IN THE PRIVY COUNCIL No.29 of 1970

ON APPEAL

FROM THE COURT OF APPEAL (CIVIL DIVISION) GUERNSEY

BETWEEN:

ADOLPHUS HENRY VAUDIN Appellant

AND

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

AMENDMENTS to the CASE for the APPELLANT

DELETE the passage beginning at line 30 on page 9 and ending at line 30 on page 11.

SUBSTITUTE therefore the following:-

RECORD

In interpreting S. 1 of the Law of 1909, the Court of Appeal correctly regarded as being of "crucial significance"the state of the law of Guernsey relating to prescription before it was altered by statute in 1852. However, its conclusions as to the state of this pre-1852 law were as follows:- p.144 LL.11-13

"Immediately before the Law of 1852, then, the law of Guernsey recognised two consequences of prescription in matters of real property.The first was the barring of any right of action for recovery of land. The second was the acquisition of a good title by the occupier. Both these consequences followed upon forty years' possession,whether that possession had been accompanied by good faith or not". p.150 LL.30-37

These conclusions apparently led the Court of Appeal to adopt in its entirety the contention of

RECORD

P.150 LL.38-p 151 L.1.

the Respondents that the first part of section 1 of the Law of 1852 and the first part of section 1 of the Law of 1909 deal exclusively with the extinctive presceription of rights of action for the recovery of land (while the second parts of these two Sections deal exclusively with the acquisitive prescription of title to land).

It is respectfully submitted that the Court of Appeal misunderstood the relevant pre-1852 law in fundamental respects, for reasons which will be amplified below but in particular because it failed to appreciate the difference in the law of prescription relating to

(i) "immeubles corporels" (corporeal or tangible immovables, which are capable of true possession) on the one hand and

(ii) "immeubles incorporels" (incorporeal or intangible immovables which are not capable of true possession) on the other hand,

and further because it failed to appreciate that even under the pre-1852 law good faith was an essential requirement if a title to land was to be acquired by prescription. It is further submitted that this misunderstanding of the relevant pre-1852 law led the Court of Appeal to misinterpret the Law of 1852 and the Law of 1909 in fundmental respects referred to below.

15. The relevant pre-1852 law was derived from La Charte aux Normans promulgated by King Louis X in 1314 in the following terms, so far as material:-

p.146 LL.17-21

"Item, que prescription ou la tenue de quarante ans suffise a chacun en Normandie dorenavant, pour titre competent, en toute justice haute ou basse, ou de quelconque autre chose que ce soit. Et s'aucun de la duché de Normandie de quelconque condition ou état quil soit, aucunes des choses dessusdites aura possidées par quarante ans paisiblement, quil ne soit sur ce moleste, en aucune maniere de nos Justiciers, ne souffert etre moleste.

Et qui le contraire voudra faire, il ne soit de rien ouy ne recu en aucune maniere; combien que le droit de la Coutume et Ordonnance de notre besael, soyent evidemment contraires à ces choses. Et ce voulons etre garde, non obstant tout usage au contraire.....".

("Item: that prescription or forty years tenure suffices for anyone in Normandy henceforth as good title in lower or higher courts or any other matter whatsoever. And if anyone in the Duchy of Normandy of whatever condition or status he may be shall have possessed peacefully for forty years any of the things above mentioned, let him not be disturbed in relation to this in any manner by our Judges nor be permitted to be disturbed.

And whoever would wish to bring about the contrary, let him in no way be heard or entertained in any manner; even though the Custom and Ordinance of our great-grandfather were contrary to those things. And this we wish to see observed notwithstanding any usage to the contrary.....").

15A. It is respectfully submitted that

(1) the second sentence of La Charte aux Normans beginning "Et s'aucun" (and likewise the second sentence of the Law of 1852 and of the Law of 1909) was in many material respects analogous to the Roman Law concept of usucapio;

(2) the first sentence of La Charte aux Normans (and likewise the first sentence of the Law of 1852 and of the Law of 1909) was in many material respects analogous to the Roman Law concept of praescriptio.

15B. Under Roman law usucapio was a positive or acquisitive method of acquiring ownership of corporeal (tangible) property by prescription: (vide Buckland's Text Book of Roman Law, 3rd Edition (1963) at p. 241). The general rule, however, was that incorporeal rights could not be acquired by usucapio, since usucapio presupposed possession of the thing to be acquired and a bare right cannot be posssessed.

"Incorporales res traditionem et usucapionem non recipere manifestum est" (Dig 41.1.43.1).

("It is obvious that incorporeal things do not admit of delivery and usucapio").

The only general exception to this general principle of Roman Law was that where buildings were acquired by usucapio the servitudes appurtenant to them were acquired with them.

"Hoc jure utimur ut servitutes per se nusquam longo tempore capi possint cum aedificiis possint". Dig 41.3.10.1.

("We apply this law that by length of time servitudes can never be acquired on their own, but can be acquired as appurtenant to buildings".)

15C. In contrast to usucapio, praescriptio was the traditional method under Roman Law method of acquiring or extinguishing incorporeal rights. It gave the holder a defence if sued for the subject matter in which the rights subsisted, but did not make him the owner. Before Justinian's time, however, it had become acquisitive: (See Buckland's Text Book of Roman Law 3rd Edition (1963) at p.250.). And by this time incorporeal rights could be acquired by prescription. (C.7: 33: 12).

15D. It is respectfully submitted that under La Charte aux Normans

(1) the first sentence (like praescriptio) was intended to provide and did provide methods of both acquisitive and of extinctive prescription in respect of incorporeal rights over or appurtenant to immovables;

(2) the second sentence (like usucapio) was intended to provide and did provide a method of acquisitive prescription in respect of corporeal immovables, provided that the requisite possession "paisible" for the requisite period could be proved (and subject to the further requirement of good faith referred to below);

(3) la Charte aux Normans never operated by prescription to extinguish an owner's ownership of corporeal immovables or his rights to enforce those rights of ownership unless another person was in a position to show an acquisitive prescriptive title to the property, by proving possession "paisible"

and in good faith for the requisite period of time.

15E. The phrase "suffise....pour titre competent" ("is sufficient for a good title") appearing in the first sentence of La Charte aux Normans, it is submitted, makes it additionally clear that the purpose of this first sentence cannot have been merely to extinguish a claim of ownership (or right of action to enforce the same) without leaving a good title to the relevant property affected in someone else; this phrase indicates that the sole purpose of the first sentence is to enable a person affirmatively to prove title. But the purpose of this first sentence cannot, it is submitted, have been to enable a person affirmatively to prove title to corporeal property capable of true possession by mere proof, on an arithmetical basis, of the passage of 40 years since possession was first taken. For such a construction would be inconsistent with the second sentence which requires that if acquisitive prescription is to be claimed in respect of corporeal property, the 40 years possession shall be "paisible". Accordingly it is submitted that the only way of reconciling the first sentence of La Charte aux Normans with the second sentence is to conclude that the first sentence was intended to assist the holder of property to prove his full title to such property either

(i) by showing that incorporeal rights which third parties claimed against the property, (sometimes referred to in Guernsey law as droit reels when the property affected is land) had been extinguished by lapse of time or

(ii) by showing that through lapse of time he himself had acquired as appurtenant to his own property incorporeal rights over the property of another (sometimes referred to in Guernsey law as "droits immobiliers")

In other words, though the prescription provided for by first sentence of La Charte aux Normans had both an extinctive and acquisitive element, it never operated to extinguish an owner's ownership of corporeal property or his right to assert such ownership by proceedings. His ownership and his right to assert it by action could be extinguished only if another person could show that he had acquired a prescriptive title to it by possession "paisible" (and in good faith) for the requisite period.

p.148
L.17

15F. Among other authorities, an important passage (at page 318) from Gallienne's Le Traite de la Renonciation par Loi Outree et de la Garantie published in 1845, confirms it is submitted, that the relevant law of Guernsey before 1852 was as summarised in paragraph 15E above:-

"Lorsqu'il s'agit d'immeubles ou de droits immobiliers, il faut que le possesseur ait joui par quarante ans paisible pour que la prescription soit accomplie /a form of acquisition which Gallienne said, ibid at p.314, had been called, Usucapion in Roman Law/ ou que celui qui réclame un droit réel n'en ait pas demander l'exercice pendant le meme laps de temps. Et a lieu telle prescription (quarante ans) en choses héréditales, et actions réelles ou dependantes de la réalité".

("When it concerns immovables or rights pertaining to them the owner must have enjoyed them peaceably for 40 years before prescription is completed, or that the person who is laying claim to a right of real action has not exercised it during the same lapse of time. And such prescription (40 years) applies to "choses hereditales" and real actions or those dependant on realty").

(a) Gallienne thus distinguished between "droits réels" which could be extinguished by prescription simply through the lapse of 40 years of non-user and

(b) "immeubles" (including "droits immobiliers") in respect of which prescription could only be achieved if the possessor of the relevant "immeubles" could affirmatively show that he had been in possession of them "paisiblement" for the requisite 40 year period.

Neither Gallienne nor Laurent Carey in his Essai sur les Institutions, Lois et Coûtumes de l'Ile de Guernsey appear to suggest that extinctive prescription can operate in respect of "immeubles corporels" or rights of action to recover the same in default of proof by some other person of an acquisitive prescriptive title thereto.

15G. For the reasons set out above, it is the Appellant's respectful submission that under the relevant pre-1852 law an action of the nature brought by him in the present proceedings would not have been automatically barred through the passage of 40 years since the cause of action accrued, in default of any proof by the defendants that they had acquired a prescriptive title. He likewise submits that under the Law of 1852 an action of this nature would not have been automatically barred through the passage of 30 years since the cause of action accrued, in default as aforesaid. He likewise submits that under the Law of 1909 an action of this nature would not be automatically barred through the passage of 20 years since the cause of action accrued, in default as aforesaid.

15H. By way of analogy the Appellant will further rely on the fact that French law does not, it is submitted, debar an action by an owner who has been dispossessed of his immovable property for recovery of such property save in a case where the defendant affirmatively proves himself to have acquired ownership of it by means of an adverse possession, uniting all the characteristics required by acquisitive prescription.

Vide for example:

Marcel Planiol's Traite du droit de Propriete (Sections 2446 and 2447)

Baudry - Lacantineries Traite de Droit Civil (Sections 592 to 594)

Explanatory Note 5 to Art. 2262 of the Code Civil.

Req: Cass. 12 July 1905 D.P. 1907 1.141.

15I. It is further submitted that it does not follow from the ordinary and natural meaning of section 1 (as the Court of Appeal considered) that while the second part deals with acquisitive prescription, the first part deals exclusively with extinctive prescription. First, the French word "prescrire", which is used in the first part of the section, can mean either to lose or to acquire by prescription and consequently would be apt to cover the case both of extinctive or acquisitive prescription and not merely extinctive prescription as the Court of Appeal held. In the second place the French word "choses" p.150 l.38

used in the first sentence is apt to include "immeubles incorporels" (as well "immeubles corporels"), while the French phrase "matiere héréditale" used in the second sentence is apt to include only corporeal, tangible matter. The two sentences thus do not relate wholly to the same subject matter. Furthermore, if it is only the second part of the section which deals with acquisitive prescription, the Court failed to explain how "immeubles incorporels" could ever be acquired by acquisitive prescription.

p.151 LL.1 et seq

15J. It is submitted that the Court of Appeal made a further error in concluding that a change in the law was brought about by the introduction of the words "bien entendu qu'elle soit de bonne foi" in the second sentence in the law of 1909.

The Court said as follows:-

p.151 ll.9-19

"In 1909 the legislature was content, in relation to the barring of rights of action, to leave untouched the ancient rule of the common law of Guernsey, that prescription operated without any requirement of good faith. In relation to the acquisition of title, however, the legislature decided that, as the period was to be reduced to twenty years (only half the period originally required by the common law) an additional requirement should be imposed, that the possession must be accompanied by good faith".

In reaching this conclusion the Court cannot have appreciated the exact meaning of "bien entendu". The meaning of this expression is not strictly "provided" or even "provided always" but rather - even though in translation the term may not sound very juridical - "provided of course" or even "on condition of course".

This expression "bien entendu" reflected the fact that (as is submitted is the case) the condition of good faith has at all material times (both before the Law of 1909 and before the Law of 1852) been required by Guernsey law if acquisitive prescription is to be successfully claimed.

It is true that the Law of 1852 does not mention good faith in connection with prescription, but as the law merely relates back to the pre-existing law or custom, and by that law or custom it was a matter of course that acquisitive prescription must be in good faith, there was no particular need to make explicit mention of the condition. In the Law of 1909, the rule was mentioned by way of reminder only, as being a matter of course.

It is thus submitted that no new rule relating to good faith in acquisitive prescription was created by the Law of 1909, but that this statute merely referred to a well established, pre-existing rule namely that there could be no acquisitive prescription in the absence of good faith.

It is further respectfully submitted that if, contrary to the Appellant's contentions, it is or ever has been possible for a possessor of corporeal land to debar by a plea of prescription an action by the true owner to recover the land without the possessor at the same time proving that he himself has acquired a good title thereto by prescription, "bonne foi" (good faith) on the part of the part of the possessor is and has at all material times been an essential requirement if such defence is to succeed.

CHRISTOPHER SLADE

G. PICARDA

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AMENDMENTS

TO THE

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