Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Godfray v. *The Constables of the Island of Sark, from the Royal Court of the Island of Guernsey; delivered the* 18*th June* 1902.

Present at the Hearing:

LORD MACNAGHTEN.
LORD SHAND.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.

[*Delivered by Lord Davey.*]

Their Lordships have delayed their judgment in this Appeal in order to give the parties an opportunity of settling the question between them by some reasonable compromise. They are however informed that the parties have not succeeded in doing so and they must therefore give their judgment according to the strict legal rights of the litigants.

The Appeal is from a decision of the Royal Court of the Island of Guernsey dated the 16th June 1896 whereby it was determined that there is a public right of way through a tunnel which has been cut in a hill called La Moie du Creux in the Island of Sark within the Bailiwick of Guernsey which is the property of the Appellant. The hill abuts on a harbour called Le Havre du Creux which is wholly enclosed by cliffs and the communication with the interior of the island is by two artificial tunnels cut through the cliffs. One of these tunnels was constructed many

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years ago and has always been open to public use but the other (which is the tunnel now in question) was cut through La Moie du Creux in or about the year 1866 in the circumstances presently mentioned.

In 1894 or 1895 a portion of the roof of this tunnel fell in consequence of certain mining operations of the Appellant and differences arose between the Appellant and the public authorities of the island as to the liability for the repair of the tunnel. In the result the Appellant commenced the present action in the Royal Court of the Island of Sark against the Constables to have it determined that the tunnel was his property and that the public had no right of way through it. The Seneschal who is the Judge of that Court having declined to adjudicate in the action on the ground of his relationship to the Appellant it was transferred to the Royal Court of Guernsey. The latter Court by its judgment of the 14th March 1896 dismissed the action with costs and this judgment was affirmed by the Full Court on the following 16th June.

It was not contested that the Appellant is the proprietor of La Moie du Creux and of the soil of the tunnel. On the other hand it was not contested by the Appellant that the tunnel had *de facto* been used by the public as a road to the harbour since its construction in or after the year 1866. The Respondents relied upon this public user and also upon a certain resolution of the 11th July 1866 a minute of which is found in the public register of the Island of Sark. It was argued that the resolution explained and gave a sufficient title for the public user.

The minute in question (when translated) is as follows:

"At an extraordinary meeting of the Seigneur "and resident tenants of this island authorised

"by order of the Chief Pleas (Chefs Plaids) of
"Easter last and held on the 11th July 1866.

"In view of the necessity of cutting a new "tunnel and removing a part of the soil of La "Moie du Creux Mr. Thomas Godfray Seneschal "natural guardian of Alfred Godfray a minor "the owner of the said soil this day consented to "give and release in perpetuity for himself and "his heirs to the public the right of passage "through the said tunnel on condition of having "in perpetuity for himself and his heirs the land "behind the public fountain of La Sécherie du "Creux."

The tunnel was made (it is said) at the public expense and the Appellant was put into possession of the piece of land behind La Sécherie. And if this case had arisen in England there would be evidence of the dedication to the public by the Appellant of the way through the tunnel and probably a contract would be inferred from the actings of the parties on the resolution of the 11th July 1866 of which a Court of Equity would decree specific performance.

In the Channel Islands however 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. It was argued before their Lordships that no length of user without title will give right to a servitude or at any rate that the shortest period of prescription is 40 years. Their Lordships on this part of the case will repeat what was said by Lord Blackburn in delivering the judgment of this Board in the case of *De Carteret* v. *Baudains* 11 A. C. 214 which was an Appeal from the Royal Court of Jersey. "If "the law of England prevailed in Jersey and a "public right of way in the nature of an ease-"ment 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 term however short it may be that
" this " (referring to some evidence of user in that
case) " 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 40 years' possession by
" the parish of a way as a public way accom-
" panied 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."

Nor is it necessary now for their Lordships to give any opinion on this somewhat difficult question for the length of user of the tunnel by the public before action did not exceed 30 years. Their Lordships were not referred to and are not aware of any authority for thinking that the law in the Island of Sark differs for the present purpose from that of Jersey and indeed the learned Counsel for the Respondents who argued this case with great zeal for their clients did not contend that they could rely upon the public user alone.

By the law prevalent in all the Channel Islands the conveyance of land and of rights of user and occupation of land is matter of record. A "contrat" is acknowledged by the parties before and attested by the Royal Court of the Island and a minute of the "contrat" is then entered in the Register of the Court. In Sark the Seneschal is the Judge of the Royal Court and the presence of jurats is not required. It is not

necessary that the "contrat" should be in writing or signed by the parties to it but it must be acknowledged by them and a minute containing the terms must be registered. There is no Court which can decree specific performance of a private contract or which administers the equities familiar to English lawyers arising out of part performance, acquiescence by the vendor in expenditure of money by the purchaser on the faith of the contract or other similar equities.

All this was admitted by Counsel for the Respondents but it was contended that the registered minute of the resolution of the 11th July 1866 was such a minute of a "contrat" acknowledged before the Seneschal who it was assumed was present at the meeting as would satisfy the requirements of the law.

To this argument several answers were made by the Appellant. In the first place it was pointed out that the meeting at which the resolution was passed was not a meeting of the Chefs Plaids themselves but a meeting convened by the authority of that body for the purpose of advising them or for inquiry and as appeared from a registered minute of the previous meeting of the Chefs Plaids without any power to bind them by a contract for the tunnel. The meeting was it appears directed to be held only in reference to a project for the construction of a breakwater. The resolution itself does not purport to record the terms of a concluded contract or to be more than a note of an offer made by Mr. Godfray in the course of the proceedings. Secondly it was said that it does not even appear that Mr. Godfray was present in person at the meeting and that if he was so he was not there in his capacity of Seneschal holding a Court but as a party making an offer and there was no one present accepting the offer or empowered to accept it and it does not

purport to be accepted so as to make a contract. Thirdly it was said that it was not registered in the proper Register as a contract or act of the Court and in support of that statement the certificate of the Greffier printed in the Record was referred to. In answer to a suggestion rather faintly put forward that Mr. Thomas Godfray the Seneschal being one of the parties it was not possible for the contract to be acknowledged before himself it was pointed out that it might have been acknowledged before the Royal Court in Guernsey and registered there as was in fact done when the property was conveyed to him in 1862 as guardian of his son the present Appellant.

Their Lordships are constrained to say that they think the answer given by the Appellant to the Respondents' argument on the form and effect of the minute of the resolution is sufficient. They cannot hold either that Mr. Thomas Godfray if present was acting as Seneschal and Judge of the Royal Court for the purpose of taking the acknowledgment of a "contrat" or that the minute records a completed transaction or is more than a note of Mr. Thomas Godfray's offer. They must therefore hold that there is no conveyance or grant of the right of way claimed or contract for the grant of it to which effect can be given in the Court of the Island.

One other argument on behalf of the Respondents must be mentioned. It was said that the Appellant who was a minor in 1866 and attained the age of twenty years (which is the age of majority in the Channel Islands) in 1876 was precluded by his delay in bringing the present action. In support of this argument reliance was placed on a law and custom of Normandy which is thus stated by Terrien (Livre ii., ch. 5, p. 23) "Pource que ceux qui sont en non age "doivent estre tenus en garde tant que les vingt

"ans soyent accomplis; on leur donne un an "par l'usage de Normandie en quoy ils peuvent "faire en cour clamer et rappeller par enqueste "les saisins de leur antecesseurs et de ceux de qui "les eschaites doivent venir à eux comme aux plus "prochains hoirs. Et s'ils le laissent tant que le "vingt et unieme an soit passé ils ne devront "apres estre ouys et ne pourront les saisines "rappeler s'ils n'ont meu le plet dedans le vingt "et unieme an poursuy ordonnément."

Terrien's commentary on this Article is "cest "an est appelé l'an profitable dedans lequel on "peut rappeler par voye possessoire les saisines "de ses predecesseurs." Laurent Carey in his Essay on the Institution Laws and Customs of the Island of Guernsey (Edition 1889, p. 172) after stating the rule adds: "Mais ils pourront "être reçus à intenter leur action par voie "proprietaire pour recouvrer leur héritage comme "aussi ils pourront poursuivre la cassation des "contrats par eux faits ou par leurs tuteurs "durant leur minorité."

Their Lordships are of opinion that the rule applies only to the class of actions called "actions possessoires" the object of which is to recover possession or "rappeller les saisines" of which the Plaintiff has been unjustly deprived and it has nothing to do with petitory or real actions in which the title is in issue such as the present one. Possessory actions require to be brought within a year and a day of the alleged disseisin or dispossession and possession for a year and a day is therefore a defence in such an action. If the Respondents were right an infant would be placed in a worse position than a person of full age as regards the assertion of his title to land and instead of the rule being for the better protection of the minor it would be to his detriment.

Their Lordships have no statement of the grounds on which the Royal Court of Guernsey decided against the Appellant. But the case was very fully argued before them and no doubt the arguments which found favour in the Court below were also presented to their Lordships.

They have however failed to find any legal principle in the law of the Island relating to real property upon which the judgment of the Royal Court can be supported and they must therefore humbly advise His Majesty that the Judgment appealed from be reversed and instead thereof it be declared that the tunnel under the Moie du Creux mentioned in the cause is the private property of the Appellant and that the public has no right-of-way through it and that the costs in both Courts below ought to be paid by the Respondents. The Respondents must also pay the costs of this Appeal.