

*original
isss: are
Judgment of in substitution*

JOINT COURT OF THE NEW HEBRIDES

In the matter of the interpretation of Joint Court Judgment No. 423; and

In the matter of the refusal of the Registrar of Titles to register certain transactions.

By Application No. 99 Santo, the Soci^t Française des Nouvelles-Hébrides, hereinafter referred to as S.F.N.H., applied for an order that they might be registered as owners of certain lands. Later, the French Government applied to be substituted to S.F.N.H. for that part of Application No. 99 known as "Zone Maritime Palikulo III", and Judgment No. 423 dealing with the application for substitution of the French Government was delivered on the 24th April, 1951. Before Judgment, and as a result of conciliation, a plan was prepared by the Survey Department which showed what was called a public road traversing the land claimed by the French Government, and the area of this road was excluded when the area of the French Government claim was being calculated. The plan was approved of by the representative of the French Government and embodied in the judgment. The Court in its judgment ordering registration excluded therefrom the said roadway and made no pronouncement on the ownership of the part so excluded.

Article 26 (3) of the Protocol provides for the appointment of a Registrar of Land Titles and sets out his duties. In brief these are :

1. The inscription in a Register of Titles of judgments of the Joint Court declaring ownership or ordering registration of title ;
2. The establishment of land title as provided in the Protocol ;
3. The delivery of extracts from the Register which constitute certificates of title ;
4. The inscription of rights and charges existing on the registered property ;
5. The making of modifications by reasons of events subsequent to registration ;
6. The custody of documents and maps pertaining to registered land and the furnishing of information to the public in connection therewith.

From the foregoing, and the fact that first registration provides an unimpeachable title, it is obvious that only a judgment ordering inscription in the register and transactions subsequent thereto may be entered by the Registrar.

By a deed of exchange purported to be made on the 25th February, 1963 between "the Government of the Condominium of the New Hebrides" represented by A. M. Wilkie, the Resident Commissioner of Her Britannic Majesty and Maurice Delaunay, the Resident Commissioner of France in the New Hebrides of the one part, and the French Government, represented by the Resident Commissioner of France in the New Hebrides, of the other

part, the "Government of the Condominium" purported to transfer to the French Government the piece of land on which were the public roads excluded from judgment No. 423 in exchange for other property owned by, and registered in the name of the French Government. An application was made to the Registrar of Titles to enter in the Register of Titles these two transactions. This, the Registrar refused to do on the grounds that as the property on which the said roads exist was never the subject of a judgment ordering its registration in the name of the Condominium of the New Hebrides (or at all) he could not make an opening entry commencing with this transfer and consequently he must refuse to register the two transactions. He pointed out that the deed submitted might be interpreted as a declaration that all public roads excluded from a judgment were public property although not previously claimed as such and that the Registrar, by registration might be held legally to have confirmed this. He submitted that judgment No. 423 had simply excluded the site of the road in question from the Zone Maritime Palikulo III without pronouncing on its ownership. As a result of this refusal an application was made to the Joint Court by the French Government, "The Government of the Condominium of the New Hebrides" and the Registrar of Titles asking the Court to resolve the matter and rule as to :

- a) whether or not the "public roads" excluded from the judgment are the property of "the Condominium" ;
- b) what is their legal position ;
- c) is the Registrar of Titles compelled to register the Condominium as owners of the roads ; and
- d) accept and register the transaction of the 25th February, 1963.

The matter came on for hearing before the Court on the 29th March at which the Registrar of Titles appeared in person; the Government of the Condominium was represented by Maître Pujol; and the French State was represented by M. Doyen.

The judgment of the Joint Court given on 24th April, 1951 and numbered 423 ordered registration in the name of the French Government of the immovable called "Zone Maritime Palikulo III", "there being excluded from the land to be registered the surfaces of the public roads which cross the property. . . . such moreover as the said roads are shown on the plan".

The legal position with regard to the network of roads in the New Hebrides can only be determined in the absence of any specific law by reference to the circumstances and the means by which they are created. Nowhere is there to be found in legislation any reference to the creation of public roads. There is, however, in most judgments of the Joint Court declaring ownership and ordering registration a clause which has rapidly become stylised, whereby there is excluded from land to be registered, public roads. This clause is usually inserted in the penultimate judgment of the Court whereby the title to property is declared valid subject to the ascertainment, with the assistance of the Survey Department, of the area of the land to be registered and any encumbrances that may attach to it. When these penultimate judgments are pronounced, the Survey Department prepares a plan showing any encumbrances affecting the property and in addition marks on the plan what is called "public roads". Before final judgment is given these plans are made available to all parties concerned for their agreement or comment. The clause is only inserted in the judgments ordering registration after the acceptance,

either expressed or implied, by the applicant for registration of the draft plan of the property. To date no objection has ever been made concerning the exclusion of "public roads" on the plan and thus, in these cases, there is an implied surrender by the applicant for registration of his rights on the road surfaces in favour of the public. By reason of this implied surrender of rights by the applicant for registration, as well as the absence of a claim by the competent authority for ownership of the site of the roads or for real rights over that part of the property, the decision of the Court to exclude the site of the public roads from the lands to be registered must not, particularly in the absence of a judgment after hearing the parties on the point, be interpreted as a rejection of the claim of the applicant for registration of title to the sites of these roads as included in his application for registration.

The surrender or dedication of roads to the public is not, either according to English or French principles of law, a surrender of ownership. In English law when a road has been dedicated to the public, ownership of it remains vested in the person who dedicated it or, if he is not known, it is presumed to vest in the owner, or the owners if more than one, of the adjacent lands. Of the ownership of public roads it is stated in Halsbury, Vol. 19, 3rd Edition at page 64, "the public right in a highway being a right of passage only, an owner who expressly dedicates, or is presumed to have dedicated, land as a public highway retains at common law his property in the soil, and can transfer it by conveyance or lease to others". At page 65 of the same volume one reads "there is a general presumption that the owner of the land of whatever tenure adjoining a highway is the owner also of the soil of one half of the highway, that is, usque ad medium filium viae . . ." It follows from this that if such a road ceases to be a public road the right of user reverts to the original grantor and is extinguished. (*Rolls v. Vestry of St. George the Martyr, Southwark* (1860) 14 Ch.D. 785 C.A.) Thus, if one follows English principles of law, the "public roads" excluded from the judgment belong to the French Government subject to their user (if any) by the public.

In French law (without prejudice to the principle that public buildings erected on land entered upon in violation of the private rights of the owner may not be removed therefrom and the owner's only remedy lies in indemnification (Cass. Civ. 28 mars 1878, D. 1878-1-13)) while classification of roads presupposes ownership in the relevant public authority there is no presumption in law to that effect (Conseil d'Etat 1er Mai 1936 D.H. 1936 - 413) save, exceptionally in favour of single parishes and only for rural roads (Code rural, Article 61 Cass. Civ. 14 novembre 1932, D.H. 1933-57 Cass. Soc. 30 octobre 1942 D.A. 1943-23).

Thus, in the absence of proof to the contrary, applicants for registration must be presumed merely to have surrendered in favour of the public a right of user of the site of the roads and with a view to their being used for traffic.

The right of user comes to an end if the road in question ceases to be used by the public under such conditions, to be assessed in each case, as indicate an unequivocal renunciation of rights. This right of user which, unlike a legal easement, has been only impliedly agreed to, and not expressly accepted, and whose registration has not been requested may not, because of the special conditions under which it is formed, be judicially declared by the Court.

The result of the foregoing is that the stylised clause in judgments excluding public roads from the areas to be registered merely postpones the judgment on the ownership and the order for registration concerning

that portion of the property claimed which forms the site of a road utilised by the public should there be any such road on the property. It is therefore permissible for an applicant for registration of title, or his assigns, on whose property such a road has been shown to exist according to the plans annexed to the judgment to apply at any time to the Joint Court for the recognition of his right of ownership, subject to the rights of user by the public if the road is still in use, or his right of full and complete ownership if he considers that the road is no longer used by the public. In the same way those responsible for the administration of the New Hebrides may apply to have registered the right of user described above or, should there have been a transfer of ownership to it the registration of such ownership.

Applying the foregoing and considering the facts of the case it seems quite clear that it was not the intention of the French Government to abandon its claim to ownership of the roadway passing over the property, and its claim as formulated in the application for registration was not rejected by the judgment. The Court in its judgment ordering registration excluding therefrom the said roadway limited itself to recognizing the right of public traffic and left the declaration of ownership and order for registration in abeyance. Thus the French Government might at any time apply to the Court to have its ownership declared subject to the right of user by the public or to have its ownership, its absolute ownership, declared over this piece of property should the user cease. The Registrar of Titles was quite right therefore to refuse to register the transfer submitted to him. He was right in that "the Government of the Condominium of the New Hebrides" supposing such a body corporate exists, was never entitled to be registered in the Register of Titles as owner of this roadway, as no order to that effect had ever been made, nor could it lawfully convey it to the French Government whose claim to ownership has never been rejected. As a sequel to this the "making of modifications in the Register necessitated by events occurring after registration" (Article 26 (3) B) was impossible.

The transactions included in the deed forwarded to the Registrar for registration were interdependent. Each transaction was the consideration for the other. Consequently, when one consideration failed, the Registrar was perfectly right to refuse that other and to refer back to the party from whom he received it the deed submitted.

The Court therefore finds in answer to the petition submitted to it that :

- a) the "public roads" excluded from Judgment No. 423 of of the Joint Court are not the property of "The Condominium" ;
- b) that their legal position is that they must, in the absence of evidence to the contrary, be presumed to be the property of the French Government subject to the user (if any) of the public ; and
- c) that the Registrar of Titles was not compelled to register the Condominium as owner of these roads and was perfectly justified in his refusal to register the transactions set out in the deed of exchange of the 25th February 1963 ./.

VILA, the 17th day of March,
~~February~~, 1964 ./.

(Signed) : G. GUESDON

(Signed) : JAMES P. TRAINOR

French Judge

British Judge

(Signed) : E. BUTERI

Registrar

Certified to be a correct copy of the original ./.

Registrar :