heir. Immovable property is not partable; the nearest relative inherits the whole of it; to the exclusion of all other relatives. The Appellant claimed that title to the property vested in him on the death of the said Marie Elizabeth Vaudin on the 19th September, 1938 on the basis set out in paragraph 3 above.

8. The law of the Bailiwick of Guernsey on the subject of prescription in relation to immovable property is contained in the following Laws:-

Projet de Loi de La Prescription Immobiliere, 1852, Section 1 (Orders in Council, vol.I, p.207)

Loi relative a la Prescription Immobiliere, 1909, Section 1 (Orders in Council, vol.IV, p. 281).

RECORD

By virtue of these Laws the relevant period is 20 years.

p.121 l.6
p.152 l.20

9. In the Court of Appeal reference was made to a Law (No. 1 of 1941) promulgated on the 27th January, 1941, and confirmed by an Order in Council dated the 14th August, 1945, and an Ordinance made thereunder by the Royal Court of Guernsey on the 25th August, 1945, providing that time did not run for the purposes of prescription during the period from the 1st July, 1940, to the 31st December, 1945. The Respondents do not admit that that Law applied outside the Island of Guernsey, but, even if it did, the period expired in the present case at some time in 1964 or 1965.

p.1

10. At the hearing before the Seneschal, no allegations of fraud, deceit or "bad faith" were made by the Appellant against John Vaudin Hamon or any of the Respondents, and the Seneschal made no finding of fact in relation thereto; nor did he decide whether the Appellant or the said John Vaudin Hamon was or believed himself to be the legal heir of Marie Elizabeth Vaudin. The Seneschal found that
p.2 l.20 the Appellant's cause of action arose on the 19th September, 1938, the date of the death of the said Marie Elizabeth Vaudin, and was barred by reason of the lapse of time thereafter.

pp. 3-52

11. At the hearing before the Royal Court of Guernsey (Ordinary Division), the submissions of the Appellant were :-

(1) that the Laws of 1852 and 1909 did not apply in Sark;

(2) that his title to the property arose on the death of Marie Elizabeth Vaudin;

(3) that he was not informed of his rights, and was unaware of them until February, 1963;

(4) that this amounted to "bad faith";

(5) that the Seneschal ought not to have dismissed the Action without first having investigated the question whether the

Appellant or the said John Vaudin Hamon was the legal heir of Marie Elizabeth Vaudin.

The submissions on behalf of the Respondents were :-

(1) that the laws of 1852 and 1909 applied throughout the Bailiwick of Guernsey;

(2) that the Appellant's cause of action arose on the death of Marie Elizabeth Vaudin;

(3) that, in the absence of fraud or deceit, which had not been alleged, it was barred by the lapse of time;

(4) that prescription, once pleaded, must be decided first as a preliminary matter and before any contestation de cause;

(5) that possession in "good faith" (that is to say, possession by one who was, or believed himself to be, the true owner) was not a requirement of extinctive prescription, but only of acquisitive prescription;

(6) that, in the absence of any allegation of fraud or deceit, and in order to maintain the defence of extinctive prescription, it was sufficient for the Respondents to establish (as they had done) that they and their predecessor in title John Vaudin Hamon had been in possession of the land for the requisite period before the Respondent instituted proceedings;

(7) that any fact which would prevent, or interrupt, the running of time must be alleged and established by the Appellant.

12. The Bailiff, who allowed the Appeal, held that only possession in "good faith" would afford a good defence to extinctive prescription, and that before dismissing the Appellant's Action on the ground that it was prescribed by lapse of time, it was necessary for the Court to be p.57 l.37

satisfied that the First Respondent had a good legal title to the property either by acquisitive prescription through his Father John Vaudin Hamon or by inheriting it from his Father as the lawful heir of Marie Elizabeth Vaudin.

13. The submissions of the parties in the Court of Appeal (Civil Division) were substantially the same as those before the Royal Court. In the course of argument, when pressed by the Court, the Appellant was unable to sustain any allegation of fraud or deceit. The only facts upon which he relied to prevent time running were his own ignorance of his legal rights before February, 1963, and personal difficulties he had encountered in preparing his case.

pp.127-8

14. The Court of Appeal allowed the Appeal and dismissed the Action. The Court held that the period of prescription began from the time in 1938 or 1939 when the First Respondent's Father, John Vaudin Hamon, took possession of the property, and had expired before the Appellant's Action was instituted. The Respondents do not challenge that ruling.

15. It is submitted by the Respondents that, upon the true construction of Section 1 of the Law of 1909, the proviso that possession must be "in good faith" relates only to the acquisition of title by the occupier, and not to the extinction of the true owner's cause of action to recover the land.

16. If, for the purpose of construing the Laws of 1852 and 1909, it is necessary to consider the law in force immediately before the enactment of the Law of 1852, the common law of the Bailiwick of Guernsey is the Ancienne Coutûme, and is to be found in Le Grand Coutumier du pays et Duche de Normandie. Those who compiled Le Grand Coutumier were familiar with Roman Law and its concepts.

17. It is submitted by the Respondents that Roman Law fully recognised the distinction between the extinctive and the acquisitive effects of prescription, and that the

requirements for the two cases were not the same. Forty years' possession (longissimi temporis praescriptio) provided the occupier with a defence to an action for recovery of the land, but it did not give him title. Other methods of prescription (usucapio and longi temporis praescriptio) were fused under Justinian, and were not extinctive only, but conferred title. The peculiar feature of longissimi temporis praescriptio, was that, unlike both usapio and and longi temporis praescriptio, possession alone was sufficient, irrespective of "good faith". "Good faith", the presence of which was presumed in the absence of evidence to the contrary, in this context meant no more than the absence in the occupier of knowledge, or reason to suppose, that he was not entitled to occupy the land.

Girard's "Manuel Elementaire de Droit Romain": 8th Ed. (1929, pp.322-336

Buckland's "Text-Book of Roman Law", 3rd Ed. (1963), pp. 241-252.

18. It is also submitted by the Respondents that the common law of the Bailiwick of Guernsey, immediately before the enactment of the Law of 1852, recognised two distinct consequences of prescription in matters of real property, viz: (a) the extinction of the true owner's cause of action and (b) the acquisition of a good title by the occupier; and that possession was not required to be in "good faith" for either purpose.

19. The Respondents rely upon the work of Guillaume Le Rouille d'Alencon on Le Grand Coutumier, published in 1539, in which no distinction is drawn between the requirements for extinctive and acquisitive prescription, although the two distinct effects are noted; and no reference is made to any requirement of "good faith". They also rely upon the following passages in commentaries upon the Ancienne Coutume:

"Prescription est une préclusion de réponse procrée de temps procédé on escheu": Le Rouillé, op. cit., Ch. CXXV.

"Item, que prescription ou la tenue de quarante ans suffise à chacun en Normandie dorénevant, pour titre competent, en toute haulte justice ou basse, ou de quelconque autre chase que ce soit": Le Charte aux Normands (granted by King Louis X at Vincennes on 19th March, 1314); cited in Le Rouillé op.cit.

"... qu'en prescription statuaire ou coûtumière il n'est besoin de prouver titre, afin que le statut ou la coûtume ajoute quelque chose au droit common, par lequel le titre est requis avec la possession. Et a lieu telle prescription en choses hereditales et actions reelles, ou dependantes de réalité"; Terrien's Commentaires du Droit Civil tant Public que Privé, Observé au pays et Duché de Normandie: (1654 Edn.)

The Respondents also rely upon Gallienne's Traité de la Renonciation par Loi Outre et de la Garantie, (1845 ed.) pp. 314 et seq.

20. It is further submitted by the Respondents that the presence of "good faith" is to be presumed unless the contrary is shown, and that no foundation for any allegation of its absence has at any stage been asserted by the Appellant.

21. The Respondents humbly submit that this Appeal ought to be dismissed and the Order of the Court of Appeal affirmed for the following (among other)

R E A S O N S

(1) BECAUSE prescription, once pleaded as a defence, ought to be decided first and before any contestation de cause.

(2) Alternatively BECAUSE the Seneschal, in his discretion, having decided to deal with prescription as a preliminary point, there is no ground for arguing that he exercised his discretion wrongly.

(3) BECAUSE the common law of the Bailiwick of Guernsey has always recognised two distinct consequences of prescription in matters of

real property, viz:

(a) the extinction of the true owner's cause of action to recover the land and

(b) the acquisition of a good title by the occupier;

and mere possession for the requisite period, irrespective of "good faith" has always been sufficient for the former.

(4) BECAUSE the Law of 1909 applies throughout the Bailiwick of Guernsey.

(5) BECAUSE the Law of 1909 introduced the requirement of "good faith" in relation to the acquisition of title only, and did not alter the ancient rule of the common law of the Bailiwick of Guernsey, which followed the Roman Law in this respect, that a cause of action for the recovery of land was extinguished by possession alone for the requisite period, irrespective of "good faith."

(6) BECAUSE in the absence of evidence to the contrary, "good faith" will be presumed.

(7) BECAUSE at no stage has the Appellant alleged any facts which are capable of supporting an answer to the plea of prescription on any ground recognised by the law of Sark.

(8) BECAUSE, on the admitted or assumed facts, the Appellant's action cannot succeed, and ought to be dismissed in limine.

(9) BECAUSE the decision of the Court of Appeal is right and the Order made by the Court of Appeal ought to be affirmed.

P. J. MILLETT.

No. 29 of 1970.

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O N A P P E A L

FROM THE COURT OF APPEAL (CIVIL DIVISION) GUERNSEY

B E T W E E N

ALDOPHUS HENRY VAUDIN — Appellant

AND

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CASE FOR THE RESPONDENTS

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