

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
The Attorney General and Receiver General
for Jersey v. the Solicitor General for Jersey
(on behalf of the Public), from the Royal
Court of the Island of Jersey, delivered
17th June 1893.*

Present :

THE EARL OF SELBORNE.

LORD WATSON.

LORD HOBHOUSE.

SIR RICHARD COUCH.

HON. GEORGE DENMAN.

[*Delivered by the Earl of Selborne.*]

The States of Jersey having purchased, for the public purpose of establishing a fever hospital, certain heritable property in the parish of St. Helier's, held of the Queen as lady of a seignory anciently belonging to the Abbot of Bellozanne, and having failed to come to an agreement with the representatives of the Crown as to the satisfaction to be made for the loss or diminution in value of seignorial rights consequent on the land being brought into mortmain, the action out of which this appeal arises was brought in 1889 by the Attorney General and Receiver General for Jersey against the Respondent, as authorised for that purpose to represent the public of the Island; claiming (in the form which seems to be usual in such cases) that the Defendant, as such representative of the public, should either give up possession of the purchased premises, or pay to

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the Crown the indemnity due by law, "*et lui bailler homme vivant, mourant, et confisquant pour ladite propriété, comme en tel cas est requis.*"

The meaning of the words "*bailleur homme vivant,*" &c., is thus explained by Routier, one of the text-writers cited by the Appellants. (Record, p. 98.) They require the nomination of a person, "on whose death the rights and profits of the fief will accrue to the lord. In a word, it is this man, '*vivant, mourant, et confisquant,*' who represents the vassal, and against whom the lord is in a condition to exercise all his rights." Whether a simple nomination would be sufficient, was a point not touched by the argument. The Judicial Committee, in *Thornton v. Robin* (1 Moore 439), seems to have understood that there would be a conveyance to the person so nominated, making him a trustee for the holders in mortmain; but their Lordships find no other authority for that statement. Terrien says, that in the *Coûtume* of Orleans, a person so nominated was called the "*vicaire,*" or substitute, of those nominating him. Whatever might be the form, whether simple nomination or anything more, the effect in law was the same.

The action was tried before the Inferior Number of the Royal Court of Jersey, sitting as a Court of Heritage, on the 8th of May 1890. They referred it to the *Vicomte* to settle, upon a view of the property and with the assistance of sworn experts, the amount of the indemnity due to the Crown, "for so long as the property had been or might remain in mortmain." The experts fixed the amount at 36*l.*, and the *Vicomte's* report, to that effect, was registered by Act of Court. The officers of the Crown appealed to the Full Court, or Greater Number, who, on the 8th October 1891, unanimously rejected the appeal; declaring, "that, according

“ to the custom of the Island, the Lord was not
 “ entitled to an Indemnity, and also to *homme*
 “ *vivant, mourant, et confisquant*, to perform and
 “ pay the duties and services due to him in respect
 “ of the property which had fallen into mort-
 “ main.”

The principal question is, whether that declaration was correct? There is a subordinate point, with which their Lordships will afterwards deal, as to the manner in which the amount of indemnity was ascertained.

Their Lordships' duty is, not to consider what rule would be most reasonable, but what is the law of Jersey applicable to this case. The law, however, laid down by the judgment appealed from, that the lord has no right to obtain, by decree of the Court, more than a complete indemnity, is not, *primâ facie*, unreasonable.

In the *Ancienne Coûtume* of Normandy, which is the foundation, on this and other subjects, of the common law of Jersey, the only rule bearing upon this subject was, that the lords, of whom lands were held, should suffer no damage by reason of those lands being, by the act of their vassals, put into mortmain. The manner or measure of indemnity to be given was not defined; and of “ *homme vivant, &c.*,” nothing was said. It is certain, however, from Terrien's Commentary, that in the practice under the *Ancienne Coûtume*, the “ *homme vivant*,” &c., was not unknown. Terrien says, that “ the King, and “ the other High Justiciers, and feudal lords,” (whether this means all lords, or only the lords of noble fiefs, may possibly be doubtful,) “ may “ compel the holders in mortmain to give up “ possession, and to find a man *vivant et mourant*, “ in order that he may perform the services and “ duties of the fief, in place of the holders in “ mortmain.” It is not to be inferred from this, (which cannot mean, that *both* those things were

to be done,) that the lord, if he availed himself of that right, could claim anything more; even though there might be casualties, such as escheats or fines upon alienation, which would not arise as long as the land was in mortmain under the same title. And what Terrien afterwards says about indemnity, (not in the same context, but after a considerable interval occupied by other matter,) by no means implies, that if the lord claimed indemnity, he could also claim "*homme vivant et mourant*." The mortmain, (he there says) "is without prejudice to the interest of the immediate lords, whose consent is necessary, and they, as well as the King, may require their indemnity; which may consist of an annuity or rent payable to the lord, or a sum of money paid down to him." This seems to refer to complete indemnity, the price of the lord's consent that the land should be discharged from his seignorial rights. But the principle of the "*homme vivant et mourant*" was that the seignorial rights should be kept alive, by the interposition of a nominal vassal between the holders in mortmain and the lord. If Terrien had understood the law to be, that the lord could enforce, in this way, the specific preservation of his rights, and also obtain indemnity for any diminution in their value, it is at least probable that he would have said so.

It was urged, at their Lordships' bar, that the 140th Article of the *Coûtume Reformée* of 1585 (which has itself no authority in Jersey) ought to be accepted as evidence of the earlier law, because it was not marked by the Revisers as new; and Poingdestre was referred to, as saying, that it was no more than an explanation of the preceding Article (Art. 139), "which followed the text of the (Old) *Coûtumier*." Article 139 did not follow that text verbally, though it may have been intended to do so

in substance; the *Ancienne Coûtume* providing only that the lords should "suffer no damage" (*ne doivent avoir nul dommage*) from the acts of their vassals in putting land into mortmain; the New (Art. 139), that "the rights of the lord shall suffer no diminution, in jurisdiction, rents, or other duties." But, when Article 140 is treated as explanatory of the *Ancienne Coûtume*, it is necessary to inquire what exactly is meant. There was certainly nothing about "*homme vivant et mourant*" in the *Ancienne Coûtume*. Not a few commentators of high authority interpreted that Article (notwithstanding the conjunction "*et*") as offering to the lord, not a double, but a single remedy, with a choice between the *homme vivant*, &c., and a pecuniary indemnity; and Lord Wynford, delivering the judgment of this tribunal in *Thornton v. Robin*, plainly took the same view; for he not only regarded the "*homme vivant*," &c., as (when that was the course followed) "the mode of providing the indemnity," but, in his translation of the text of Article 140, he substituted the disjunctive "*or*" for the conjunctive "*et*." So understood, the Article might, without substantial error, be regarded as expository, not indeed of the text of the *Ancienne Coûtume*, but of the law and practice under it, agreeably to Terrien's Commentary. But the case is different if it is insisted that Article 140 is to be taken as a positive law, to be strictly construed; and if on the mere text of that Article, so interpreted, the doctrine of a double or cumulative remedy is founded. It was on such a verbal criticism, supported by the decisions of the Duchy Court in the cases of the Prioress of St. Louis and the Nuns of Briosne (more than seventy years after the publication of the *Coûtume Reformée*), and the 21st Article of the Règlement of 1666, that Basnage, Godefroy, Flaust, and other Norman

Commentators, founded their dissent from the writers who maintained the opposite view. Even in Normandy, the opposite view seems to have prevailed till it was overruled by those decisions; for in the case of the Hospital of Orbec, cited by Flaust (Additional Translations, p. 6), the Réglement of 1666 was said to have “restored” the true maxim, by condemning the mortmain bodies not only to furnish *homme vivant mourant et confisquant*, but also to pay the indemnity due.” Unless it is otherwise shown that the view of the law established in the cases of the Prioress of St. Louis and the Nuns of Briosne, and by the Réglement of 1666, was accepted in Jersey, that proposition cannot, in their Lordships’ judgment, be proved by decisions of 1659 and 1661, or the Réglement of 1666, which had no force of their own in Jersey, or by any verbal criticism of Courts or Commentators upon the text of Article 140 of the *Coutume Reformée*, where it differs from that of the *Ancienne Coutume*.

Their Lordships do not think it necessary, for the purposes of this case, to examine another question, on which there seems to have been some diversity of opinion and practice; viz., whether *homme vivant et mourant* was exigible in any case except that of a noble fief (which that now in question was not), where fealty and homage were due. Ferriere (Dictionary, ed. 1771, Title “*homme vivant et mourant*”) says that it was not; and Basnage (Record, p. 85, lines 5—11) refers to other writers who made the same distinction; which, according to him (Record, p. 86) was not made in Normandy under the law as settled in 1666. For the purposes of the present case, their Lordships will assume that no such distinction was known in Jersey.

The Record contains seven precedents of cases,

which came before the Royal Court of Jersey between 1830 and 1860; and their Lordships cannot doubt that others would have been added to them, if there had been any others which were equally or more in point. In one only of those seven cases was a judgment at all favourable to the Appellants' contention pronounced; and this was by the casting vote of the Chief Magistrate, an officer of no judicial authority, who only intervenes when (as on that occasion) there is no majority in the Court in favour of any opinion (*Le Breton v. Godfray*, 1838). That was a case of land acquired by the States of Jersey for public markets; and, after the judgment, from which the States had leave given them to appeal to a Greater Number, it was compromised, upon the terms of a reference to experts, "to value the entire indemnity to which the lord had right for the loss of all his rights, including *homme vivant mourant et confisquant*" (Record, pp. 34, 35). In another case, of land acquired for a Wesleyan chapel, an agreement of the parties (made an act of Court without any judgment), was for the payment of an annual rent to the lord, "*tant pour l'indemnité, que pour être affranchis de l'homme vivant mourant et confisquant*" (*Dart v. Godfray*, 1856, Record, p. 49). In three other cases, *Thornton v. Robin* (affirmed by Her Majesty in Council, 1 Moore, P.C., 439, Record, pp. 28, 29); *Le Breton v. Godfray*, 1837 (Record, p. 31); and *Baudains v. Perchard*, 1855-56 (Record, pp. 52-56), indemnity only, at the rate of 4 per cent., was given, without *homme vivant*, &c. These three cases were distinguished, on the ground that the Crown, and public authorities who had taken land compulsorily under statutory powers, could not be required either to give up possession, or to provide *homme vivant*, &c. Their Lordships do

not inquire whether that distinction is satisfactory; but there was, at least, nothing said or done in any of those cases which could assist the Appellants' argument. The two remaining decisions, in *Constable of St. Heliers v. Godfray*, 1856 (Record, pp. 36, 37), and *Filleul v. Godfray*, 1855—58 (Record, pp. 41, 48), are distinctly against the Appellants. The judgment in both of them was the same. The holders in mortmain were condemned "to give up possession, or give the lord *homme vivant* " *mourant et confisquant*, and pay him an indemnity of 2 per cent. on the actual value of the property," within a limited time; "or, if they failed to do this, to pay him an indemnity of 4 per cent. on the actual value of the property, for the relinquishment of all his rights." The choice was, in effect, given them, either to provide *homme vivant*, &c., and pay half the usual indemnity, or to pay the full indemnity of 4 per cent. without *homme vivant*, &c.; the operative part of the decree being only for the full indemnity, if the other alternative were not preferred.

These decisions of the Courts are not the only evidence of the law and practice of Jersey upon the subject. The statutory enactment of 1862 may, in their Lordships' opinion, properly be referred to; because a statute of so wide a scope, treating a fixed pecuniary indemnity as the full measure of the lord's right when use was made of the facilities which that Act afforded for bringing land into mortmain, may be presumed, not arbitrarily to innovate upon, but to follow and give effect to, the principles of compensation already known to the law. It was an Act which enabled all kinds of real property in the Island to be brought into mortmain, upon application to the Royal Court, "for any purpose of public utility; for the use and

“ profit of commercial and industrial associations ;
 “ for the uses of the Church of England or of
 “ other religious bodies ; or for the establishment
 “ of schools and educational institutions and
 “ other philanthropic purposes.” The Attorney-
 General, (before whom the papers in every such
 case were to be laid), was to state in open Court
 “ his opinion on any objections which he might
 “ find to the purposes of the trust, or to the form
 “ or effects of the deed” ; but there was no
 provision for giving notice, in any case, to the
 lord of any seignory of which the land might be
 held, or for giving him any *locus standi* to oppose
 the application. The lands brought into mort-
 main under that Act were to be “ for ever
 “ discharged from all seignorial rights, duties,
 “ and services” (other than rents), “ except the
 “ indemnity due to the lord of the fief” ; the rate
 of indemnity, payable under the Act to the
 Queen and every other lord, being fixed at “ 4 per
 “ cent. upon bare lands, and 3 per cent. upon
 “ houses, on the purchase price or on the value
 “ of the realty to be freed.” Provision was made
 for ascertaining the value by experts, if the lord
 should not be satisfied with the purchase price,
 and the parties were to pass a hereditary contract
 before the Court declaring the land (whether taken
 at the purchase price, or as re-valued by experts,)
 “ freed for ever from the seignorial rights, dues,
 “ and services.” And it was further provided,
 that “ the seignorial rights, dues, and services,
 “ when once extinguished by the operation
 “ of this law cannot under any circumstances
 “ revive ; the rent assigned or payable for
 “ their extinction being deemed to represent,
 “ as regards the interested parties, the fair value
 “ of the said rights, dues, and services.”

If, therefore, the property now in question had
 been brought into mortmain under that law,
 (which it was not), no *homme vivant*, &c., could
 have been claimed ; and when the indemnity,

according to the prescribed rate, was paid, the land would have been for ever, and to all intents and purposes, enfranchised. The rate of 4 per cent. was, beyond question, the *maximum* rate of indemnity known to the law of Jersey (independently of the Act of 1862) in cases of this kind.

The statute speaks of '*the*' indemnity, as if it were a well-known thing, and an equivalent for the extinction of seignorial rights. Its framers must have had before their minds some definite view of the nature and extent of those rights, and it is difficult to suppose that their view could have been any other, than that the lord was not entitled both to an indemnity and to the preservation of his rights or some of them in specie.

In this state of authority their Lordships are satisfied that the declaration in the decree of the Superior Number of the 8th October 1891 was right.

There remains the subordinate question, as to the mode in which the amount of the indemnity due was ascertained in this case.

The property acquired by the States for the Fever Hospital consisted of houses, with gardens attached to them; the purchase money paid by them for that property was 1,200*l.* They offered 36*l.*, or 3 per cent. on that purchase money, before the case came into Court; but this was refused. The claim of the Crown was to 4 per cent. of the purchase money, without re-valuation. The Court referred it to experts to settle the amount of the indemnity, for so long as the land should remain in mortmain, without fixing either 3 or 4 per cent. on the value, as the rate to be paid. It would have been more satisfactory if the Court had fixed the rate, and had only referred it to experts to find the true value of the property (which might be more, or less, than 1,200*l.*), as was done in

some of the precedents. But, on the other hand, the form of reference was the same as in *Thornton v. Robin* (affirmed here), and *Le Breton v. Godfray* (1838); in both which cases the Court was silent as to the *ad valorem* rate. Under these circumstances, the amount in controversy being only 12*l.*, and the Appellants having failed to show any substantial miscarriage of justice, their Lordships think, that it would not be right to disturb the judgments of the Courts below upon a point of form only; though they may express their hope that what they think the better of two courses, for each of which precedents exist, may be hereafter followed in similar cases. The experts awarded 36*l.*, which may have been arrived at by taking 3 per cent. on the purchase money; and their Lordships are not satisfied that this would have been wrong, having regard to the distinction made by the law of 1862; though the case is not directly governed by that law. If, as the Appellants say they believe (Appellants' Case, p. 5), the experts reduced the value of the property to 300*l.* less than the purchase money, and gave 4 per cent. on 900*l.*, this (so far as the rate was concerned) would be in accordance with the Appellants' own contention; and their Lordships, upon the materials before them, could not say that such a re-valuation was wrong. It must have been in the power of the Court, if properly called upon, to ascertain, through the Vicomte, what the experts actually did, and to correct it, if wrong; but it does not appear that either party thought this necessary. On the whole, their Lordships will advise Her Majesty to dismiss this appeal; but they do not think the case one for costs.

