

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
6 - DEC 1971
25 RUSSELL SQUARE
LONDON W.C.1

IN ~~THE COURT OF APPEAL~~ THE PRIVY COUNCIL
No. 36 of 1968

O N A P P E A L

FROM THE WEST INDIES ASSOCIATED STATES SUPREME
COURT

COURT OF APPEAL - DOMINICA

B E T W E E N :

HER MAJESTY'S ATTORNEY-GENERAL
FOR DOMINICA (Plaintiff) Appellant

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- and -

HOWELL DONALD SHILLINGFORD
(Defendant) Respondent

CASE FOR THE RESPONDENT

RECORD

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1. This is an appeal from the judgment of the Court of Appeal of the West Indies Associated States Supreme Court (Lewis C.J., Gordon J.A. and Cecil Lewis J.A.) dated 6th July 1968, which allowed the appeal of the Respondent against a judgment of Louisy J. in the Supreme Court of the Windward Islands and the Leeward Islands dated 21st October 1966. By his judgment Louisy J. ordered the Respondent to give up possession of certain portions of land (numbered 1, 2, 3, 4 and 6 on the plan being Exhibit 29a) in the Colony of Dominica, which land was held by the Respondent (together with other land) under a Certificate of Title issued on 4th November 1941 by the Registrar acting under the Title by Registration Ordinance (Cap. 222) and registered in Book of Title R folio 126. The Court of Appeal allowed the appeal of the Respondent and set aside the judgment of the Court below.

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2. In the action the Appellant (on behalf of the Crown represented in Dominica by the Executive Government of Dominica) claimed a declaration that certain portions of land totalling 486 acres included in the said Certificate of Title was the property of the Crown that the said 486 acres be restored to the Crown and that the said Certificate of Title be cancelled or amended accordingly. The portions of land so claimed are those edged red and blue on the said plan (Exhibit 29a) and numbered 1, 2, 3, 4, 5 and 6 (hereinafter referred to as Lots Nos. 1, 2, 3, 4, 5 and 6 respectively) and three portions of land part of the foreshore one adjoining Lot No. 1 comprising 5 acres one adjoining the land coloured red on the said plan comprising 3 acres 1 rood and 20 perches and one adjoining Lot No. 5 comprising 1 rood 3 perches. The said portions of land are hereinafter referred to as "the King's Three Chains". No claim was made to the land coloured red, green, grey and yellow on the said plan. In his judgment Louisy J. held that the Appellant's claim failed as regards Lot No. 5 and the King's Three Chains. There was no appeal from that part of the Judgment. This appeal accordingly relates only to Lots Nos. 1, 2, 3, 4 and 6.

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3. The case was heard by Louisy J. on 15th, 16th, 17th, 18th, 19th, 22nd and 23rd November 1965. The Appellant called 4 witnesses. Jerome Robinson, Crown Surveyor and Commissioner of Lands, was called to produce a map, called the Byers Map, alleged to be a map made in 1776 by John Byers Chief Surveyor of Dominica and which was alleged to show that all the land now in dispute was originally Crown land. However, the said Jerome Robinson admitted in cross-examination that the map produced was not the original map, but a copy, and the learned judge held that the map produced was therefore inadmissible as evidence. Albert Matthew, Legal Assistant to the Appellant and junior counsel for him at the trial, was called to produce and describe the results of his searches into the records of the history of the Batalie Estate and its neighbouring lands. Karol Winski, retired Government Surveyor, Dominica, who had also made a search of the records, was

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called to give an account of his work and to produce the map Exhibit 29a of the Batalie Estate and neighbouring land which he had drawn. Joseph Vaughan Jean Pierre, Registrar of the Supreme Court, Dominica, was called to produce File No. 12 of 1941 containing the application for title by the Respondent in which the affidavit of service of notice to adjacent occupiers indicates that service was made on the Colonial Engineer for the Government the Respondent's Certificate of Title and other Certificates and to describe the procedure for obtaining such Certificates.

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4. The Appellant claimed that Lots Nos. 1, 2, 3, 4 and 6 were originally Crown lands and had been the subject of Crown grants conferring rights of occupancy subject in each case to a condition or proviso for re-entry by the Crown in certain events. The documentary evidence relating to the original grants is as follows:-

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(a) Lot No. 1. By an Indenture dated 18th December 1812 (Exhibit 28) it was provided that the Crown "Do give and grant to the said James Laing and Robert Reid their heirs and assigns our Royal Licence and permission to use occupy possess and enjoy all that piece or parcel of land to have and to hold the said piece or parcel of land to the said James Laing and Robert Reid their heirs and assigns forever to the only proper use and behoof of the said James Laing and Robert Reid and to and for no other use upon and under the following express conditions that is to say that the said James Laing and Robert Reid their heirs or assigns shall not directly or indirectly sell assign convey or transfer either absolutely or in trust or otherwise in any manner whatsoever to any person or persons whomsoever the said lands and premises or any part thereof without the licence or permission in writing of Our Governor or commander in chief of Our said Island of Dominica for the time being first had and obtained for that purpose under his hand and seal and if any such assignment sale conveyance or transfer of the said lands and premises without such licence first had

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and obtained as aforesaid shall be made either by the said James Laing and Robert Reid their heirs or assigns or any of them contrary to the true intent and meaning of these presents then and in such case these our letters patent and the grant and license therein contained shall be null and void to all intents and purposes whatsoever . . . and further we do hereby declare 10 that these our letters patent and this grant and license therein contained are and is determinable upon this express proviso and condition that is to say that if at any time or times hereafter the said piece or parcel of land and premises shall be wanted by us our heirs or successors for public uses or if we our heirs or successors shall think fit to disallow or determine the grant licence or permission hereby given by 20 any order from us signified by any notification thereof from any of our Secretaries of State sent to our Governor or Commander in Chief of our said Island of Dominica for the time being then upon such order or notification being made to the said James Laing and Robert Reid their . . . these our letters patent and licence or title or occupancy thereby made shall cease determine and become absolutely null and 30 void to all intents and purposes whatsoever and the said land and premises hereby granted by way of occupancy shall immediately revert to us our heirs and successors as if these our letters patent had never been made or issued . . ." This Lot comprises 100 acres.

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(b) Lot No. 2. By a Grant made in April 1812 and recorded on 24th July 1812 (Exhibit 30) the Crown granted to Peter Larocque his 40 heirs and assigns, land comprising 60 acres, upon the same conditions as to alienation and determination as previously set out in relation to the said Indenture dated 18th December 1812.

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(c) Lot No. 3. No original grant is in evidence. The only evidence relating to the original title to this land is a

10 petition dated 26th September 1812 by William Anderson to the Government seeking permission to sell to George Cunningham the land comprised in this lot (being 60 acres in extent), which permission was granted on 12th October 1812. A note at the foot of this document reads "P.4 folio 301 - 60 acre grant on 29th July 1812 to William Anderson". This footnote is not part of the document and the grant referred to has not been produced.

20 (d) Lot No. 4. No original grant is in evidence. However, in the grant recorded on 24th July 1817 to Peter Larocque of Lot No. 2 (Exhibit 30) it is stated that that Lot was bounded to the North partly by lands of Laing, Reid and Lucas. It was suggested in the Court of Appeal by Lewis C.J. that part of this Lot was comprised in a Deed dated 1st April 1862 (Exhibit 7) made between the said John Imray (1) and George Birrel Blanc (2) since the Northern and Western Boundaries of the land comprised in that Deed are described as the Batalie Estates.

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30 (e) Lot No. 6. This land, being 24 acres in extent, was found by Louisy J. to be the western portion of lands the subject of a Crown Grant dated 4th August 1804 (Exhibit 33) of 50 acres to Marie Victoire Roger Bellair her heirs and assigns upon similar conditions as to alienation and determination as previously set out in relation to the said Indenture dated 18th December 1812.

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40 5. By an Indenture dated 31st May 1941 (Exhibit 15) and made between Eleanor Margaret Macintyre and Annie Frances Macintyre and Eleanor Margaret Macintyre the said Eleanor Margaret Macintyre, Annie Frances Macintyre and Kathleen Annie Macintyre, Georgina Celia Lockhart and Annie Francis Macintyre (therein called "the Vendors") of the one part and the Respondent (therein called "the Purchaser") of the other part the Vendors for the consideration therein mentioned conveyed to the Respondent in fee simple "all that Estate Lands and premises known as the "Batalie" estate together with the

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p. 71 King's Three Chains containing 652 acres the said Estate being butted and bounded as follows . . . ". On 5th September 1941 the Respondent filed a Request for the issue to him of a certificate of title to the land known as the "Batalie" estate comprising 776 acres 1 rood and 12.08 poles. The reason the Request was for 776 acres and not 652 acres was because in the Abstract of Title exhibited in the Request it was stated "other lands the property of the Applicant being included". The Request was considered by the Chief Justice on 8th November 1941 who made an Order, namely "Let First Certificate of Title issue". On 14th November 1941 the Certificate of Title was issued in respect of the land comprised in the plan attached to it being 776 acres 1 rood and 12.08 poles. 10

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6. The material provisions of the Title by Registration Ordinance (Cap. 222) are :- 20

Section 7. "Whenever a grant of land is made by "the Crown, the grantee may elect, instead of "receiving the grant, to have a certificate of "title issued to him in lieu thereof, and on "notice in writing of such election being given "to the Administrator, the grant, instead of "being given to the grantee, shall be delivered "to the registrar of titles, with a direction "endorsed on the grant and signed by the "Administrator, that a Certificate of Title be "issued to the grantee. Whenever a Crown "grant is so delivered to the registrar of "titles, he shall, without payment or further "or other fees, issue to the grantee a "certificate of title in respect of the land "comprised in the grant." 30

Section 8. "All certificates of Title granted "under this Ordinance, and all notings of "mortgages and incumbrances on the same, shall "be indefeasible". 40

Section 10. "The right of the registered "proprietors named in a Certificate of Title to "the land comprised in a Certificate of Title "granted under this Ordinance shall be the "fullest and most unqualified right which can "be held in land by any subject of the Crown

"under the Law of England, and such right
"cannot be qualified or limited by any
"limitations or qualifications in the Certificate
"of Title itself, unless such limitations and
"qualifications were inserted in any Crown Grant
"in place of which the Certificate of Title has
"been issued, or in respect of any Certificate
"of Title issued by virtue of any scheme under
10 "the Town and Country Planning Ordinance or
"under the Slum Clearance and Housing Ordinance,
"or as in the case of mortgages and incumbrances,
"when these are noted on the Certificate of
"Title".

Section 121. "The registrar of titles may, of
"his own motion, enter a caveat upon the register,
"either to protect the rights of the Crown, or
"the rights of any person under legal disability
"or absent from the Colony, or for any good,
20 "valid and sufficient reason to him appearing
"which may require him to act in such a manner
"in the interests of justice, and he may also
"enter a caveat when it shall appear to him
"that any error has been committed in regard to
"any certificate of title, or any noting thereon,
"in order to prevent dealing with the said land
"until such error shall have been corrected."

The First Schedule to the said Ordinance
provides, inter alia, as follows :

30 "Indefeasible. The word used to express
"that the Certificate of Title issued by the
"registrar of titles, and the notings by him
"thereon, cannot be challenged in any Court of
"law on the ground that some person, other
"than the person named therein as the
"registered proprietor, is the true owner of
"the land therein set forth, or on the ground
"that the mortgages or incumbrances in the
"noting thereon are not mortgages and
40 "incumbrances on the said land; except on the
"ground of land connected with the issue of
"such Certificate of Title, or the noting of
"such mortgages or incumbrances, or that the
"title of the registered proprietor has been
"suspended by a Limitation Ordinance, by the
"person making the challenge. The word also
"means that, the Certificate of Title being
"issued by the Government of the Colony, the
"Government of the Colony is, with the
50 "exceptions above-mentioned, prepared to

10 time as the grant to Peter Larocque and that the fact that the Grants of Lots Nos. 1, 2, 3 and 6 were all subject to similar conditions raised the inference that the Grant of Lot No. 4 was also subject to such conditions. He held that the condition, which he had held to be included in the Grants of Lots Nos. 3 and 4, had also been broken and that the Crown was accordingly entitled to re-enter and recover the land comprised in these lots.

20 9. The Respondent relied (amongst other things) on his Certificate of Title and on the Crown Suits Act 1769. The learned Judge held that, although a Certificate of Title was conclusive as between subject and subject, it was not conclusive as against the Crown. He further held that the Title by Registration Ordinance as a whole was not binding on the Crown. He also held that the Crown Suits Act 1769, known as the Nullum Tempus Act, which provides that the Crown loses any right of re-entry onto land unless the right is exercised within 60 years from the date of its accrual, did not apply to Dominica. He held, however, that the Respondent and his predecessors had been in possession for more than 60 years prior to the commencement of the proceedings of all the land in dispute other than Lots Nos. 2 and 3, and had been in possession of Lots Nos. 2 and 3 since 1941.

30 10. On 10th November 1966 the Respondent lodged an appeal from the judgment of Louisy J. on the grounds set out in paragraph 3 of the Notice of Appeal

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40 11. The appeal was heard on 21st and 23rd February. Judgment was given on 17th June 1968 and the order was filed on 6th July 1968. Lewis C.J. accepted the facts as found by Louisy J., subject to the reservations that, at the date of his death in 1880, the said John Imray also owned the three sections of the Three Chains which were in dispute, and that the said John Imray may also have been in occupation of Lot No. 1 at his death. He noted that the Appellant had argued the appeal on the basis that it was for the Appellant to prove the title of the Crown and decided, contrary to the findings of Louisy J., that the Appellant had not

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proved the original title of the Crown to Lots Nos. 3 and 4. He held, however, that the Appellant had done so as regards Lots Nos. 1, 2 and 6. He held that, assuming the grants which were in evidence (which related to Lots Nos. 1, 2 and 6), were grants in fee simple upon condition, the Crown did not dispose absolutely of its rights of ownership but retained sufficient of its rights to entitle it to retake possession of the land in appropriate circumstances. He held that the Crown could so re-enter where the original grantee had gone out of possession and a third party had gone into possession for sufficient time under the Real Property Limitation Ordinance (Cap. 16) to bar the right to recover, it being conceded that the Ordinance did not bind the Crown. He held in relation to Lots Nos. 3 and 4 that, since no grant was in evidence, no inference could be drawn that grants were made subject to conditions identical or similar to those in respect of Lots Nos. 1, 2 and 6. On the question of the indefeasibility of the Respondent's Certificate of Title, Lewis C.J. also reached a different conclusion to that of the learned Judge, holding that, on the proper construction of the Title by Registration Ordinance (Cap. 222), the Crown was bound thereby and that the Certificate was conclusive against it. On the question whether the Nullum Tempus Act applied to Dominica, Lewis C.J. also held that it did not on the ground that English statutes passed subsequent to the Royal Proclamation dated 7th October 1763 did not apply to Dominica unless express words showed an intention that they should.

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12. Gordon J.A. delivered a concurring judgment. He said that it was common ground that the Crown grants in respect of Lots Nos. 1, 2 and 6 created estates in fee simple upon condition. He held that the Crown retained some interest in this land which could be asserted if and when it desired, because an occupier of Crown Lands in Dominica could not prescribe against the Crown and that when the Respondent sought to do so he provided the grounds for regarding the original grants as being at an end and therefore extinguished. In relation to Lot No. 3, he held that the trial judge was in error in inferring that the grant to Anderson must have

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been upon condition, and held that the Respondent had a prescriptive title to it. As to Lot No. 4, he also held the learned trial judge was in error in assuming, in the absence of the original grant, that this grant was upon condition, and he held the Respondent had a prescriptive title to it. On the question of the indefeasibility of the Respondent's Certificate of Title, he held that The Title by Registration Ordinance did bind the Crown and pointed out, inter alia, that to hold otherwise would be a complete negation of the warranty of title given by the Ordinance. With regard to the Nullum Tempus Act he held that it did not apply to Dominica because Dominica fell within the boundaries of the Government of Grenada between the date of the Proclamation by which Dominica was ceded to the Crown, namely 7th October 1763, and the passing of the Nullum Tempus Act and the Grenada Assembly had been summoned in 1768 but did not adopt the Act.

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13. Cecil Lewis J.A. delivered a concurring judgment. He dealt only with the questions of the effect of the Registration Ordinance and the Nullum Tempus Act. He held that the fundamental purposes of the Ordinance were to provide for certainty of titles to land, to facilitate proof and transfer of title, and to reduce expense of dealings in land, and that the Crown was bound by it because to decide otherwise would be to defeat the avowed purpose of creating certainty. He also held that by Section 10 of the Ordinance a registered proprietor in Dominica had the same rights as a registered proprietor in England and such a proprietor took free of any estate or interest of the Crown. With regard to the Nullum Tempus Act he also held this did not apply to Dominica. He held that the Proclamation of 7th October 1763 only applied English law as at that date to Dominica.

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14. On 6th July 1968 the Appellant gave notice of appeal against the decision of the Court of Appeal and final leave to pursue this appeal was granted by Order of the Court of Appeal dated 22nd November 1968.

15. On the hearing of this appeal the Respondent wishes to contend that the conditions in the said Grants of Lots Nos. 1, 2 and 6 are

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void for remoteness and that the conditions therein contained purporting to empower the Crown to disallow or determine the same by Order notified as therein mentioned are also void as repugnant to the estates thereby granted. Although these contentions were not raised in the Courts below, the Respondent humbly submits that since these contentions are contentions of law arising on 3 documents already in evidence, it would be proper for them to be dealt with on this appeal in order to do justice between the parties, having regard to the observations of Lord Watson in Connecticut Fire Insurance Company v. Kavanagh 1892 A.C. 473 at p. 480. 10

16. The Respondent respectfully submits that this appeal should be dismissed for the following (among other)

R E A S O N S

- (i) BECAUSE the Appellant has failed to show that the Crown has any title to Lots Nos. 3 and 4 or that Lots 3 and 4 have ever been Crown land. 20
- (ii) BECAUSE on the footing that the facts found by Louisy J. found the inference that Lots 3 and 4 were originally the subject-matter of Crown Grants there is no evidence to found the inference that such Grants were subject to any condition or right of re-entry by the Crown. 30
- (iii) BECAUSE there is no evidence of any breach of condition entitling the Crown to re-enter Lots Nos. 1, 2 and 6 and no evidence that such Lots are required for public purposes or that any order disallowing or determining the said Grants has ever been made or notified as provided by the said Grants
- (iv) BECAUSE the conditions or rights of re-entry in the Grants of Lots 1, 2 and 6 are void for remoteness and because the conditions therein contained for the disallowance or determination thereof by Order notified as therein mentioned are also void for repugnancy. 40

- (v) BECAUSE the Respondent's Certificate of Title confers an indefeasible title upon him in respect of all the land comprised in the said Certificate, and because the Crown is debarred by Section 8 of The Title by Registration Ordinance (Cap.222) from denying or disputing the same.
- 10 (vi) BECAUSE The Title by Registration Ordinance (Cap. 222) binds the Crown.
- (vii) BECAUSE any right of re-entry by the Crown is barred by 60 years adverse possession by virtue of the Crown Suits Act 1769 which applies to lands in Dominica, by reason of the fact that notwithstanding the Proclamation of 1763 no assembly was duly summoned until the Proclamation of 1775 first establishing an assembly for Dominica.
- 20 (viii) BECAUSE the decision of the Court of Appeal was right.

VINELOTT

JOHN ~~VINELOTT~~

RUPERT EVANS.

No. 36 of 1968

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FROM THE WEST INDIES ASSOCIATED
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COURT OF APPEAL - DOMINICA

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- V -

SHILLINGFORD

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