Privy Council Appeal No. 29 of 1970

Adolphus Henry Vaudin – – – – – – *Appellant*

v.

Adolphus John Hamon and others – – – – *Respondents*

FROM

THE COURT OF APPEAL (CIVIL DIVISION) GUERNSEY

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH JUNE 1973

Present at the Hearing:

LORD WILBERFORCE
LORD KILBRANDON
LORD SALMON

[*Delivered by* LORD WILBERFORCE]

These proceedings have been brought by the appellant in order to establish his right to possession of immovable property in the Island of Sark called Le Port à la Jument. The history of this claim must be stated in some detail in order that the issues before their Lordships may be understood.

Until her death on 19 September 1938, the property belonged to Marie Elizabeth Vaudin. It may be mentioned, though in their Lordships' opinion this does not affect the legal position, that it appears that for some years that lady was suffering from a degree of mental incapacity which necessitated management of her affairs and property under a curatelle, the curator being her cousin John Vaudin Hamon.

Miss Vaudin died childless, so that under the law of Sark, which does not permit testamentary disposition of immovables, the property passed to her heir. There seems to be no doubt, though of these and other related facts no legal proof has so far been established, that John Vaudin Hamon was treated as the heir and that at some date, also not proved, he took possession of the property. The appellant was born in Mauritius and spent most of his life there in the service of the Crown—this is not disputed by the respondents. In 1954 he came to the Channel Islands and paid a one day visit to Sark. Having heard that John Hamon's middle name was Vaudin, he appears to have introduced himself to the latter and to his son Adolphus Hamon, the first respondent, but what, if anything, was said or done in the course of his visit is not proved. The appellant went back to Mauritius and did not return to Sark until 1962. He then discovered that he was related to Miss Vaudin but was unable to obtain documents necessary to establish this relationship. These came to light at the end of 1965. Meanwhile John Vaudin Hamon had died in August 1964 and his son Adolphus, the first respondent, was regarded as the heir. He sold the property to Mr. and Mrs. Mesney, the second and third respondents, who, their Lordships were told, had previously occupied it as tenants and who live there at the present time.

On 23 August 1968 the appellant started these proceedings by a petition to the Court of the Seneschal of Sark. It is necessary to reproduce the remonstrance in full. It reads as follows:—

" Remontre:—

Que je suis fils de Joseph Vaudin et petit fils de feu le Reverend Adolphus Vaudin fils légitime de feu Thomas Vaudin du Port à la Jument en cette qualité, je suis l'héritier legal à la succession de Marie Elizabeth Vaudin ma cousine issue de Germain

1. Que suivant la succession de Mademoiselle Mary Elizabeth Vaudin ma cousine issue de Germain qui décéda en 1938, à l'Ile de Serk, la succession de la Maison Ancestrale appelée Le Port à la Jument fut par manque de renseignements à mon sujet attribuée à feu Monsieur John Hamon fils de Bernel Hamon.

2. Votre remontrant prie très humblement votre Cour:

(*a*) de m'entendre aux fins de déclarer que le titre de la propriété du Port à la Jument a été mal attribuée;

(*b*) de déclarer et ordonner que la vente de la propriété par Monsieur Adolphus Hamon est nulle et de nul effet;

(*c*) d'ordonner que le dit Adolphus Henry Vaudin a droit à la possession de la propriété qui de fait lui appartient;

(*d*) de faire tel autre Ordre ou de prendre telles autres mesures que votre Cour dans sa sagesse trouvera juste et équitable, et votre remontrant sera toujours tenu de prier.

Ce 23 Août Mil neuf cent soixante-huit. "

The basis of the appellant's claim to be the lawful heir of Marie Elizabeth Vaudin, rather than John Vaudin Hamon, was that he traced descent from the common ancestor exclusively through males whereas John Vaudin Hamon's descent was through a partly female line. His contention was that descent through a male line is preferred by the law of Sark.

No answer to this petition was filed by any of the respondents—this was in accordance with the practice in the Seneschal's Court—and the case came on before the Seneschal on 23 November 1968.

The appellant appeared in person, as he has in all stages of the proceedings up to the present appeal: the respondents were represented by Counsel, who in the course of the oral proceedings raised the preliminary plea that the appellant's action was barred by prescription. The Seneschal decided to deal with this plea as a preliminary point and no evidence was heard. This again was in accordance with practice: but, as both Superior Courts in Guernsey have pointed out, has had very unfortunate consequences, since many of the facts which might be relevant to a plea of prescription, at least on one view of the law, have never been put in evidence or proved.

The Seneschal upheld the plea of prescription and dismissed the action: his formal order was in the following terms:—

" And upon hearing the Plaintiff and the Advocates for the Defendants the Court adjudged that, by virtue of Section 1 of the 'Loi relative à la Prescription Immobilière 1909' registered on the records of the said Island of Sark in the month of April, 1909, the action of the Plaintiff was prescribed by reason of the lapse of at least twenty years from the date on which the Plaintiff's cause of action arose, which the Court found to be on the 19th day of September, 1938, the date of death of Mary Elizabeth Vaudin, whom all parties to the action accepted to be the rightful owner of the tenement known as 'Le Port à la Jument' in the Island of Sark. "

The basis of this judgment, on the face of the order, was clearly that the appellant's action was prescribed—*i.e.* his right of action was extinguished—by the lapse of more than 20 years from the date on which it arose. This was assumed to be the date of the death of Marie Elizabeth Vaudin. It is now admitted that this last finding was erroneous and that the relevant date from which time started to run (on the view of the law taken by the Seneschal) was the date on which adverse possession was taken. Moreover, as will be shown in due course, the relevant period was not 20 years but 25½ years. But the vital point is that the Seneschal's decision depended upon the legal proposition that the appellant's claim could be barred extinctively by the mere lapse of time irrespective of whether any title to the property had been acquired by the respondents. No finding was made, or indeed evidence taken, which would establish an acquisitive title for the respondents, so that if the proposition is incorrect, the necessary support for the decision disappears and a fresh and difficult situation arises.

The appellant appealed to the Royal Court of Guernsey and the Bailiff, on 21 January 1969, allowed the appeal. The essential part of his judgment was the following:—

> "... in my view the decision of the Court of the Seneschal was wrong in establishing that the Plaintiff's cause of action arose on the death of Mary Elizabeth Vaudin (on the 19th September 1938) without establishing also that the Plaintiff in that action was the lawful heir. And it was wrong in deciding without hearing more, that the Defendants were entitled to judgment merely on a mathematical calculation and without being satisfied that in law the first Defendant had lawfully inherited this property by valid prescriptive title through his father or that he held it by representation of his father as the lawful heir.
>
> The Court of the Seneschal thus failed to establish, as the basis of its decision, the essential facts which warranted the application of the law in the sense indicated in its judgment. . . .
>
> There is evidently therefore an unexplained gap between the date of the death of Mary Elizabeth Vaudin in 1938 and the death of John Vaudin Hamon in 1964 in which the Court of the Seneschal should have satisfied itself that John Vaudin Hamon was the lawful heir or if not, that in good faith he believed himself so to be; that he entered into possession on a date at least 20 years previous to the date of his death; that after his entry into possession he maintained it without lawful interruption and in continuing good faith."

As will later appear, their Lordships are of opinion that the decision of the Bailiff was correct and that the case ought to have been returned to the Seneschal to find the necessary facts regarding the respondent's title, which, it seems likely, in an island so small in extent and population as Sark, could have been done comparatively easily. However the respondents decided to take the case on appeal to the Court of Appeal in Guernsey on the legal point that the Bailiff was in error in failing to distinguish the differences between prescription acquisitive and prescription extinctive.

The appeal was heard by the Court of Appeal in November 1969. The appellant was not legally represented but he put before the Court a written Statement of Contentions of fact and law. He claimed that on the death of Marie Elizabeth Vaudin the property in Le Port à la Jument vested automatically in him as the true heir ("le mort saisit le vif") and that his right of action could not be lost by extinctive prescription unless the respondents could show that they had a title by acquisitive prescription. He also contended that good faith was a necessary condition of acquisitive prescription and further that time could not run against a

person who was " empêché d'agir " or kept in ignorance of his right of action. As to the facts, no evidence was given before the Court of Appeal but the President of the Court put a number of questions to the appellant as to the manner in which he became aware of his interest in the property. The respondents were represented by Counsel.

The Court of Appeal delivered, on 11 March 1970, a judgment containing a full and careful review of the law of Guernsey as well as of Roman, French and Jersey Law on the question of prescription. They finally came to a conclusion in the respondents' favour, holding that the relevant law provided separately for extinctive prescription of rights of action and for acquisitive prescription. They held that the prescription period was 25 years and 6 months. They then considered from what date that period started to run. After holding that this should be the date on which John Vaudin Hamon took possession, they pointed out that, apart from admissions made either in the course of argument or in the appellant's petition, no facts had been proved. However they treated the following facts as admitted or assumed namely—

(*a*) that Mr. John Hamon entered into possession of the house shortly after Miss Vaudin's death;

(*b*) that he remained in possession until his death in 1964;

(*c*) that shortly after his death his son, the first appellant, sold the house to the second and third appellants;

(*d*) that the second and third appellants have remained in possession of the house since that sale up to the present.

It will be seen that these facts extend beyond those relevant to the plea of extinctive possession which alone was before the Courts.

On this basis they concluded that John Vaudin Hamon must have taken possession, at the latest, some time in 1939 so that the period of prescription expired at or before the end of 1965. Thus the appellant's action, started in 1968, was barred.

The first question for consideration, which is of general importance, is whether the law of Guernsey, in relation to a claim of title to an immovable, provides for extinctive prescription independently of proof of acquisition of title by another than the claimant. In other words was it correct to hold that the appellant's claim was barred by reason of the simple, mathematically calculated, fact, that more than 25 years and 6 months elapsed between the arising of his right of action and the commencement of the action?

Their Lordships were referred to a number of authorities under various systems of law relevant to prescription, its nature and its effect. These were said to be applicable, or at least relevant, by analogy to the present case. This argument appears to their Lordships to be too widely stated. If an argument based on analogy is to have any force, it must first be shown that the system of law to which appeal is made in general, and moreover the particular relevant portion of it, is similar to that which is being considered, and then that the former has been interpreted in a manner which should call for a similar interpretation in the latter.

While it may be true, in a very general sense, that there is some basic similarity between Roman Law, at various periods, the various customary laws applicable in different parts of France, the Civil Napoleonic Code, the law applicable in Jersey and that which governs in Guernsey, this similarity is of a too general and approximate character to be of much assistance in a particular case: it covers, quite clearly, large differences in matters not only of detail but of principle. Examination of the various laws of prescription in fact shows examples, within these supposedly analogous systems, of purely extinctive prescription, prescription

extinguishing the remedy but not the right, prescription defined purely in terms of acquisition, and prescription effective both to confer title and to extinguish adverse claims. It is not uncommon, within a single system, for the law to select different combinations of these elements in relation to different subject-matters, and also to progress from one kind of prescription to another: an example is the Roman Law development from *usucapio* (acquisitive) to *longi temporis praescriptio* (first extinctive—then acquisitive), and *longissimi temporis praescriptio* (extinctive and later in some cases acquisitive). A movement from extinction of the remedy to extinction of title can be seen in English law before and after the Real Property Limitation Act 1833.

Thus, although as this Board has pointed out in *La Cloche v. La Cloche* (1870) L.R.3 P.C. 125, it is proper to look at related systems of law, and commentators on them, in order to elucidate the meaning of terms, the particular legal provision under examination in any case, in this case the Guernsey Law as to Prescription, must in the end be interpreted in the light of its own terminology, context and history.

The relevant provision in the law of Guernsey is Section 1 of the Loi Relative à la Prescription Immobilière 1909: this reads:—

> " A partir du 1er avril 1909 toutes choses immobilières, et actions réelles ou dépendantes de la réalite, qui se prescrivent maintenant par le laps de trente ans seront prescrites par le laps de vingt ans; et suffira la tenue de vingt ans, bien entendu qu'elle soit de bonne foi, pour titre compétent en matière héréditale. "

This section is, on the face of it, unclear. It raises at once the question whether it contains two independent limbs, the first enacting a period of purely extinctive prescription, the second a separate period of acquisitive prescription, or whether it contains one combined system to be read as one whole, so that extinction does not take place apart from acquisition. The respondents' case throughout, which the Court of Appeal accepted, has been to the former effect.

In their Lordships' opinion, while the articulation of this gives support to the view of the Court of Appeal, the choice between the two interpretations cannot be made on consideration of this section alone. The words " qui se prescrivent maintenant . . . " show clearly that the Law looks back to and builds upon the pre-existing law and indeed suggests that the section is primarily one altering the period from 30 to 20 years, but (with the possible exception of the reference to bonne foi) not otherwise changing the law. This impression is confirmed by the text of the pre-existing Law of 1852. This, as the Bailiff's Petition to Her Majesty in Council makes clear, was introduced in order to amend the period of 40 years fixed by " the ancient Law of Normandy " to 30 years. The relevant provision is:—

> " Toutes choses immobilières, et actions réelles ou dépendantes de la réalité, qui se prescrivent maintenant par le laps de quarante ans, seront à l'avenir prescrites par le laps de trente ans; et suffira la tenue de trente ans pour titre compétent en matière héréditale ".

Apart from the absence of reference to bonne foi, this is in similar form to the Law of 1909—apparent articulation in two limbs, clear reference back to earlier law, alteration of the period (40 to 30 years). The earlier Law to which both statutes refer is contained in La Charte aux Normans promulgated by King Louis X in 1314. The relevant passage reads:—

> " Item, que prescription ou la tenue de quarante ans suffise à chacun en Normandie dorenavant, pour titre compétent, 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 qu'il soit, aucunes des choses dessusdites aura possidées par quarante ans paisiblement, qu'il ne soit sur ce molesté, en aucune manière de nos Justiciers, ne souffert être molesté.

Et qui le contraire voudra faire, il ne soit de rien ouy ne reçu en aucune manière; combien que le droit de la Coûtume et Ordonnance de notre besael, soyent évidemnent contraires à ces choses. Et ce voulons être gardé, non obstant tout usage au contraire . . . ".

This text, though not simple, on careful examination, leads to conclusions upon which the present appeal can be decided. For its proper understanding, it must first be appreciated that it is dealing, as any law relating to prescription must deal, not only with claims to acquire title to corporeal, or tangible immovables (immeubles corporels), which are capable of possession, but with claims of an incorporeal character against property (sometimes called in Guernsey " droits réels ") free from which an owner of land may claim to hold the land after expiry of a period during which those claims or rights have not been exercised. In relation to these claims or rights the text provides for extinction by prescription but this extinction is accompanied by, and indeed produces, a positive title, free from them, in the owner of the property.

In their Lordships' opinion, one thing the text certainly does not do is by prescription to extinguish an owner's title to corporeal immovables unless another person was in a position to show an acquisitive prescriptive title; and, most importantly, as a condition of the latter, possession " paisiblement " has to be shown. Even under the first sentence, which may operate extinctively, it is made clear that the purpose of the prescription is to enable a person to prove good title—" pour titre compétent ". To suppose that, in relation to a corporeal immovable, it does nothing but provide for extinction of adverse claims after 40 years, would be inconsistent with the second sentence which requires that, in relation to corporeal immovables, possession must be " paisible ".

This point, indeed, illustrates the essential weakness of the respondents' case. For if it is right that a man's claim to a corporeal immovable is barred automatically by the mere lapse of (20) years, one of two consequences must follow: either the title to the land must be left *in vacuo*, or title may be acquired by a person whose possession has not been " paisible " or in good faith. La Charte aux Normans lends no support to this: the text is concerned with title and is dealing throughout with the conditions on which title may be acquired—either against adverse claimants, or against claims to incorporeal rights. And although in matters of prescription arguments based on logic or reason may be overstressed, neither reason nor logic supports a system such as that for which the respondents contend, which while extinguishing claims might leave the title *in vacuo*, or which would effectively confer title in the absence of good faith.

That this view of La Charte is correct and was carried forward into the later legislation is borne out by the 19th century writer Gallienne—a Guernsey lawyer—writing shortly before the law of 1852 was introduced. His Traite de la Renonciation par Loi Outrée et de la Garantie (1845) contains this passage: —

" Lorsqu'il s'agit d'immeubles ou de droits immobiliers, il faut que le possesseur ait joui ' par quarante ans paisiblement ' pour que la prescription soit accomplie [a form of acquisition which Gallienne said, *ibid.* at p. 315, had been called Usucapion in Roman Law], ou que celui qui réclame un droit réel n'en ait pas demandé l'exercice pendant le même laps de temps. ' Et a lieu telle prescription (quarante ans) en choses héréditales et actions réelles, ou dependantes de réalité'." (p. 318)

This makes it clear that, in his opinion, while a "droit réel" can be extinguished by non user for 40 years (in which event the owner of the property enjoys it free from the right), the only form of prescription applying to "immeubles", which includes corporeal immovables, is by 40 years "peaceful" possession. There is no suggestion that an adverse claim to a corporeal immovable can simply be extinguished by lapse of a prescription period in the absence of proof by another of acquisitive title.

Another authoritative writer on the law of Guernsey, Laurent Carey, in his 18th century Essai sur les Institutions, Lois et Coûtumes de l'Ile de Guernesey (1889 edition p. 207), writes in the same sense.

Finally, reference may be made to Terrien, a commentator of great authority on the Civil Law of the Duchy of Normandy. His commentaries (2nd ed. 1578, p. 305) refer to the fixing of the 40 years period in A.D. 1314 in place of the previous 30 years as required "pour gaigner la propriété d'un héritage" and says that "la possession ou tenue . . . saisoit et rédoit le possesseur paisible et ne pouvoit plus la chose être rappelée par bref". Thus immunity from action by "bref" is a consequence of acquisitive possession for the prescribed period. It is only in relation to personal actions—where the prescriber does not possess anything—that prescription operates upon the claim: this it does in detestation of the creditor's lack of concern (*op. cit.* ed. 1654 p. 335). There is no suggestion that this could apply to claims for immovable corporeal property. (See also *ibid.* p. 338, commenting on the text of the Charter.)

Against the background of these antecedents, the laws of 1852 and 1909 cannot, in their Lordships' opinion, be interpreted in the manner favoured by the Court of Appeal. They adopt and are based upon the pre-existing customary law, doing no more than reducing the prescriptive period, and in the case of the law of 1909 introducing or reaffirming (it is not necessary for their Lordships to decide between these) the requirement of good faith. Thus, proof of a title acquired by prescription is required to defeat a claim to a corporeal immovable: lapse of time in preferring a claim is not, by itself, enough.

So far as present proceedings are concerned, the period of 20 years, laid down by the Law of 1909, was, in their Lordships' judgment, extended by five years and six months by Law No. 1 of 1941 (promulgated on 27 January 1941) confirmed by an Order in Council dated 14 August 1945 and an Ordinance thereunder of the Royal Court of Guernsey on 25 August 1945. An attempt was made, on behalf of the respondents, to contend that this legislation did not extend to Sark—the argument being based on the distinction between the Bailiwick of Guernsey which includes Sark and the Island of Guernsey which does not: the legislation, it was said, only applied to the latter. Their Lordships, in agreement with the Court of Appeal, while accepting that the language used is not entirely precise, nevertheless, upon a consideration of these enactments, are clearly of opinion that the distinction sought to be drawn should not be made, and that the legislation applied throughout the Bailiwick. The relevant period becomes therefore 25 years and 6 months.

It remains to consider what course should be followed as regards the present proceedings.

The appellant brought his action upon the basis that, as the rightful heir of Marie Elizabeth Vaudin, he became entitled to the property on her death: his claim has not been proved in fact or established in law, but for the purpose of the present preliminary objection must be assumed to be correct. The preliminary objection against his claim was made and has been maintained throughout on the basis that in law the respondents needed merely to show the lapse of the prescriptive period in order to extinguish his claim. Their Lordships have held that this legal foundation

for the objection is unsound and that prescription can only be made good against him if the respondents can show an acquisitive title based on 25½ years possession. This possession, in order to qualify, must, in the terms of the old law, be " paisible ". To interpret this expression it is legitimate—under the principle previously stated—to refer to learned commentators: de Ferrière in his Dictionnaire (Ed. 1771 Vol. 2 p. 371) defines possession paisible as " celle qui n'a point été interrompue ". So it must be uninterrupted and, under the law of 1909, in good faith. No proof has so far been offered by the respondents to support such a title: the appellant has had no opportunity to challenge such evidence as might be offered. It would, in their Lordships' opinion, be quite wrong to hold the appellant's claim to be barred on the basis of admissions made while the case was being argued on a different and incorrect legal foundation, or upon assumptions as to what may have been the duration and nature of the respondents' possession. Unfortunate though it is for the process of litigation to be prolonged, their Lordships consider that justice to the appellant requires that the case return to the Court of the Seneschal of Sark to find the necessary facts to support or repel a case of acquisitive prescription. Their Lordships wish to endorse what has already been said in the course of the proceedings as to the necessity for the Court of first instance to find and explicitly state the facts upon which its conclusion is based.

As to the issues which will fall to be decided in the future, their Lordships would make no observations as to the facts or method of proof. These are matters for the Seneschal's Court acting on normal evidentiary principles. There are however two points to which they would draw attention.

1. The Law of 1909 requires that possession, in order to establish acquisitive title by prescription, must be in good faith. Under the law of Guernsey, as of most other systems, good faith is presumed unless the contrary is shown, the burden of so showing resting upon the appellant. If the appellant wishes to make any allegations of lack of good faith, he must do so in precise terms with full and clear particulars of the matter relied on; no allegation unsupported by full and clear particulars, or falling outside any particulars given, should be entertained by the Court. The appellant cannot put forward general allegations and seek to support them by fishing enquiries or cross examination.

2. Suggestions were made in the course of argument before the Court of Appeal and their Lordships that the appellant would wish to argue that the period of prescription should not run against him while he was " empêché d'agir ". That empêchement d'agir is recognised in the authorities as preventing the prescriptive period from running, their Lordships would accept, but in their Lordships' opinion that expression does not extend to the length contended for by the appellant.

The key to its scope is provided by the word empêchement itself. There must be an impediment from acting: or as the Latin maxim states " *contra non valentem agere nulla currit praescriptio* ". Older authorities provide a number of examples of what at various times were accepted as impediments: absence on public business (Terrien *l.c.* p. 332), absence in the service of the State if there is nobody entrusted with his affairs (Pothier (1831) Vol. V. p. 365), being a prisoner of the enemy (Terrien *l.c.* p. 332), or various types of personal incapacity. These cannot necessarily be carried forward into modern times without consideration of the essential question whether in modern conditions they bring about an impediment from acting. Mere absence overseas, even in Crown service, does not in their Lordships' opinion qualify: it may be the cause of ignorance, but not of impediment. As regards ignorance, this too is mentioned in some of the Commentators, but only when brought about by fraud or misrepresentation (see Carey *l.c.* p. 207).

If the appellant wishes to rely upon empêchement under this head, he must do so with full supporting particulars of the fraud or misrepresentation relied on and he must conduct his case strictly within the limits of the particulars stated. Again he cannot be allowed to put forward a general allegation as support for a fishing enquiry or cross-examination.

With these observations, their Lordships dispose of the appeal as follows. They will humbly advise Her Majesty that the appeal should be allowed and the case remitted to the Court of the Seneschal of Sark to proceed in accordance with the law as stated by the Board. The respondents must pay the appellant's costs before the Board and in the Court of Appeal.

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DELIVERED BY
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Printed by HER MAJESTY'S STATIONERY OFFICE
1973