

Arthur John Fry Gibbons - - - - Appellant,

v.

The Guernsey Banking Company (Limited) - Respondents.

FROM

THE ROYAL COURT OF THE ISLAND OF GUERNSEY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 8TH MARCH, 1918.

Present at the Hearing :

EARL LOREBURN.

LORD DUNEDIN.

LORD SUMNER.

LORD PARMOOR.

[*Delivered by* LORD DUNEDIN.]

This appeal raises a very short point. Certain suits were pending between the appellant as defendant and the respondents as plaintiffs, in which the plaintiffs sued the defendant on three separate bonds. The defendant admitted the bonds, but alleged payment in various ways. The suits were consolidated. Obviously, the defence could not be made good except through testimony. By the law of Guernsey, if an appeal is to be competent the depositions of the witnesses must be taken in writing. If this were not done the appeal would not be competent. Either party may apply for the testimony so to be taken, and it is then taken at the sight of a Commissioner of Court ("Commis de Cour") by an officer of Court ("Greffier"). The matter is regulated by an Ordonnance of 1859, of which clause 2 is that on which the present question turns. It is in the following terms :—

"2. La demande de faire examiner les témoins à futur se fera la première fois que les Parties seront devant la Cour après que les témoins auront été ordonnés, faute de quoi ni l'une ni l'autre des Parties sera admissible à faire la dite demande. Les frais de l'examen seront avancés par la Partie faisant la dite demande."

The appellant made this application, and was met by a demand to advance the costs of the proceeding. The demand, as made, was for (1) the fees of the "Commis de Cour"; (2) the fees of the "Greffier"; (3) the fees of the advocate for the

plaintiffs, who had to examine the witnesses for the plaintiffs and cross-examine those for the defendant.

The appellant admitted his obligation to pay items 1 and 2, but denied his obligation to pay item 3. The Ordinary Court, and subsequently the Full Court, decided unanimously against this contention.

The appellant presented an elaborate argument based on various Ordonnances dealing with "frais curiaux," the gist of which was that "frais curiaux" must be costs or expenses which are adjudged to be paid, and that there is here no case of adjudgment, but only of duty to advance.

It is quite unnecessary to examine these citations, for the following brief considerations: In the first place, the expression in article 2 is "frais," and not "frais curiaux," and the generality of the expression may well include all "frais," whether technically "frais curiaux" or not. In the second place, the question of whether "frais" does or does not include the fees of the opponent's advocate is a question of practice. If the Court could make a special order—which is admitted—it is difficult to see why they may not interpret a general order in a certain sense, and in a question of practice this Board would never interfere with a unanimous judgment of two Courts unless it was clear beyond all doubt that the Courts below had gone wrong. Further, there is, apart from the convenience of the suitor, no real substance in the question. If the appellant eventually succeeds on the merits and secures a general finding of costs, he will obviously be entitled to repayment of the sums he is now obliged to advance. Their Lordships will humbly advise His Majesty to dismiss the appeal.

always suit the state of affairs as they exist at the date at which the judgment is pronounced. Once, therefore, it is conceded that no person other than the actual proprietor can obtain an injunction, the right of the appellant as an individual to obtain the remedy is gone, and the state of affairs when he raised his original complaint is no criterion of whether the company, the present proprietor, is or is not entitled to an injunction. The citations which the appellant made from *Pothier*, have no application. They all went to the point that a successor in real property will have the benefit of a *res judicata* as to a matter litigated as to the property by a predecessor. That is a doctrine common to many otherwise dissimilar systems of real property law.

It may be that when the appellant sought to introduce the company into the suit the Court might have allowed him to do so. They did not do so, and their Lordships cannot say that they were as a matter of practice obliged by making the company a co-plaintiff along with the original plaintiff, to give them the benefit of the pending process. All this is said on the assumption that the proper instance of a company in Guernsey is the instance of the managing director. This appeal therefore fails. If the company has under the present state of affairs a right to an injunction in respect of a breach of the law of neighbourhood on the part of the defendants, nothing in these proceedings will hinder them from raising an action to get that injunction pronounced.

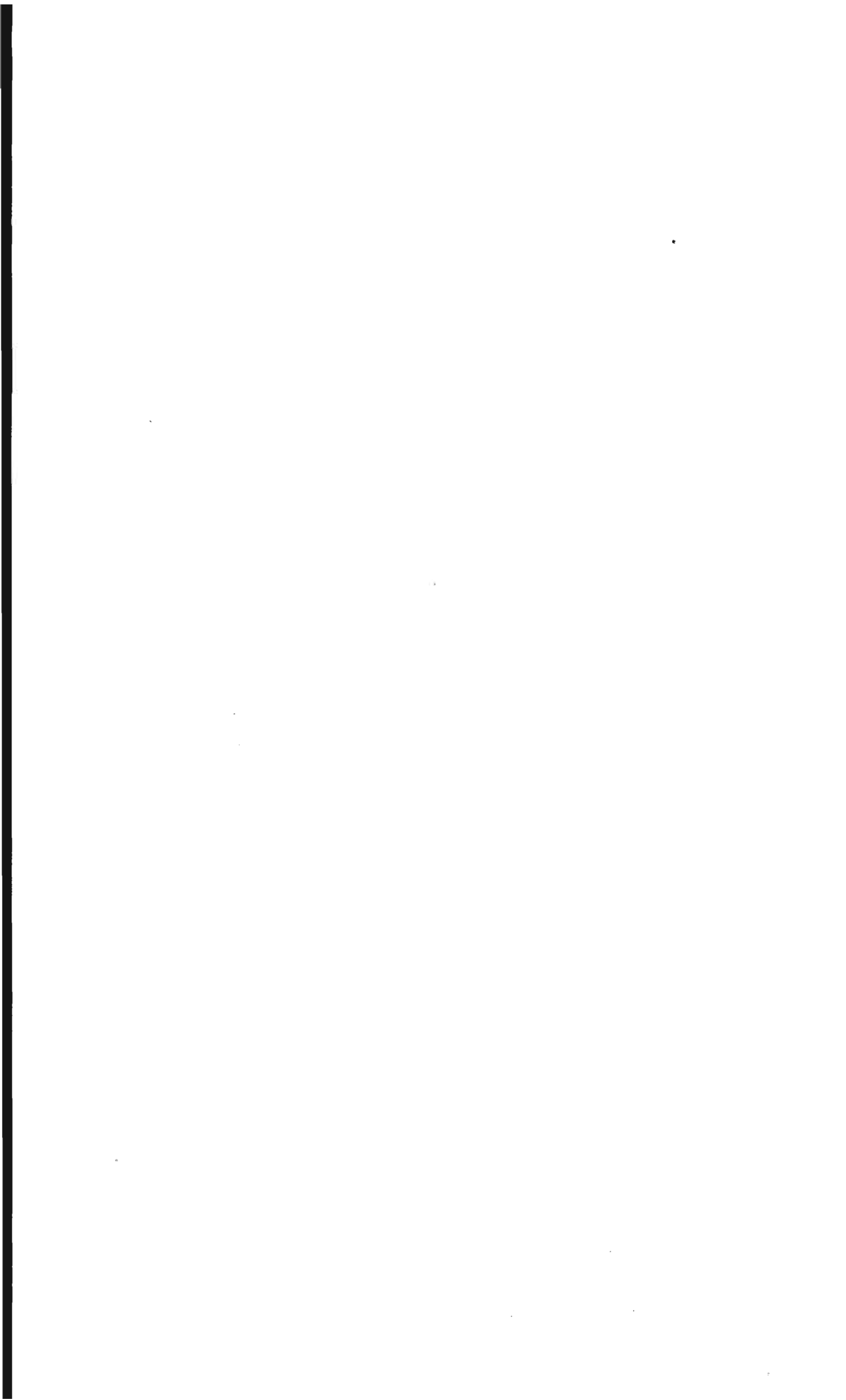
Next, as to the action of damages. In this case the right of action obviously remained with the appellant and was not affected by the transference of ownership. Accordingly, no "prétention" similar to that upheld in the injunction action was tabled. But the defendants did two things: they denied the facts alleged, and they also put in a "prétention" which will be quoted in the judgment presently to be mentioned. On this the Ordinary Court on the 19th May, 1917, pronounced a judgment, in which, after narrating the earlier steps of the case, and the reversal by this Board of the first judgment, which remitted the cause to be tried on its merits, they say:—

"Sur la niance des faits allégués dans la dite cause et sur la prétention des dits défendeurs que si le dit dommage a été causé il est attribuable en tout ou en partie aux changements à la nature des lieux du dit Gibbons faits par le dit Gibbons ses ouvriers ou employés lesquels avant le mois d'avril mil neuf cent cinq avaient mis des tuyaux afin de transporter l'eau qui venait sur le terrain du dit Gibbons à des réservoirs dans plusieurs parties du dit terrain et fait généralement des travaux pour conserver la dite eau et d'en renvoyer la surabondance sur les prémisses du dit Lenfestey par l'entremise d'autres tuyaux ou autres voies. Avant que faire droit il a été ordonné que les témoins de part et d'autre seront ouïs, les exceptions et objections des parties sauves."

The case was then set down for the examination of witnesses. The date was fixed for the 2nd July. But in the

meantime the appellant obtained special leave to appeal. This leave was granted because there was already an appeal pending in the injunction action, and the two cases arose out of the same alleged wrong and had on the former occasion been consolidated. It is necessary to mention this, as it must not be supposed that their Lordships would ordinarily entertain an appeal from the Ordinary Court passing over the Full Court.

The appellant could not deny that the judgment, so far as it ordered witnesses to be heard in support of the appellant's allegations, and of the "*niance des faits allégués*," was right. But he said that the further "*prétention*" was contrary to the former judgment of this Board, and consequently irrelevant. In particular he referred to that part of their Lordships' opinion which dealt with the former exception 2, and pointed out that "*changer*" and "*aggraver*" were not controvertible terms. Their Lordships do not, however, find that the present "*prétention*," though somewhat loosely expressed, is in conflict with what their Lordships said on the former occasion. It was carefully pointed out that the right of the superior proprietor to discharge water on the inferior tenement was not absolute, that the limits could not be fixed by definition, and that each case must depend on its own circumstances. The present "*prétention*" does no more than open up such an enquiry. The enquiry is: Was the damage, if any, caused by the wrongful act of the inferior proprietor, or was it caused by some ultroneous act of the plaintiff himself? Mere alteration of his premises would not of itself constitute such an ultroneous act, and the "*prétention*" must not be read to affirm the contrary. More cannot be said till the facts are disclosed. But the right of the defendants to prove what they can so as to shift the real cause of damage, if any, from their own on to the plaintiff's shoulders cannot be denied. This appeal therefore also fails. Their Lordships will humbly advise His Majesty to dismiss both appeals with costs.



In the Privy Council.

ARTHUR JOHN FRY GIBBONS

o.

THE GUERNSEY BANKING COMPANY
(LIMITED).

DELIVERED BY
LORD DUNEDIN.

PRINTED AT THE FOREIGN OFFICE BY C. R. HARRISON.
1918.