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# **PROPERTY LAW IN JERSEY**

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**PhD**

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## CONTENTS

<b>PREFACE</b>	<b>ix</b>
<b>DECLARATION</b>	<b>xi</b>
<b>ABSTRACT</b>	<b>xiii</b>
<b>BIBLIOGRAPHY AND ABBREVIATIONS</b>	<b>xv</b>
<b>INTRODUCTION</b>	<b>1</b>
<b>CHAPTER 1: FOUNDATIONS OF JERSEY PROPERTY LAW</b>	<b>5</b>
A. INTRODUCTION	5
B. LEGISLATION	5
C. CASES	6
D. JURISTIC WRITING	9
E. CUSTOMARY LAW	14
F. GAPS	16
G. JERSEY: A MIXED JURISDICTION	16
H. FOREIGN LAW: SOME PROBLEMS AND SOME MERITS	18
I. WHICH SYSTEMS TO LOOK AT?	20
J. WHEN AND HOW TO LOOK AT OTHER SYSTEMS	22
K. CONCLUSION	24
<b>CHAPTER 2: FEUDAL LAND TENURE</b>	<b>25</b>
A. INTRODUCTION	25
B. FEUDAL LAND TENURE	25
C. DECLINE OF FEUDALISM	29
D. REFORMS IN JERSEY	30
E. MODERN LAW	33
<b>CHAPTER 3: REAL RIGHTS</b>	<b>35</b>
A. INTRODUCTION	35
B. WHAT IS A REAL RIGHT?	36
C. BRIEF HISTORY OF REAL RIGHTS	38
D. RIGHTS <i>IN REM</i> AND RIGHTS <i>IN PERSONAM</i> , AND “REAL” AND “PERSONAL” IN ENGLISH LAW	40
E. REAL RIGHTS IN JERSEY LAW: INTRODUCTION	41
F. REAL RIGHTS IN JERSEY LAW: WRITERS	42
(1) Terrien (1574)	42
(2) Poingdestre (late 1600s)	44
(3) Le Geyt (late 1600s – early 1700s)	45
(4) Basnage (1709)	45
(5) Pothier (works produced between 1740 and 1772)	47
(6) Papon & Durell, Hemery & Dumaresq (1789)	48
(7) Le Gros (1943)	48
(8) Other Materials	49
G. REAL RIGHTS IN JERSEY LAW: LAWS	50
H. REAL RIGHTS IN JERSEY LAW: CASES	51

I. REAL RIGHTS IN JERSEY LAW LISTED	52
(1) Ownership	52
(2) Servitude: General	55
(a) Real servitude	56
(b) Personal servitude: usufruct	56
(3) Right in security	57
(4) Lease	60
(5) Real Obligation?	64
(6) Rights of the Beneficiary and Trustee of a Trust?	66
(7) Possession?	67
J. <i>NUMERUS CLAUSUS</i>	67
K. SUBDIVISION OF THE CLASS OF REAL RIGHTS	68
L. CONCLUSION	69
<b>CHAPTER 4: CLASSIFICATION OF PROPERTY</b>	<b>71</b>
A. INTRODUCTION	71
B. ARE RIGHTS THINGS?	73
C. CORPOREAL AND INCORPOREAL	74
D. MOVEABLE AND IMMOVEABLE	75
E. CHANGE OF CLASSIFICATION: ACCESSION	79
(1) Moveable-to-immovable accession	79
(a) Attachment	84
(b) Intention	85
(c) Effect of removal	88
(d) Function	89
(2) The Test for Accession	90
(3) Compensation	91
(4) Accession of Fruits	92
F. CLASSIFICATION BY ANTICIPATION	93
(1) Moveables by Anticipation	93
(2) Immoveables by Anticipation	94
(3) Comparison	97
G. FISH AND OTHER ANIMALS	97
H. CLASSIFICATION OF RIGHTS	99
(1) Real Rights	99
(2) Personal Rights	99
(3) Real Obligation: <i>Rente</i>	100
(4) Leases	101
(5) Deeds	101
I. CONCLUSION	102
<b>CHAPTER 5: VOLUNTARY TRANSFER OF IMMOVEABLE PROPERTY</b>	<b>105</b>
A. THE PROCESS OF TRANSFER	105
(1) Initial Stages: Before the Contract Court	107
(2) The Contract Court	109
(3) The Nature of the Contract Passed Before the Court	115
(4) Registration of Hereditary Contracts	117

B. WHEN DOES TRANSFER OCCUR?	121
(1) Before 1602	122
(2) 1602 Act	124
(3) Subsequent Legislation	127
(4) Analysis: Passing Contract	131
(5) Analysis: Registration	132
(6) The Nature of the Hereditary Contract	137
C. REQUIREMENTS OF FORM	137
(1) Agreements Concluded Prior to the Contract Court	137
(a) Does the agreement need to be in writing?	137
(b) Requirement of a stipulated penalty clause in order to be able to claim damages?	142
(c) Reform	142
(2) The Hereditary Contract	143
D. ENFORCEMENT	144
(1) Enforcement of an Agreement Concluded Prior to the Contract Court	144
(a) No specific performance: <i>nulle promesse à héritage ne vaut</i>	144
(b) The reason for the rule: first justification	146
(c) The reason for the rule: second justification	148
(2) Acquisition of Possession	152
E. CONCLUSION	152
<b>CHAPTER 6: INTRODUCTION TO, AND CREATION OF, SERVITUDES</b>	<b>155</b>
A. INTRODUCTION	155
(1) Reception of Servitudes	156
(2) Definitions	156
(a) Servitude	156
(b) Positive (or affirmative), and negative (or passive)	157
(c) Real (or praedial), mixed, and personal	157
(d) Rustic (rural), or urban	157
(3) Balancing Rights	158
(4) Publicity Principle	158
B. EXPRESS CREATION	158
C. <i>DESTINATION DU PERE DE FAMILLE</i>	159
(1) History	159
(2) Jersey Sources	160
(3) A Qualification to the Application of Destination?	163
(4) Which Servitudes are Capable of Creation by Destination?	163
(a) Continuous	163
(b) Apparent	165
(c) Conclusion on continuous and apparent	166
(d) Urban	167
(5) Basis of Destination	168
D. ACQUISITIVE PRESCRIPTION	169
(1) No Acquisitive Prescription	169



(2) <i>Nulle Servitude Sans Titre</i>	170
(3) Le Geyt on Acquisitive Prescription	172
(4) Quasi-prescription: <i>Baudains v Simon</i>	173
(5) Conclusion	176
<b>CHAPTER 7: EXERCISE OF SERVITUDES</b>	<b>177</b>
A. INTRODUCTION	177
B. SERVITUDES CREATED EXPRESSLY	178
(1) <i>Arbaugh v Leyland</i>	178
(2) <i>Blackburn v Kempson</i>	179
(3) <i>Representation Blampied</i>	181
(4) <i>Haas v Duquemin</i>	181
(5) <i>Colesberg Hotel v Alton Hotel</i>	182
(6) <i>Cotillard v O'Connor</i>	184
(7) <i>La Petite Croatie v Ledo</i>	184
(8) Interpretation of Servitudes Created Expressly	187
C. SERVITUDES CREATED BY DESTINATION	188
D. SERVITUDES CREATED BY PRESCRIPTION	189
E. PURPOSE	189
(1) <i>Le Feuvre v Mathew</i>	190
(2) Default Rule	192
F. MANNER OF EXERCISE OF SERVITUDES OF ACCESS	193
G. USE ONLY FOR THE BENEFIT OF THE DOMINANT TENEMENT	193
H. IMPLIED CONTENT	194
(1) General	194
(2) Illustration of a Test: <i>Moncrieff v Jamieson</i>	195
I. CIVILITER PRINCIPLE	197
J. AGGRAVATION	199
(1) Nature of Aggravation	199
(2) Effect of Aggravation	201
K. RESIDUAL RIGHTS OF THE SERVIENT OWNER	202
(1) No Positive Obligation	202
(2) Negative Obligation Not to Diminish the Servitude	202
<b>CHAPTER 8: EXTINCTION OF SERVITUDES</b>	<b>205</b>
A. INTRODUCTION	205
B. AGREEMENT	206
C. CONFUSION	206
D. <i>DÉGRÈVEMENT</i>	207
E. EXPROPRIATION	208
F. EXTINCTIVE PRESCRIPTION	209
G. PARTIAL PRESCRIPTION	211
H. DESTRUCTION	214
I. END OF FIXED TERM	214
J. FULFILMENT OF RESOLUTIVE CONDITION	214
K. AVOIDANCE OF TITLE TO LAND	215

<b>CHAPTER 9: VOISINAGE AND NUISANCE</b>	<b>217</b>
A. INTRODUCTION	217
(1) English Law and Nuisance	219
(2) Some Mixed Jurisdictions	221
(3) French Law: <i>Troubles Anormaux ou Excessifs de Voisinage</i>	222
(4) Similarities and Differences	226
B. VOISINAGE AND NUISANCE IN JERSEY	228
(1) Early Cases and Materials	228
(2) <i>Key v Regal</i> and <i>Searley v Dawson</i>	233
(3) After <i>Searley</i>	236
(4) <i>Rockhampton</i> Litigation	238
(5) After <i>Rockhampton</i>	240
C. HOW MANY DOCTRINES?	241
(1) Nuisance Only	242
(2) <i>Voisinage</i> Only	243
(3) Two Doctrines with Identical Spheres of Application	243
(4) Two Doctrines with Overlapping Spheres of Application	244
(5) Two Doctrines with Distinct Spheres of Application	244
D. DOCTRINAL BASES	245
(1) Nuisance	245
(2) <i>Voisinage</i>	246
E. PREREQUISITES FOR LIABILITY	248
(1) Nuisance	249
(2) <i>Voisinage</i>	253
(3) Conclusion	254
F. LIMITS OF LIABILITY	255
(1) Personal Injury	255
(2) Identity of Parties	256
(a) <i>Who can be sued?</i>	256
(b) <i>Who can sue?</i>	257
(3) Defences	257
(4) Remedies	258
G. NEIGHBOURHOOD LAW	259
H. CONCLUSION	260
<b>FINAL CONCLUSION</b>	<b>263</b>



## PREFACE

In the 2011 *Tour de France*, Mark Cavendish – a native of that other Crown Dependency, the Isle of Man – won five stages and finished the race with the Green Jersey. When asked to reflect on his performance, his constant refrain was that, although he finished the race with his hands in the air, he could not have done so without the capable and dedicated support of his team. Similarly, although writing a thesis is a task for one, it cannot be done alone; my thanks to all who have assisted me. Particular mention must be made of the Channel Islands Education Trust, which funded the first three years of my study, Sir Philip Bailhache, who brought the idea of this thesis and the means to do it together,<sup>1</sup> Advocate Dr John Kelleher, Advocate Gordon Dawes (and Andrea Holford), and my long-suffering supervisors: Professor Kenneth Reid, and Professor George Gretton. I am also grateful to the late Hazel Bailey, and all who helped me at the Guernsey Archive (particularly Dr Darryl Ogier), the Jersey Archive, the Jersey Institute of Law (particularly Lori-Ann Foley), the Jersey Judicial Greffe, the Jersey Law Officers Department, the Jersey Public Library, the Jersey Society Library, and the Priaulx Library in Guernsey. Additionally, I – and the chapter on *voisinage* and nuisance in particular – benefited greatly from time spent at the Max Planck Institute for Comparative and International Private Law in Hamburg, both in the library and with Professor Zimmermann's *Lehrstuhl*. A full list of thanks would be very long indeed. *Merci à tous*.

Chan urrainn dhomh crìoch a chur air seo gun taing chridheil a thoirt do Sheonaidh, an duine agam, oir is ann airson a bha a' chuid a bu mhotha de chudthrom a' ghnothaich. A-nise feumaidh mise mo dhìchioll a dhèanamh air a shon-san...

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<sup>1</sup> *800 Years* 291.



## **DECLARATION**

I, Rebecca Frances MacLeod, declare that I have composed this thesis, that it is my own work, and that I have not submitted it for any other degree or professional qualification.



## **ABSTRACT**

Jersey law, and within it Jersey property law, has received little academic attention. This thesis seeks to examine, and provide a systematic account of, the Jersey law of property. Specific aspects of substantive law are explored. From these, general observations about the nature and structure of property law are made.

Unsurprisingly, given the small size of the island, Jersey has a relatively limited amount of indigenous legal material to offer, much of it in French. Inevitably, there are gaps in the sources and some way of addressing these has to be determined before a systematic account of the law is possible. Juristic writing and modern case-law demonstrate consistent recourse to the laws of other jurisdictions when gaps are encountered. Norman law, modern French law, and English law (to a much lesser extent and mainly where it conforms to Roman law) are used in the cases on property law, and thus also in this thesis. Reference is also made to the law of Guernsey (Jersey's sister jurisdiction) but the difficulties encountered in researching Jersey law are no less evident there.

In areas such as the law of servitudes, Roman law is often referred to explicitly by the Jersey jurists and by the commentators on Norman law. The influence of Roman law is also evident in the division between real rights and personal rights, sometimes barely visible in Jersey law, and is also a general backdrop to the rules on classification of things. Norman feudal law remains vestigially in place but the structure of the law and its individual rules bear many civilian characteristics. For this reason, in addition to Jersey sources, Norman law, modern French law, and any other materials used by the courts, other jurisdictions with civilian systems of property law are also referred to, specifically mixed jurisdictions, of which Jersey is one.





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Mapp	TW Mapp <i>Torrens' Elusive Title: basic legal principles of an efficient Torrens System</i> (1978)
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Poingdestre <i>Caesarea</i>	J Poingdestre <i>Caesarea, or a discourse of the Island of Jersey</i> (1889)
Poingdestre <i>Commentaires</i>	J Poingdestre <i>Les Commentaires sur l’Ancienne Coutume de Normandie</i> (published 1907)
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## ARTICLES, PERIODICALS, PAPERS, AND REPORTS

Abbreviation	Full Reference
1771 Code	Code of 1771
1861 Report	<i>Report of the Commissioners Appointed to Enquire into the Civil, Municipal, and Ecclesiastical Laws of the Island of Jersey</i> (Command Paper 2725, 1861)
1861 Report Evidence	Minutes of Evidence to the <i>Report of the Commissioners Appointed to Enquire into the Civil, Municipal, and Ecclesiastical Laws of the Island of Jersey</i> (Command Paper 2761, 1861)
<b>A.</b>	
Atias “Mutabilité”	C Atias “La mutabilité des servitudes conventionnelles” RTD civ (1979) 245
Aubin	CN Aubin “Bordage, Bedelage and Sergenté Tenure in Jersey” (1994) 26 Jersey Society Bulletin 246
<b>B.</b>	
Barham “Methodology”	ME Barham “Methodology of the Civil Law in Louisiana” (1976) 50 TullLR 474
Benest “Aggravation”	D Benest “A cause of some aggravation” (2006) JLRev 73
Binnington “Frozen”	A Binnington “Frozen in aspic? The approach of the Jersey courts to the roots of the Island’s Common Law” (1997) JLRev 21
Binnington “Gathering”	A Binnington “Gathering dust? The creation and operation of the Jersey Law Commission” (2004) JLRev 78
Birt “Trusts and Divorce”	M Birt “Trusts and Divorce Courts – An Offshore Perspective” (2009) JGLR 5
Borghetti “Responsabilité”	J-S Borghetti “La responsabilité du fait des choses, un régime qui a fait son temps” (2010) RTDCiv 1

### C.

Cyprian Williams “Terms” T Cyprian Williams, “The Terms Real and Personal in English Law” (1888) 4 LQR 394

### D.

Dawes “Citation” G Dawes “Citation from other legal systems: a reply” (2004) JLRev 69

Dawes “Code” G Dawes “From Custom to Code – The Usefulness of the *Code Civil* in Contemporary Guernsey Jurisprudence (2004) JLRev 255

De Waal “Uniformity” MJ de Waal “The Uniformity of Ownership, *Numerus Clausus* and the Reception of Trust into South African Law” (2000) 8 European Review of Private Law 439

Dicker & Ismail “Corporate” R Dicker & R Ismail “Corporate Insolvency – Recent Developments” (2001) JLRev 288

Dorey “Rights” G Dorey “Rights to Wreck in Norman Customary Law” (1993) 15 GLJ, page 63

### F.

Falle “Pen” R Falle “By the stroke of a pen” (2007) JGLR 82

Falle “Poem” R Falle “‘*Sur La Coustume de Jersey*’: A 17<sup>th</sup> Century Poem” (2000) JLRev 217

Falle R Falle “The Structure of a Pro Forma Jersey Conveyance” (2004) JLRev 156

Falle & Kelleher R Falle & J Kelleher “The Customary Law in Relation to the Foreshore (1)” (2008) JGLR 70

### G.

Gordley “Nuisance” J Gordley “Immissionsschutz, Nuisance and Troubles de Voisinage in Comparative and Historical Perspective” 6 (1998) *Zeitschrift für Europäisches Privatrecht* 13

Gretton “Equitable” GL Gretton “Equitable Ownership in Scots Law?” (2001) 5 EdinLR 73

Gretton “Ownership”	GL Gretton “Ownership and its Objects” (2007) 71 Rabels Zeitschrift 802
	GL Gretton, review of “Charles Sydney Le Gros, <i>Traité du Droit Coutumier de l’Île de Jersey</i> ” (2009) 1 EdinLR 170
Gretton “Trusts”	GL Gretton “Trusts without Equity” (2000) 49 ICLQ 599
Gretton & Reid “Thoughts”	G Gretton & K Reid “The Civil Law Tradition: Some Thoughts from North of the Tweed” (2007) JGLR 286
<b>H.</b>	
Hanson “Civil”	T Hanson “Civil appeals to the court of appeal and all that jazz” (2003) JLRev 169
Hanson “Jersey”	T Hanson “Jersey contract law: a question of identity” (2005) JLRev 126
Hanson “Jurats”	T Hanson “Jurats as Adjudicators in the Channel Islands and the Importance of Lay Participation” (2010) 39 Comm L World Rev 250
Hanson “Legal”	T Hanson “No legal system is an island, entire of itself” (2004) JLRev 209
Hanson “Postscript”	T Hanson “The language of the law: a postscript” (2006) JLRev 91
Hanson “Language”	T Hanson “The language of the law: the importance of French” (2005) JLRev 238
Hanson “Tort”	T Hanson “Tort & Voisinage: A Squirrel’s Tale” InDret 2/2007
Hemery & Dumaresq	J Hemery & J Dumaresq <i>A Statement of the mode of proceeding, and of going to trial, in the Royal Court of Jersey in all causes, Criminal, Civil, and Mixed</i> (1789)
Hibbs “Canon”	L Hibbs “Jersey Canon Law – Its ‘Peculiar’ History” (2000) 27 Jersey Society Bulletin 257
Hohfeld “Fundamental”	WN Hohfeld, “Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1917) 26 Yale LJ 710

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- JLC CP6 Jersey Law Commission *The Jersey Law of Real Property, including the use of English in conveyancing* (2002) Consultation Paper 6
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- JLC CP8 Jersey Law Commission *Security on Immoveable Property* (2006) Consultation Paper 8
- K.**
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- Kelleher “Effect” J Kelleher “The Effect of the *Fourniture Et Garantie* Clause in an Hereditary Contract” (1997) JLRev 37
- Kelleher “Sources” J Kelleher “The sources of Jersey Contract law” (1999) JLRev 1
- L.**
- Landers “Poingdestre” JP Landers “Jean Poingdestre (1609-1691)” (1964) 18 Jersey Society Bulletin 405
- Langlois “Hypothechs” N Langlois “Hypothechs but no Guarantee” (2001) JLRev 17
- Le Couteur P Le Couteur “Hypothecation and Guarantee: Lecture Given to an Audience of Bankers on the 6<sup>th</sup> December 1955” (1998) JLRev 14
- Loengard “Assize” J Loengard “The Assize of Nuisance: Origins of an Action at Common Law” (1978) 37 CLJ 144

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- Lovett “Creating” JA Lovett “Creating and Controlling Private Land Use Restrictions in Scotland and Louisiana: A Comparative Mixed Jurisdiction Analysis” (2008) 19 Stellenbosch LRev 231
- M.**
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- RP Marett *Lettre Explicative du Projet de Loi Amendé sur la Propriété Foncière* (logé au greffe le 23 Janvier 1878) (1999) JLRev 41
- Matthews “Theirs” P Matthews “Theirs is not to reason why” (2001) JLRev 186
- Matthews “Choice” P Matthews “Choice of Law in Property Transactions in Jersey Law” (2005) JLRev 187
- Matthews “Fiducie” P Matthews “The French fiducie: and now for something completely different” [2007] Trust Law International 16
- Mazeau “Registration” M Mazeau “Registration of Title to Immovables in Louisiana” (1957–1958) 32 TullRev 677
- J McNeill, review of “Law and Opinion in Scotland During the Seventeenth Century by J D Ford” (2008) JGLR 385
- Messervys “Notes” JA & Mme Messervy “Notes sur Quelques Contrats du Commencement du XVII<sup>e</sup> Siècle” (1918) 8 Jersey Society Bulletin 36
- Mollet “Assise” R Mollet “Assise d’Héritage” (1951) 15 Jersey Society Bulletin 281
- Mollet “Interesting” R Mollet “Interesting Local Documents” (1955) 16 Jersey Society Bulletin 289
- Mollet “Ouye” R Mollet “Ouye de Paroisse 1463” (1960) 17 Jersey Society Bulletin 255

Mollet “Contrats” R Mollet “Contrats and the Ouye de Paroisse” (1955) 16 Jersey Society Bulletin 195

## N.

ET Nicolle “Notice Biographique sur Jean Poingdestre, Lieutenant-Bailli de Jersey” (1998) JLRev 134

## O.

O’Connor “Deferred” P O’Connor “Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems” (2009) 13 EdinLR 194

Olsen “Court” A Olsen “The Court of Appeal – Use or Abuse?” (1998) JLRev 150

## P.

Pallot S Pallot “Incidents of Corporate Status – Personal Liability of Members of An Incorporated Body” (1997) JLRev 258

Pipon & Durell T Pipon & J-T Durell *A Statement of the mode of proceeding, and of going to trial, in the Royal Court of Jersey in all causes, Criminal, Civil, and Mixed* (1789)

Popovici “Poule” A Popovici “La Poule et l’Homme: sur l’article 976 C.c.Q” (1997) 99 R du N 214

## R.

Redmann “Recordation” WV Redmann “The Louisiana Law of Recordation: some principles and some problems” (1964–1965) 39 TulLRev 491

Reid “Abuse” E Reid “Abuse of Rights in Scots Law” (1998) 2 EdinLR 129

Reid “Equity” KGC Reid “Equity Triumphant: Sharp v Thomson” (1997) 1 EdinLR 464

Reid “Trust” KGC Reid “Patrimony not Equity: the Trust in Scotland” (2000) 3 European Review of Private Law 427

Reid “Real Burden”	KGC Reid “What is a Real Burden?” (1984) 29 JLawSocSc 9
Reid “Conceptualising”	KGC Reid “Conceptualising the Chinese Trust: Some Thoughts from Europe” 2011/06, University of Edinburgh School of Law Working Paper Series ( <a href="http://ssrn.com/abstract=1763826">http://ssrn.com/abstract=1763826</a> )
Robilliard “Foundation”	St J Robilliard “Foundation of Guernsey as Trust Jurisdiction” (1996) 2 (8) Trusts & Trustees 5
Roubier “1386”	P Roubier “L’article 1386 du Code Civil et sa portée dans le droit contemporaine” 1949 JCP 768
Rybot “Deeds”	NVL Rybot “Two Seventeenth Century Deeds of Sale” (1941) 16 Jersey Society Bulletin 85
<b>S.</b>	
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SLC DP 125	Scottish Law Commission <i>Land Registration: Void and Voidable Titles</i> (2004) Discussion Paper 125
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SLC R 208	Scottish Law Commission <i>Sharp v Thomson</i> (2007) Report 208
Simpson “Wheeldon”	AWB Simpson “The rule in <i>Wheeldon v Burrows</i> and the Code civile” (1967) 88 LQR 240
Skea & Steven “Difficulties”	S Skea & AJM Steven “The landlord’s hypothec: difficulties in practice” 2010 SLT (N) 120
Southwell “Note”	R Southwell “A note on sources of Jersey Law” (1999) JLRev 213
Southwell “Appeals”	R Southwell “Appeals to the Privy Council” (2006) JLRev 46

Southwell “Citation”	R Southwell “Citation from other legal systems” (2004) JLRev 66
Southwell “Sources”	R Southwell “The sources of Jersey Law” (1997) JLRev 221
Sowden “Origin”	T Sowden “The origin of the Jersey Court of Appeal” (2000) JLRev 61
Stadnik “Doctrinal”	TJR Stadnik “The Doctrinal Origins of the Juridical Nature of Lease in the Civil Law” (1980) 54 TulLRev 1094
Steven “Accessoriness”	AJM Steven “Accessoriness and Security over Land” (2009) 13 EdinLR 387
Steven “Goodbye”	AJM Steven “Goodbye to the Landlord’s Hypothec?” 2002 SLT (N) 177
Steven “Landlord’s”	AJM Steven “The Landlord’s Hypothec in Comparative Perspective” (2008) 19 Stellenbosch Law Review 278
<b>T.</b>	
Trotter	D Trotter “Commentary on a Jersey Conveyance” (2005) JLRev 253
Tunc “Methodology”	A Tunc “Methodology of the Civil Law in France” (1976) 50 TulLRev 459
<b>V.</b>	
Van der Merwe “Numerus”	CG van der Merwe “Numerus Clausus and the Development of New Real Rights in South Africa” (2002) 119 S African LJ 802
Van Vliet “Accession I”	LPW van Vliet “Accession of Movables to Land: I” (2002) 6 EdinLR 67
Van Vliet “Accession II”	LPW van Vliet “Accession of Movables to Land: II” (2002) 6 EdinLR 199



**W.**

White  
“Acquisitive”

JS White “Acquisitive Prescription of Servitudes” (1955)  
25 LaLRev 777

## OTHER ABBREVIATIONS

<b>Abbreviation</b>	<b>Full Reference</b>
1852 Ordinance	<i>Des Biens Meubles et Immeubles</i> (1852) (available in R MacCulloch (ed) <i>Recueil d'Ordonnances</i> (1864), vol 3 (covering 1841 – 1860))
1854 Rapport	<i>Rapport sur le Droit Coutumier à l'Égard de l'Usufruit établi sur les Immeubles</i> (1854) (available in R MacCulloch (ed) <i>Recueil d'Ordonnances</i> (1864), vol 3 (covering 1841 – 1860))
1880 Law	<i>Loi (1880) sur la propriété foncière</i>
1888 Ordinance	<i>Ordonnance relative aux Biens Meubles</i> (1888) (available in R MacCulloch (ed) <i>Recueil d'Ordonnances</i> (1900), vol 4 (covering 1861 – 1900))
1909 Law	<i>Loi Relative à la Prescription Immobilière, 1909</i>
CC	Civil Code
RC	Reformed Custom of Normandy ( <i>La Coutume Reformée de Normandie</i> )
FCC	French Civil Code
GC	<i>Grand Coutumier de Normandie</i>
GLJ	Guernsey Law Journal
JGLR	Jersey and Guernsey Law Review
JJ	Jersey Judgments
JLR	Jersey Law Reports
JLRev	Jersey Law Review
LaCC	Louisiana Civil Code
QCC	Quebec Civil Code
TJL 1984	Trusts (Jersey) Law 1984
TGL 2007	Trusts (Guernsey) Law 2007



## INTRODUCTION

Jersey is an Island in the English Channel, located around one hundred miles south of England and fourteen miles west of the French Cotentin peninsula. It is the most southerly of the Channel Islands and, at nine miles from west to east and five miles from north to south, it is also the largest. Its forty-five square miles support around 92,500 permanent residents.<sup>1</sup> The main settlement is the town of St Helier, on the south coast of the Island. The main language is English.<sup>2</sup>

The Channel Islands are “possessions of the English Crown – dependencies of the Crown, outside of the United Kingdom”.<sup>3</sup> The Duchy of Normandy, of which the Channel Islands were formerly part, became united with the English Crown in 1066. In 1204, King John lost Continental Normandy to the French King, Philip Augustus. The Channel Islands, however, retained their allegiance to the English King.<sup>4</sup> Despite this separation from Continental Normandy, significant influence from English law has come only relatively recently, and not to all areas of the law. Jersey has its own legislative assembly: the States of Jersey.<sup>5</sup>

Jersey law has its own distinctive character, which is now being re-interpreted through the medium of the English language, and by largely English-speaking lawyers and judges. Related to this, Jersey is a mixed jurisdiction, that is to say, Jersey law has been influenced by both (English) common law and the civil law.<sup>6</sup> Therefore, in addition to considering French law (pre- and post-codification) and English law alongside Jersey law, reference to other mixed jurisdictions can usefully be made.

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<sup>1</sup> States of Jersey, Statistics Unit, population estimate for 2009.

<sup>2</sup> For further general information (for example): Le Quesne, ch 1; Kelleher, chs 1, 2.

<sup>3</sup> J Jowell “The UK’s Power Over Jersey’s Domestic Affairs” in Bailhache *800 Years*. Consider also: Interpretation Act 1978, s5, schedule 1.

<sup>4</sup> See further, for example: Le Quesne, 297.

<sup>5</sup> For history, see: Le Quesne, 99 *et seq*; Le Patourel, 117 – 118; Lemasurier, 205 – 220, 273 – 293.

<sup>6</sup> See generally: Palmer *Mixed*.

The first chapter in this thesis provides a general overview. Thereafter, some specific areas are considered. For reasons of time and space, as well as seeking to balance breadth and depth, many areas have not been covered. “Trop vouloir à la fois, c’est s’exposer à ne rien obtenir”.<sup>7</sup> The specific areas examined reflect the approach taken to the research. There are three chapters on aspects of the law of servitudes. This was where research began, on the basis that the law of servitudes tends to have been present in western legal systems for several centuries. (Jersey law proved to be no exception.) Thus, the law of servitudes is an area where a reasonable body of legal sources has had time to build up. Not only did this facilitate research, but it also provided the important additional benefit of conveying something of the nature and sources of Jersey property law as a whole.

As the feudal system of land tenure has never been abolished in Jersey, research into the history and present-day extent of that system was clearly also important, both for its own sake and – again – in order to build a picture of the nature of property law as a whole.

The remaining chapters which cover specific areas rather than matters of structure or sources concern the voluntary transfer of immovable property, and *voisinage* and nuisance. The former was chosen because the process of transfer is a fundamental part of any system of property law. It is regretted that a corresponding chapter on moveable property could not be included; some research on the topic was carried out, but constraints of time and space prevented its inclusion. The latter was chosen because, during the course of research, two cases reached the level of the Court of Appeal in Jersey and raised interesting taxonomical questions about the boundary between property law and the law of tort.

The focus of the thesis is principally on immovable property as can be seen from the chapters on feudal land tenure, transfer of immovables, servitudes, and *voisinage*. Nonetheless, this is not a thesis on land law. The chapters on real rights and classification include consideration of other types of property. Broadly, what is

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<sup>7</sup> Le Gros, 201.

considered is property law, or the “law of things”: the law of items with pecuniary value, whether immovable, moveable, corporeal, or incorporeal.



## **CHAPTER 1 – FOUNDATIONS OF JERSEY PROPERTY LAW**

- A. INTRODUCTION
- B. LEGISLATION
- C. CASES
- D. JURISTIC WRITING
- E. CUSTOMARY LAW
- F. GAPS
- G. JERSEY: A MIXED JURISDICTION
- H. FOREIGN LAW: SOME PROBLEMS AND SOME MERITS
- I. WHICH SYSTEMS TO LOOK AT?
- J. WHEN AND HOW TO LOOK AT OTHER SYSTEMS
- K. CONCLUSION

### **A. INTRODUCTION**

Legislation, judicial decisions (cases), juristic writing, and customary law all contribute to an account of Jersey property law. Can these all be described as sources of law? Are they of equal “weight”? What can be done to illuminate and support these sources when they are few in number? Can a general overview of property law be constructed? If foreign law is to be used to facilitate these ends, when and how should that be done?

### **B. LEGISLATION**

A number of Laws impact on Jersey property law, but nothing which amounts to any sort of codification. In 1771, a “Code” was introduced, but it brought together existing legislation rather than attempting any overall systematisation.<sup>1</sup> Some of its provisions are of relevance to property law.<sup>2</sup>

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<sup>1</sup> 1861 Report, vi – vii. Le Quesne, 102 “a selection of laws and ordinances which had been passed by the States and of United Kingdom statutes which had been registered in the Island” (the 1771 Code removed the Royal Court’s power to legislate); Mautalent-Reboul, 417 – 418; Nicolle *Origin* 78, para 17.3. On the circumstances leading up the Code, see: Le Quesne, 395, 440 – 442; Lemasurier, 95 – 98; Kelleher, 18 – 19.

<sup>2</sup> For example: “A la Cour du Samedi”, “Regîtres”.



The total number of Laws in force on “Land and Housing” (which, obviously, excludes moveables)<sup>3</sup> as collated by the Jersey Legal Information Board is 22.<sup>4</sup> Some of these are of narrow scope.<sup>5</sup> Among them must be mentioned the *Loi (1880) sur la propriété foncière*, which reformed the law of hypothecs and insolvency proceedings and which, in terms of technical law reform, is probably the finest piece of legislation on Jersey property law. The law on transfer of moveable property is mainly governed by the Supply of Goods and Services (Jersey) Law 2009. The Jersey law of property remains, however, largely non-statutory.

As with other materials on Jersey law, older legislation is in French. Although most modern legislation is in English,<sup>6</sup> occasionally French is still used. It seems that this is done when it concerns concepts already established in French, such as *hypothèque*.<sup>7</sup> The use of French presents a linguistic barrier for the Island’s majority English-speaking population.<sup>8</sup> Although much legislation is available on the internet,<sup>9</sup> laws no longer in force are not currently available except in hard copy, which makes historical research more difficult from outside the Island.

## C. CASES

Prior to 1950, there was no system of case reporting in Jersey. Decisions are available in large volumes, stored at the Jersey Archive.<sup>10</sup> Separate series exist for

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<sup>3</sup> The spellings “moveable” and “immoveable” are used throughout this thesis, following, for example: Poingdestre *Remarques* on art 506; Le Geyt *Manuscrits* vol 3, 317; Hemery & Dumaresq, 27; Matthews & Nicolle, 78, para 7.52 (quoting *In re Désastre Overseas Insurance Brokers Ltd* (1966) 1 JJ 547); Royal Court Rules 2004; JLC CP8. “Movable” and “immovable” are, however, also used in Jersey. See: Nicolle *Immovable Property* and Nicolle *Conveyancing* where both spellings are used.

<sup>4</sup> Excluding regulations and orders. See: [www.jerseylaw.je](http://www.jerseylaw.je).

<sup>5</sup> Such as: F.B. Playing Fields (Sports Hall) (Jersey) Law 2007; Howard Davis Farm (Abrogation of Covenant) (Jersey) Law 2008; Jersey College for Girls (Removal of Covenant) (Jersey) Law 2006; *Loi (1839) sur l’acquis de propriété foncière par les Rectorats*.

<sup>6</sup> The transition appears to have taken place by the 1940s: from *Loi (1832) sur les décrets*, to Dwelling-Houses (Rent Control) (Jersey) Law 1946, Housing (Jersey) Law 1949.

<sup>7</sup> *Loi (1996) sur l’hypothèque des biens-fonds incorporels*. Also: *Loi (1959) touchant les remboursement des rentes et l’extinction d’hypothèques conventionnelles simples*; *Loi (1959) touchant la vente des immeubles de mineurs*; *Loi (1991) sur la copropriété des immeubles bâtis*.

<sup>8</sup> See: ch 1 n132.

<sup>9</sup> At [www.jerseylaw.je](http://www.jerseylaw.je).

<sup>10</sup> Clarence Road, St Helier, JE2 4JY. Open access catalogue at [www.jerseyheritagetrust.jeron.je/reference.html](http://www.jerseyheritagetrust.jeron.je/reference.html), collection reference “D/Y”.

each part of the old structure: *Cour de Billet*, *Cour de Cattel*, *Cour d’Héritage*, and *Cour de Samedi*.<sup>11</sup> Decisions are in chronological order. The records recite the Order of Justice,<sup>12</sup> the arguments made for each side, and the decision of the court.<sup>13</sup> Consequently, the reasons for a decision are difficult, or impossible, to ascertain. The court records are in French until well into the twentieth century. Some go back to the sixteenth century. They are almost all handwritten, in hands of varying legibility; printing began to be used in the first half of the twentieth century. A partial index exists, covering the period from 1885 to 1950,<sup>14</sup> in which notable cases are ordered under subject headings. Jurists provide further assistance. Le Geyt in his *Manuscripts* (written around the turn of the eighteenth century, published in 1846)<sup>15</sup> sometimes identifies cases relevant to a particular point of law. Le Gros (circa 1943)<sup>16</sup> does this more often, and that is a great advantage of his Treatise. Otherwise, there is little to guide the researcher (or practitioner) through the volumes of the court records.

One way of dealing with the unindexed material would be to read through each volume systematically. This approach has not been adopted, principally because of the time which would be involved. Also, the rewards would be relatively few because no reasons are given for the decisions and legal materials are only very rarely alluded to. Pre-1950 cases have been used wherever they could be discovered, but only the reasoned, post-1950 judgments are examined in detail.

In 1950, the English-language Jersey Judgments series of case reports began. As an unofficial series<sup>17</sup> it was not subject to rigorous editing, but these reports are nevertheless extremely useful in comparison to the court records, for they give the court’s reasons for its decisions.<sup>18</sup> The Jersey Judgment series ended in 1984 and a professional series of case reports began in 1985: the Jersey Law Reports (also in

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<sup>11</sup> Nicolle *Origin* 94 – 95. Also: Hemery & Dumaresq, 5; Pipon & Durell, 41 – 42; Le Quesne, 30; Havet, 142 – 143; Lemasurier, 191 – 200.

<sup>12</sup> The document which starts the action and sets out the parties, the facts (including the wrong alleged), and the remedy requested.

<sup>13</sup> On practice in Normandy: Dawson *Oracles* 292.

<sup>14</sup> *Tables des Décisions de la Cour Royale de Jersey*, 8 volumes covering: 1885 – 1888; 1889 – 1893; 1894 – 1900; 1901 – 1907; 1908 – 1916; 1917 – 1930; 1931 – 1940; 1941 – 1950.

<sup>15</sup> See: ch 1 D.

<sup>16</sup> *Ibid.*

<sup>17</sup> Although they were compiled from the court’s written judgments.

<sup>18</sup> Of related interest: Matthews “Theirs”.

English). Unlike the court records, the case reports (that is, the Jersey Judgments and the Jersey Law Reports) frequently refer to legal materials cited to the court, and are consequently a valuable resource for identifying the sources of property law.

The doctrine of precedent applies in Jersey though, it is stated, less strictly than in English law: if a decision is patently wrong, a judge may depart from it in a subsequent case on the same point.<sup>19</sup> A comparison has been made with the doctrine of precedent as it operates in Scotland.<sup>20</sup> In that jurisdiction, cases are a source of law,<sup>21</sup> and it seems likely that this is the position in Jersey also. Perhaps a distinction could be made between reasoned decisions (including reasoned unreported cases, which have been recorded), and those decisions in respect of which reasons are not given (pre-1950). While the reasoned decisions are a source of law, the unreasoned decisions may be persuasive only.

For property matters, the hierarchy of the courts is broadly from lowest to highest:<sup>22</sup> the Inferior Number of the Royal Court (judge of law with two Jurats);<sup>23</sup> the Superior Number of the Royal Court, or *Corps de Cour* (Bailiff as the judge of law, with a minimum of five Jurats);<sup>24</sup> the Court of Appeal;<sup>25</sup> and the Privy Council.<sup>26</sup> In practice, the involvement of the Superior Number in civil cases is minimal, and most cases are heard before the Inferior Number. Property law cases are usually heard by the *Héritage* or *Samedi* divisions of the Royal Court.<sup>27</sup> In some circumstances, the Bailiff may sit as sole judge.<sup>28</sup> On average, a handful of property cases are decided

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<sup>19</sup> *State of Qatar v Al Thani* 1999 JLR 118, 124 – 127, per Bailhache, Bailiff (see also: *Nicolle Origin* 97 – 99), but consider *In re Barker* 1985 – 86 JLR 186, 191, per Hoffmann, JA. Also, see generally: *Mautalent-Reboul*, 708 – 717; (Guernsey) *Dawes Laws* 13 – 16.

<sup>20</sup> *State of Qatar*, *ibid* 124.

<sup>21</sup> For example: *SME* vol 22, 247 *et seq.* Consider also: (Quebec) *Gall*, 275 – 276.

<sup>22</sup> See also: *Nicolle Origin* 99 – 100.

<sup>23</sup> The judges of law are the Bailiff, the Deputy Bailiff, a Lieutenant Bailiff, or a Commissioner. See: *Bois History* 2/2; Royal Court (Jersey) Law 1948, arts 10 – 12. The Jurats are lay justices, and judges of fact. See further: Hanson “Jurats”.

<sup>24</sup> Royal Court (Jersey) Law 1948, art 16(1). The 1948 Law restricted the Jurats to judges of fact alone: art 15. See also: *Metzner v AG* 2010 JLR N22 (summarising law on *doléance*); *Le Gros*, 151, 479.

<sup>25</sup> Court of Appeal (Jersey) Law 1961, art 1. Comment: Olsen “Court”; Sowden “Origin”; Hanson “Civil”.

<sup>26</sup> Court of Appeal (Jersey) Law 1961, art 14. Comment: Southwell “Appeals”.

<sup>27</sup> The other divisions are Probate and Family: Royal Court Rules 2004, r3/1.

<sup>28</sup> Where the issues raised are of law only: Royal Court (Jersey) Law 1948, art 17.

each year. Many of these are decided by the Royal Court (Inferior Number) and so are not binding precedents, but where, as here, sources are few such cases clearly merit consideration.

In addition to hard copy, the Jersey Law Reports are available on the Jersey Legal Information Board website, together with unreported judgments from 1997 onwards (which are password protected). The process of uploading the Jersey Judgments to that site is ongoing. Thus, there has been a revolution in access to Jersey cases in the years since 1950. Since its inception in 1999, the Jersey Legal Information Board website has done a great deal to further this work. This improved accessibility facilitates the doctrine of precedent.

#### **D. JURISTIC WRITING**

Law gives rise to comment,<sup>29</sup> and where comment is made in written form, by lawyers, in a scholarly fashion, this may be called juristic writing. In civilian systems, juristic writing has traditionally been held in high regard or even viewed as authoritative.<sup>30</sup> Historically, mixed systems have tended towards this civilian practice,<sup>31</sup> and Jersey is no exception among their number.<sup>32</sup> Juristic writing plays an important part in the elucidation of Jersey property law. Most significant are the contributions of three local writers on Jersey law: Jean Poingdestre, Philippe Le Geyt, and Charles Sydney Le Gros.<sup>33</sup> Some non-native writers have also achieved prominence,<sup>34</sup> and reference to works on Continental Norman law in the present work is guided by those referred to in the cases considered,<sup>35</sup> such as Terrien,<sup>36</sup>

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<sup>29</sup> For example: Dickens *Oliver* 354.

<sup>30</sup> For example: Tunc “Methodology” 468 – 472; Jestaz & Jamin *Doctrine*; Steiner *Comparative* ch 9. Consider also: Cohn *German* vol 1, 6, para 8.

<sup>31</sup> For example: (Louisiana) Barham “Methodology”; (Quebec) Gall, 276; (South Africa) Zimmermann & Visser *Southern* 11 – 12; (Scotland) *SME* vol 22, paras 433 – 445, 534 – 538.

<sup>32</sup> See: ch 1 G. Matthews & Sowden, Foreword by LH Hoffmann (Feb 1988): “Furthermore, Jersey preserves the Continental tradition by which learned treatises can acquire an authority beyond anything accorded to writers in England.” On the beginning of this practice, see 1861 Report, iv.

<sup>33</sup> On Poingdestre and Le Geyt: Mautalent-Reboul, 283 – 314.

<sup>34</sup> See, for example: Nicolle *Origin*, particularly sections: 6, 7, 9, 10.

<sup>35</sup> Also: Le Geyt on his sources in his own preface to the *Manuscripts*, ii. On the Continental commentators on the Reformed Custom: Mautalent-Reboul, 273 – 283.

<sup>36</sup> See: Nicolle *Origin* 13 – 15, 7.6 – 7.14; Dawes *Terrien*. References to Terrien are given as [book number].[chapter number].

Basnage,<sup>37</sup> Bérault, Godefroy, d’Aviron,<sup>38</sup> and Houard.<sup>39</sup> For the same reason, the work of Pothier is considered, although it is not concerned with Norman customary law.<sup>40</sup>

As with other older legal materials considered by the Jersey courts, the relevant works of all of these authors are in French. References to Roman law and its later development in the *ius commune* are common, and following these up often gives a greater understanding of the points being made. While this is of interest and value to the scholar, it makes using these texts time-consuming, particularly as, for example, the older method of citing Roman sources is employed (modern references are given in this thesis).

Jean Poingdestre (1609 – 1691), Lieutenant Bailiff<sup>41</sup> of Jersey from 1668 to 1676,<sup>42</sup> was the first of the Jersey writers.<sup>43</sup> He wrote three accounts of the law.<sup>44</sup> His *Commentaires sur l’Ancienne Coutume de Normandie*<sup>45</sup> and *Remarques et Animadversions sur la Coutume Reformée de Normandie*<sup>46</sup> were commentaries on two of the Norman law customals (the *Grand Coutumier* and *Coutume Reformée*, or Reformed Custom, respectively)<sup>47</sup> in which he detailed which parts represented Jersey law. *Les Lois et Coutumes de l’Ile de Jersey*,<sup>48</sup> his “magnum opus”,<sup>49</sup> comprises short commentaries on particular topics. Some headings are meaningfully

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<sup>37</sup> Basnage *Oeuvres* (1<sup>st</sup> edn, 1678). See: Nicolle *Origin* 17 – 19.

<sup>38</sup> Whose commentaries were published together: Bérault, Godefroy, Bathelier d’Aviron *Commentaires*. See: Nicolle *Origin* 17 – 19. Poingdestre’s view of Bérault and Godefroy is mixed, but generally positive: *Remarques* Preface.

<sup>39</sup> Houard *Dictionnaire*. See: Nicolle *Origin* 20 – 21.

<sup>40</sup> Pothier was used as a source in, for example, *Searley v Dawson* (1971) 1 JJ 1687, and is authoritative in the law of obligations (see, for example: Kelleher “Sources”). Le Gros (18) describes Pothier as “cet auteur si éminemment judicieux, et si consciencieux dans les motifs de ses opinions”. On the use of non-Norman, French writers, see: Nicolle *Origin* 50, 14.10. Also: Mautalent-Reboul, 663 – 684; (Guernsey) Jeremie, ch 1.

<sup>41</sup> A Lieutenant(-)Bailiff discharges the functions of the Bailiff in his absence: Bois, 25 – 27.

<sup>42</sup> “Notice Biographique sur Jean Poingdestre, Lieutenant-Bailli de Jersey” in Poingdestre *Commentaires* viii, x (reprinted: (1998) JLR 134).

<sup>43</sup> *Ibid* v – xii. Landers “Poingdestre”.

<sup>44</sup> He is also the author of *Caesarea, or a discourse of the Island of Jersey* (1889).

<sup>45</sup> Published 1907.

<sup>46</sup> Never printed. Written circa 1680: *Jersey Financial Services Commission v AP Black (Jersey) Limited* 2002 JLR 294, 298, para 7, per Bailhache, Bailiff.

<sup>47</sup> See: ch 1 E.

<sup>48</sup> Published 1928.

<sup>49</sup> Poingdestre *Lois* preface. The work is 347 pages long.

grouped together (such as on public law, prescription, *rentes*, and things in common), but no overarching structure is imposed.

Philippe Le Geyt (1635 (baptised) – 1716) succeeded Poingdestre as Lieutenant Bailiff in 1676.<sup>50</sup> He was the author of *Privileges, Loix & Coustumes de l'Isle de Jersey*<sup>51</sup> (known as the “Code Le Geyt”)<sup>52</sup> and *Les Manuscrits sur la Constitution, les Lois, et les Usages de cette Ile* (his “Manuscrits”).<sup>53</sup> The *Code Le Geyt* is an attempt to systematise the law. The *Manuscrits* comprise a great number of ruminations (“petites Remarques”)<sup>54</sup> on specific points, and four short “treatises”, and were intended for Le Geyt’s personal use and assistance, not for publication.<sup>55</sup> By his own admission, the *Manuscrits* are “sans liaison et sans ordre”.<sup>56</sup>

Charles Sydney Le Gros (1867 – 1947) finished his *Droit Coutumier de l'Ile de Jersey* in 1943, during the German Occupation of Jersey, but it was not publicly available until after the Liberation.<sup>57</sup> Like Poingdestre and Le Geyt, he too held the office of Lieutenant Bailiff.<sup>58</sup> Like Poingdestre’s *Lois et Coutumes* and Le Geyt’s *Manuscrits*, his work evidences no overarching structure. Consequently, even taking all three writers’ works together, treatment of a number of questions and areas is absent.<sup>59</sup>

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<sup>50</sup> “Notice Biographique sur Jean Poingdestre, Lieutenant-Bailli de Jersey” in Poingdestre *Commentaires* xi. According to the 1861 Report (iv) he was Lieutenant Bailiff until 1711. Marett records that he resigned the office of Jurat in March (1710 –) 1711: RP Marett “Preface” in Le Geyt *Manuscrits* xix.

<sup>51</sup> Published 1953. On the job of reconstructing the *Code Le Geyt*, see the “Avis aux Lecteurs” to it. It is thought that the original manuscript no longer exists: *Code Le Geyt* “Avant-Propos” v. See also, 1861 Report, iv. The *Code Le Geyt* is reviewed in (1955) 4 ICLQ 574. The reviewer’s name is not given, but it could have been the comparatist Charles d’Olivier Farran, who wrote “Judicial Machinery in the Channel Islands” in the same volume (46).

<sup>52</sup> “Avant-Propos” in *Code Le Geyt* v. References to the *Code Le Geyt* are given as [book number].[title number].[article number].

<sup>53</sup> Published 1846 (by the States). RP Marett in his “Preface” to the *Manuscrits* records that various parts were finished in 1696, 1697, 1698, and 1701 (xxxiii, xxxv – xxxvi).

<sup>54</sup> *Manuscrits* Le Geyt’s preface, ii.

<sup>55</sup> *Ibid*: “Mon seul but n’a esté que de me divertir et de m’instruire moy-même.” Although the existence and tone of this preface indicate he expected others to read his work.

<sup>56</sup> *Ibid*. Also: 1861 Report, iv; RP Marett “Preface” in Le Geyt *Manuscrits* vol 1, xl.

<sup>57</sup> PM Bailhache “Introduction” in Le Gros. The 2007 facsimile is reviewed by GL Gretton: (2009) 1 EdinLR 170. Le Gros also wrote an “Etude compare du droit des gens mariés d’après l’ancienne coutume de Normandie et d’après le droit de Jersey” available in Vernon & Pilon *Travaux* 239.

<sup>58</sup> 5 January 1946 – 17 March 1947 (when he died).

<sup>59</sup> For example: Kelleher “Sources” 8 – 12 (contract law is almost absent from Norman customary law).

There is a conspicuous time-gap between Le Geyt's and Le Gros's times of writing (circa 1716 – 1940s). During this period, legal systems elsewhere were undergoing significant legislative development<sup>60</sup> and were the subject of much scholarly writing. Some descriptive accounts of Jersey law appeared during this period,<sup>61</sup> and legislative reforms were also introduced,<sup>62</sup> but there was nothing on the scale seen elsewhere in Europe. It is regrettable that no treatises were produced locally of the like of Poingdestre's *Lois et Coutumes* or Le Geyt's *Code* or *Manuscripts*.<sup>63</sup> This is perhaps particularly to be regretted of Robert Pipon Marett, the author of the 1880 Law, and the Explanatory Letter to it,<sup>64</sup> both of which demonstrate an impressive technical understanding of Jersey law. Marett is described by Le Gros as “[t]rès versé dans la science du droit”.<sup>65</sup> In any event, there was comparatively little written on Jersey law and the pace of legislative change was considerably slower than elsewhere in Europe. Consequently, indigenous sources on a given point of law beyond the eighteenth century are often sparse, and old sources, often rooted in an ancient Norman customary law long abandoned in France itself, may have little to contribute to developing rules fit for the twenty-first century.

In 1865, the Privy Council described Le Geyt as “as high an authority as can be produced on the local law of Jersey”<sup>66</sup> and Terrien's *Commentaires* as “a Book of

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<sup>60</sup> Such as codification in France (1804) and Germany (1900).

<sup>61</sup> Such as: 1861 Report; the First Report of the Commissioners Appointed to Enquire into the State of the Criminal Law in the Channel Islands (1847); Hemery & Dumaresq; Pipon & Durell. Regarding the circumstances surrounding the production of the reports of Hemery & Dumaresq and Pipon & Durell, see: *Foster v AG* 1992 JLR 6, 15 – 16, per Le Quesne, JA.

<sup>62</sup> For example: *Loi (1832) sur les Décrets*; *Loi (1851) sur les Testaments d'Immeubles*; *Loi (1862) sur les Teneures en Fideicommiss et l'Incorporation d'Associations*; *Loi (1880) sur la Propriété Foncière*. Consider also: Lesaffer, 284.

<sup>63</sup> Aubin *Digest* (which was published during this period) is not of the same order.

<sup>64</sup> The *Lettre explicative du projet de loi amendé sur la propriété foncière* was reprinted in (1999) JLR 41.

<sup>65</sup> Le Gros, 201 (also, of Marett (202): “L'hypothèque a été traité avec science et méthode”).

<sup>66</sup> *Godfray v Godfray* (1865) 3 Moo PC (NS) 316, 338, per Turner, LJ (see also: 340). Also: 1861 Report, iv “Le Geyt's essays, as is not surprising, are characterized by the multifariousness of the authorities cited, and the uncertainty of the conclusions. As these defects are imputable not so much to himself as to the obscurity of the subject at that period, and to the fact that these writings were not prepared by the author for publication, they only show a dread on his part of hasty and peremptory judgement, and we therefore feel justified in attaching the greater value to any such clear information of reasonable customs, consistently followed, as may be gathered from him, from Poingdestre, and from contemporary records”; RP Marett “Preface” in Le Geyt, *Manuscripts*, vol 1, xii, xxi; *Code Le Geyt* “Avant-Propos” vi (on the influence of Le Geyt); *Nicolle v Wigram* [1954] AC 301, 305.

authority in the Courts of Jersey”.<sup>67</sup> The Privy Council’s description of Le Geyt could be interpreted as elevating him to the status of binding authority.<sup>68</sup> Heavy reliance on one text is understandable when indigenous sources are few, but the work of one man should not be approached uncritically. Le Geyt himself would not have been in favour of such treatment, given his stated purpose of writing.<sup>69</sup> Poingdestre’s work, although respected,<sup>70</sup> has not been judicially described in the same way. Does this mean that his work is of lesser authority? Perhaps the difference is only due to Le Geyt’s *Manuscrits* having been printed around sixty years before Poingdestre’s *Commentaires* (1846 and 1907, respectively), and almost eighty years before *Lois et Coutumes*, the equivalent text to the *Manuscrits*. Compared to Poingdestre, Le Geyt is generally more discursive. The view has been expressed that when Le Geyt is sure on a point, his view carries more weight as it is the product of greater consideration,<sup>71</sup> but this seems unfair to Poingdestre, who was clearly an able jurist.

Compared to that of Poingdestre and Le Geyt, the work of Le Gros has attracted less praise. In part, this may be because it is much more recent, so such comment has not had the opportunity to accumulate, but there is also a perception that as a jurist Le Gros was not of the same order as Poingdestre and Le Geyt. Perhaps surprisingly, he does not demonstrate the same level of familiarity with Roman law and the *ius commune* as his predecessors, although he does make some reference to foreign sources such as Halsbury’s *Laws of England* and the French Civil Code. He frequently copies out court records and other works, from which he has derived the law on the point in question. Consequently, there is often no need to rely on Le Gros himself because his source can be relied upon. Le Gros’s work has been followed,<sup>72</sup>

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<sup>67</sup> *La Cloche v La Cloche* (1870) 6 Moo PC NS 383, 399, per Lord Westbury. Comparing Terrien, Bérault, and Godefroy: Poingdestre *Remarques* preface “Si bien que leur prefere, Terrien de bien loing”.

<sup>68</sup> Compare: *Blackie Stair*. But see also: Reid *Third* 46 – 49.

<sup>69</sup> See: ch 1 n55.

<sup>70</sup> On Poingdestre’s reputation: RP Marett “Preface” to Le Geyt *Manuscrits* vol 1, xii; ET Nicolle “Notice Biographique sur Jean Poingdestre, Lieutenant-Bailli de Jersey” in Poingdestre *Commentaires* particularly xii.

<sup>71</sup> 1861 Report, iv.

<sup>72</sup> For example: *Snell v Beadle* 2001 JLR 118; *Colesberg v Alton* 2003 JLR 47; *Gale v Rockhampton* 2007 JLR 332.



as well as criticised.<sup>73</sup> This criticism is an example of juristic writing being treated as a contribution to legal thought: as persuasive, not binding, authority.

The civilian view that juristic writing is a valuable resource is present in Jersey also, and it is in keeping with that culture that juristic writing – whether old (such as Terrien, Poingdestre, and Le Geyt) or relatively new (such as Le Gros, and Matthews and Nicolle) – should be treated as persuasive authority. Limits of time and resources have hampered critical engagement with juristic writing, but the establishment of the Jersey Law Commission<sup>74</sup> and the Jersey and Guernsey Law Review<sup>75</sup> have stimulated greater engagement in recent times.

## E. CUSTOMARY LAW

A serviceable definition of customary law is given by Routier<sup>76</sup> (a Continental commentator on Norman law), which Nicolle renders as: “unwritten law which has been introduced with the tacit agreement of the sovereign and the people as the result of having been observed for a considerable time”.<sup>77</sup> “Customary law” also describes the law in the customals of Normandy.<sup>78</sup> There are three great distillations of Norman customary law into written form: the *Très-Ancien Coutumier* (late twelfth – early thirteenth century), the *Grand Coutumier* (mid-thirteenth century), and the *Coutume Reformée* (or Reformed Custom, 1583).<sup>79</sup>

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<sup>73</sup> *Mendonca v Le Boutillier* 1997 JLR 142.

<sup>74</sup> [www.lawcomm.gov.je](http://www.lawcomm.gov.je). See also: Binnington “Gathering”.

<sup>75</sup> Began in 1997 as the Jersey Law Review and changed to its present name in 2007.

<sup>76</sup> 1: “La COUTUME n’est autre qu’un DROIT non écrit, qui s’est introduit par un tacite consentement du SOUVERAIN & du PEUPLE, pour avoir été observée pendant un tems considérable.”

<sup>77</sup> *Origin* 31, 12.1. Also: *Snell v Beadle* 2001 JLR 118, 127, para 17, per Lord Hope of Craighead; A Binnington “The Law of Contract – Which Way?” in Bailhache *800 Years* 59; J Kelleher “Cause for Consideration: Whither the Jersey Law of Contract?” in Bailhache *800 Years* 69. Compare, for example: Erskine *Institute* 1.1.43.

<sup>78</sup> Consider also: Lemasurier, 28 – 42.

<sup>79</sup> See: Nicolle *Origin* 8, 9, 16; Everard, xviii – xx. *Grand Coutumier* is the title of the French version, which was predated by a Latin version: the *Summa de Legibus* (see: Everard “Introduction”; Nicolle *Origin* 9). Dobozy *Mirror* 28 *et seq* is of interest on customals in the 12<sup>th</sup> and 13<sup>th</sup> centuries. See generally: Besnier.

A related question is to what extent the customals of Normandy can be considered to be Jersey law. For Jersey, each of the three is an unofficial compilation. (The Reformed Custom was promulgated by the French king in 1585, but that was long after the separation of 1204.) As the general consensus is that the *Très-Ancien Coutumier* was compiled prior to the separation, it ought to represent the Jersey law of the time (in so far as local usage did not differ from its terms). However, Kelleher warns that “There is no evidence that the [*Très-Ancien Coutumier*] was used as a text in Jersey at the time of its publication [although it] is clear [...] that the [*Grand Coutumier*] was used.”<sup>80</sup> Even if the *Très-Ancien Coutumier* had been used, it seems to have been superseded by the *Grand Coutumier*, aspects of the Reformed Custom, Jersey custom, Jersey legislation, and Jersey case-law, in respect of property law.

The *Grand Coutumier* is thought to date from the middle of the thirteenth century.<sup>81</sup> Although it appeared after the separation of 1204, the gap was only of a few decades, and the *Grand Coutumier* is seen as a source of Jersey law.<sup>82</sup> By contrast, the Reformed Custom did not appear until 1583, centuries after the separation. One view is that the Reformed Custom is merely a written illustration, or exposition, of aspects of customary law, but without authority in Jersey.<sup>83</sup> While this was certainly true initially,<sup>84</sup> it may be questioned whether such a description is still accurate. Based on Le Geyt,<sup>85</sup> Nicolle draws the persuasive conclusion that the tradition of relying on the Reformed Custom has assimilated it into Jersey law.<sup>86</sup> Obviously, this could only apply to those areas in which such reliance has been placed, but two examples (used later in this thesis) are the titles on servitudes and on things deemed moveable or immoveable.

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<sup>80</sup> J Kelleher “Cause for Consideration: Whither the Jersey Law of Contract?” in Bailhache *800 Years* 69.

<sup>81</sup> See: ch 1 n79.

<sup>82</sup> *La Cloche v La Cloche* (1870) 6 Moo PC NS 383, 398 – 399, per Lord Westbury.

<sup>83</sup> Le Quesne, 98. *La Cloche v La Cloche* (1872) LR 4 PC 325, 334, per Lord Justice James. *Att Gen and Receiver Gen for Jersey v Turner (Sol Gen for Jersey)* [1893] AC 326, 333, per Earl of Selbourne.

<sup>84</sup> Similar points are made about the 13<sup>th</sup> century German customal, the *Sachsenspiegel*, in Dobozy *Mirror 7 et seq.* See also: Lesaffer, 273 – 274.

<sup>85</sup> *Manuscripts* vol 1, preface i – ii.

<sup>86</sup> *Origin* 27, 11.14.

When using the customals to help to construct the modern law, as is sometimes done in this thesis, they present some obstacles to understanding: they are ordered in a fashion unfamiliar to a modern lawyer; and they contain some legal concepts which have either fallen out of use or were never in use in Jersey.

## F. GAPS

Legislation, cases, juristic writing, and customary law do not alone provide as complete a view of a modern system of property law as is achieved in many other legal systems. The problems are two-fold: some areas of detail are missing, and the structure of the law is itself often unclear.<sup>87</sup> One way of addressing these gaps is by reference to foreign law. All legal systems borrow from others at some point, smaller ones more than others. The question is: from where? There is no single answer, but classifying a system assists the finding of foreign law which is most compatible.

## G. JERSEY: A MIXED JURISDICTION

Houard states that Roman law was not followed in Normandy under the first Dukes<sup>88</sup> in the tenth century. The renaissance of Roman law began in the late eleventh century,<sup>89</sup> and by Poingdestre's time, reference to Roman law appears habitually to have been made:

“[...] Droict Romain, qui est celuy que tout le monde suit en matière de Contracts, & autres, ou les coustumes n'ont rien pourvu de plus particulier.”<sup>90</sup>

Underlying this is the common European view of Roman law as written reason.<sup>91</sup> In Jersey, Poingdestre's *Lois et Coutumes* and Le Geyt's *Manuscrits* evidence frequent references to Roman law and its later development. Some areas of the law show quite

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<sup>87</sup> Consider, for example: Mautalent-Reboul, 616 – 617, 625.

<sup>88</sup> Houard *Dictionnaire* vol 1, preface, xxxviii. Also: Le Quesne, 77 – 78.

<sup>89</sup> See: ch 3 C. There are some traces of Roman law in the *Summa de Legibus*: R Généstal “La Formation et le Développement de la Coutume de Normandie” in Havilland & Nézard *Travaux* 53 – 55. Consider also: Dawson *Oracles* 263 – 266, 348 – 350.

<sup>90</sup> Poingdestre *Remarques* preface. Also: Poingdestre *Lois* 261; Poingdestre *Commentaires* 4.

<sup>91</sup> For example: Nicolle *Origin* section 13; Robinson & Fergus *European Legal History* 115. On Scotland (and Holland, and through it South Africa) see: Birks & McLeod “Introduction” 21.

full Roman influence,<sup>92</sup> such as the chapter on the law of servitudes in the Reformed Custom (not present in the *Grand Coutumier*), which has been influential in Jersey.<sup>93</sup> Other examples are the law on accession,<sup>94</sup> and on the classification of property.<sup>95</sup> The overall picture is that Jersey law has absorbed a significant amount of Roman law.<sup>96</sup>

Influence from English law was resisted in the centuries following the separation. However, English law has gradually risen in importance, most significantly in areas such as tort and criminal law.<sup>97</sup> Consequently, Jersey law bears, *inter alia*, significant evidence of civilian influence and English law influence. Therefore, Jersey can be described as a “mixed jurisdiction”, that is to say, a jurisdiction which draws inspiration both from (English) common law and from the civil law. It is increasingly understood that the mixed jurisdictions form a distinct legal family with commonalities in their structure and individual legal rules in spite of different legal histories. The mixed jurisdictions include Israel, Louisiana, the Philippines, Puerto Rico, Quebec, Saint Lucia, Scotland, the Seychelles, South Africa, and Sri Lanka.<sup>98</sup>

It is noteworthy that property law in other mixed jurisdictions is not itself “mixed” but is almost entirely civilian.<sup>99</sup> This thesis shows that that is true of Jersey property law also.<sup>100</sup> Of course, there are points of similarity between civilian property law and common law property law, but usually only where the latter has borrowed rules from Roman law.<sup>101</sup> More frequently the detail does not converge. Unlike in English law, Jersey law has not developed on the basis of a separation between Law and

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<sup>92</sup> See also: Houard *Dictionnaire* vol 1, xxxviii *et seq*; Nicolle *Origin* section 13.

<sup>93</sup> See: ch 6 A(1). See also: *nemo plus* principle in *Mendonca v Le Boutillier* 1997 JLR 142 (D.50.17.54).

<sup>94</sup> See: ch 4 E.

<sup>95</sup> See: ch 4.

<sup>96</sup> Consider, on Roman influence evidenced in Terrien’s work: Besnier, 152 – 157. Also, on Roman law influences which pre-date the *ius commune*: Mautalent-Reboul, 255 – 268, 318 – 327; Besnier, 47 – 50.

<sup>97</sup> Nicolle *Origin* section 15; Southwell “Sources”; Le Geyt *Manuscripts* author’s preface, ii; Mautalent-Reboul, 643 – 660.

<sup>98</sup> Consider: Palmer *Mixed*; Papers from the First Worldwide Congress on Mixed Jurisdictions in (2003) 78 TulLRev; Gretton & Reid “Thoughts” 297, para 29 *et seq*.

<sup>99</sup> See, for example: Palmer *Mixed* 57.

<sup>100</sup> See: ch2 F, I(2), I(3); ch3 E(2), E(3), E(4), F(2), G; ch6 A(1), C(1), C(4)(a); ch7 I; ch8 C.

<sup>101</sup> See: ch3 E(1); ch7 E(1); ch9 A(4).

Equity,<sup>102</sup> which underlines and partly explains the doctrinal differences between the two. Another point of difference, the nature and decline of feudalism in Jersey, is explored in chapter four.

## H. FOREIGN LAW: SOME PROBLEMS AND SOME MERITS

The sources of Jersey law are the subject of a debate, which focuses on the law of contract. The debate is ideological, rather than historical, and opinion is broadly divided over whether to develop the law of contract on the basis of English law, or of pre-codification French law (of which the work of Pothier is frequently taken to be the embodiment).<sup>103</sup> The same debate does not arise over property law, because English law is too remote to be of much relevance.<sup>104</sup> Indeed, contract law in common law and civil law jurisdictions is relatively close compared with the respective laws of property. Nonetheless, consideration of some issues raised regarding the sources of contract law brings further definition to the sources of the law of property.

Various concerns have been voiced in the contract law debate: that the old customary law sources are insufficient to meet the needs of a modern legal system;<sup>105</sup> that indigenous materials are insufficiently accessible;<sup>106</sup> regarding the evils of “cherry picking” from other legal systems; and regarding the expense associated with researching foreign laws. Questions arising relative to the use of foreign law are: the place of French law, particularly post-codification; the place of other foreign laws;

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<sup>102</sup> See, for example: *Ex parte Viscount Wimborne* (1983) JJ 17; *Trollope v Jackson* 1990 JLR 192; *Fiduciary Management v Sheridan* 2002 JLR N11. For England, see: Carter *History* ch 8; Pollock & Maitland *History* vol 1, 189 *et seq.*

<sup>103</sup> See generally: Binnington “Frozen”; Southwell “Sources”; Kelleher “Sources”; Southwell “Note”; Southwell “Citation”; Dawes “Citation”; Hanson “Legal”; Dawes “Code”; R Southwell “The Sources of Jersey Law” in Bailhache *800 Years*; P Hodge “The Value of the Civilian Strand” in Bailhache *800 Years*; A Binnington “The Law of Contract – Which Way?” in Bailhache *800 Years*; J Kelleher “Cause for Consideration: Whither the Jersey Law of Contract?” in Bailhache *800 Years*; A Ozanne & G Dawes “Guernsey Contract Law: Which Way?” in Bailhache *800 Years*; Hanson “Jersey”.

<sup>104</sup> Rejection of English property law in Jersey: *De Carteret v Baudains* (1886) LR 11 App Cas 214, 219, per Lord Blackburn. Also: *Kwanza v Sogeo* (1981) JJ 59, 76, per Ereaut, Bailiff; Nicolle *Origin* 67, 15.26; Binnington “Frozen” 27.

<sup>105</sup> Binnington “Frozen”.

<sup>106</sup> *Ibid*; and, A Binnington “The Law of Contract – Which Way?” in Bailhache *800 Years* 62 – 63. (Guernsey) Dawes “Citation” 76, para 13.

and when and how foreign law should be used. To these latter points, a preliminary question is whether it is necessary – or legitimate – to consider foreign law at all.

Jersey law has a long-standing tradition of reference to, and adoption of, foreign law. Jersey continued to look to legal developments in continental Normandy after the separation of 1204. In customary law jurisdictions generally, it was common practice to refer to other customs (and also to Roman law) where local law did not provide an answer.<sup>107</sup> The tendency of Jersey lawyers to look to France was observed by Royal Commissioners in their report of 1861,<sup>108</sup> and this tendency has continued. English law is now also a point of frequent reference in some areas (but not property law).<sup>109</sup>

Jersey's use of foreign law is typical of many, and particularly of small, legal systems.<sup>110</sup> The question is usually not whether to borrow, but which systems to look at (and when and how to do this). England will sometimes refer to other Commonwealth countries, which makes sense because of the closeness of their laws.<sup>111</sup> In the area of tort law, English law also borrows from Scots law (where "tort" is known as "delict") and *vice versa*, because the two systems are very similar in that area.<sup>112</sup> On the other hand, English property law is largely alien to Scots property law – as it is also to Jersey property law – so that reciprocal borrowing would cause problems.<sup>113</sup>

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<sup>107</sup> On the common practice of looking at other customs see, for example: de Ferrière *Fiefs* preface, 1 – 2; *La Cloche* (1870) 6 Moo PC NS 383, 401, per Lord Westbury. Also, works such as Lalaure.

<sup>108</sup> 1861 Report, iii. Also: Nicolle *Origin* 52, 14.17.

<sup>109</sup> Nicolle *Origin* section 15 (compare with 1861 Report, iii: "It was indeed contended before us, that the common law of England has been introduced into Jersey. We do not see any proof of this [...]")

<sup>110</sup> A point made in respect of English law by Dawes "Citation" 72 – 73, para 8. Consider the influence of the French and German Civil Codes (see, for example: Zweigert & Kötz).

<sup>111</sup> A prominent example is: *Overseas Tankship v Morts Dock and Engineering Co (The Wagon Mound)* [1961] AC 388.

<sup>112</sup> The obvious example is *Donoghue v Stevenson* 1932 SC (HL) 31, [1932] AC 562.

<sup>113</sup> See, for example: *Sharp v Thomson* 1997 SC (HL) 66; Reid "Equity"; Gretton "Equitable"; SLC DP 114; SLC R 208.

## I. WHICH SYSTEMS TO LOOK AT?

Given the long-standing relationship, French law is an obvious possibility for legal “borrowing” in the area of property law. Mixed jurisdictions also fall to be considered.

French law, loosely so called, can be separated into that of the period 1204 to 1804, and from 1804 to the modern day. 1204 was the date of the separation of the Channel Islands from continental Normandy, thus rendering continental Norman law foreign. However, Jersey law continued to follow legal developments in Continental Normandy. In 1804, there occurred a “second separation”<sup>114</sup> when the laws of France were united and codified, and Norman law was abrogated in Normandy. Nicolle notes some Jersey legislation which has been modelled on the French Civil Code.<sup>115</sup> This echoes the way in which Jersey law developed following the first separation. There is some sense in this, for in some respects the French Civil Code represents the natural development of the previous law adapted to modern times.<sup>116</sup> Additionally, aspects of property law (elements of the law of servitudes, for example) which were the same in Norman law and in Jersey law find close counterparts in the Code.<sup>117</sup> Obviously, there are many significant differences, of which the abolition of feudal land tenure in France is one.<sup>118</sup> Nonetheless, French legal materials, both pre- and post-codification, continue to be an important resource for Jersey property law.<sup>119</sup>

The mixed jurisdictions are also of interest, not simply because they are from the same legal family as Jersey, but also because the nature of the “mix” is similar in every case. As already mentioned, property law is always heavily civilian.<sup>120</sup> Of the

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<sup>114</sup> Gretton & Reid “Thoughts” 289, para 7.

<sup>115</sup> Nicolle *Origin* 52, 14.17.

<sup>116</sup> Dawes “Code” 270, para 32.

<sup>117</sup> Consider, for example: arts 637, 640, 646, 647, 653, 682, 684, 687, 688, 689, 696, 701, 705, 708 CC. Pannier *Ruines*; Nicolle *Origin* 52, 14.17. Dawes “Citation” 74 – 75, para 10, (3). Dawes “Code” 270, para 32 (“Taking all the above into account it is suggested that the *Code civil* is best seen as being itself a new *coutume*”), 271, para 33, 272 – 277, paras 39 – 60. Also considered in: Southwell “Sources” 228.

<sup>118</sup> Consider also: *Maynard v Public Services Committee* 1996 JLR 210, 218, per Southwell, JA (but also: Nicolle *Origin* 47, 14.2). See: ch 2.

<sup>119</sup> *Kwanza v Sogeo* (1981) JJ 59, 76, per Ereaud, Bailiff.

<sup>120</sup> See: ch 1 n99. Also: Gretton & Reid “Thoughts” 289, para 8, 296 – 297, para 27.

mixed jurisdictions, Guernsey law is an obvious resource for Jersey law,<sup>121</sup> a point not lost on Le Geyt.<sup>122</sup> However, both systems share a lack of comprehensive legal development in a number of key areas.<sup>123</sup> Therefore, whilst Guernsey law may be a first port of call, it is likely that other systems will more frequently provide assistance.

Among the most prominent mixed jurisdictions are Louisiana, Quebec,<sup>124</sup> Scotland, and South Africa. All four are referred to in this thesis. As for Jersey (and Guernsey), the civilian aspect of the laws of Louisiana and Quebec came through the influence of French law.<sup>125</sup> By contrast, the civilian elements of South African law came through Roman-Dutch law.<sup>126</sup> Having derived civilian influence from the French and the Roman-Dutch traditions, Scotland sits somewhere in the middle.<sup>127</sup> Unlike Jersey, Louisiana and Quebec are codified systems, while Scotland and South Africa are uncodified. Given the influence of French law (pre- and post-codification), Louisiana and Quebec appear to hold greatest interest for Jersey property law. However, it appears that, generally, more frequent reference has been made to Scots law (and secondly to that of South Africa) albeit that the total number of instances is not great.<sup>128</sup>

Geographical proximity is certainly part of the reason for this trend. A reference was made to Scots law in the 1861 Report,<sup>129</sup> written at a time when people and books were less likely to make long journeys. For Jersey, an attraction of Scots and South African law, whether consciously appreciated or not, is their overall structure as

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<sup>121</sup> See, for example: Dawes *Laws* ch 1.

<sup>122</sup> RP Marett “Preface” in Le Geyt *Manuscripts* vol 1, xxvi. See also: Nicolle *Origin* 71, 16.2.1.

<sup>123</sup> A similar point is made by Dawes “Citation” 70, para 3.

<sup>124</sup> See also: Nicolle *Origin* 74, 16.4.

<sup>125</sup> Palmer *Experience*; Gall, 266 *et seq.*

<sup>126</sup> Zimmermann & Visser *Southern* ch 1.

<sup>127</sup> JW Cairns “Historical Introduction” in Reid & Zimmermann.

<sup>128</sup> For example: *AG v Foster* 1989 JLR 70, 1992 JLR 6 (CA) (reference made to South Africa also); *Maynard v Public Services Committee* 1995 JLR 65; *State of Qatar v Al Thani* 1999 JLR 118; *Snell v Beadle* 2001 JLR 118; *Haas v Duquemin* 2002 JLR 27 (reference is also made to South Africa). Also, Terrien in Scotland: Ford *Scotland* 257, 263, 271 – 272 (and J McNeill’s review in (2008) JGLR 385); R MacLeod, review of “George Joseph Bell, *Principles of the Law of Scotland*” (2011) JGLR 260; a copy of Terrien was in the library of Charles Aerskine, professor at the University of Edinburgh from 1707 (Baston *Library* Appendix A, F146).

<sup>129</sup> Evidence, 278 – 279, question 6286.



uncodified systems with case law which can readily be borrowed.<sup>130</sup> Further, Louisiana, South Africa, and Scotland offer legal materials in English,<sup>131</sup> which are, therefore, readily accessible to lawyers in Jersey for whom French is no longer the working language.<sup>132</sup> Also, accessibility of foreign law has been revolutionised through the internet. Legal databases serve greatly to augment law libraries.

The Court of Appeal in *Attorney General v Foster*,<sup>133</sup> a criminal appeal,<sup>134</sup> was critical of references to Scots and South African law, which had been based on the common link of Roman law between these jurisdictions and Jersey. The scepticism expressed by the court may be justified in criminal law,<sup>135</sup> but cannot be applied more widely without justification. Nevertheless, a note of caution may rightly be sounded. There is a time and a place for consideration of foreign law.<sup>136</sup>

## J. WHEN AND HOW TO LOOK AT OTHER SYSTEMS

Dawes suggests four guiding principles for the use of sources: (1) look at, and follow, home authorities first; (2) if these are insufficient or lacking, look at other Channel Islands authorities; (3) if these are insufficient or lacking, look at “the non-Channel Island system of law most closely connected with the matter at issue”; and (4) “consider legal solutions to legal problems adopted by any other jurisdiction.”<sup>137</sup> This is a common-sense hierarchy, so it is unsurprising that it echoes a similar plan

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<sup>130</sup> On the nature of precedent in Scotland and South Africa, see, for example: (Scotland) *SME* vol 22, 247 *et seq*; (South Africa) Zimmermann & Visser *Southern* 15. On Jersey, see: ch 1 nn19 – 21.

<sup>131</sup> Quebec is a partial exception as most commentary is in French. On these points generally: Gretton & Reid “Thoughts” 286, 299, para 35.

<sup>132</sup> JLC R10, 4; Hanson “Language”; Trotter; Hanson “Postscript”; Falle “Pen”; Royal Court Rules 2004, r20/9. At the 2001 census, around 21% of Jersey residents spoke French or Jersey French either as a first or a second language. The figure drops significantly when considering only those with French or Jersey French as a first language: 0.5%. The results of the 2011 census are not yet available. Also: Kelleher, ch 5.

<sup>133</sup> 1992 JLR 6, 30 – 31, per Le Quesne, JA. Comment: Southwell “Citation”; Dawes “Citation” 73 – 75.

<sup>134</sup> See also: Nicolle *Origin* 75 – 77.

<sup>135</sup> Although for Scots criminal law, at least, the point is dubious.

<sup>136</sup> Nicolle *Origin* 75, 16.5.6: “Where there is no true link between the law of Jersey and the law of a foreign jurisdiction, the courts will be unlikely at the present day to seek guidance from the law of that jurisdiction.” See also, for example, the use of foreign law by the Privy Council in: *Spread Trustee Company Limited v Hutcheson* [2011] UKPC 13 (Guernsey appeal).

<sup>137</sup> Dawes “Citation” 73 – 75, para 10. Compare: *Official Solicitor v Clore* (1983) JJ 43, 50 – 51, per Crill, Deputy Bailiff.

set out by Routier, some 250 years earlier, for the interpretation of customary law,<sup>138</sup> and is consistent with the approach of the Court of Appeal in *Haas v Duquemin*,<sup>139</sup> a case on property law. Following this pattern, the order for property law is: (1) Jersey; (2) Guernsey; (3) France and the mixed jurisdictions; and (4) anywhere else. While the fourth stage could be reached in a comparative academic study of Jersey law, it is unlikely that it will be necessary to go to that level in the ordinary course of legal practice.

According to Southwell, “citation of cases from other jurisdictions [...] must be to the point, and informed by a sufficient understanding of the jurisdiction in question.”<sup>140</sup> But if “a sufficient understanding” means undertaking study in a system,<sup>141</sup> that would lead to potentially absurd results, with one set of advocates being qualified to cite only Jersey law and English law – having qualified in both jurisdictions – and the other only able to cite Jersey law and Scots law, for the same reason. Lord Hodge – who served as a Court of Appeal judge – has suggested all that is needed is “access to the leading textbooks on the property law of analogous jurisdictions”.<sup>142</sup> This is a sensible approach, which takes account of the concerns expressed over increased burden of research on practitioners and consequent increased costs.<sup>143</sup>

The “when” and “how” of looking at other systems have another aspect. From a scholarly perspective, an account of the law must aim to be systematic, lest the reader be “lost in a totally indigestible mass of casuistry”.<sup>144</sup> The mass of casuistry (quite a small mass in Jersey’s case) is like scattered bones, which give little sense of the overall shape of the organism. Therefore, for the academic writer, the stage of considering foreign law is reached almost immediately. This is a second, most useful, employment for foreign law. Following the identification of broadly similar systems,

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<sup>138</sup> Routier, 3 – 9. Nicolle *Origin* 32 – 35.

<sup>139</sup> 2002 JLR 27. Also: P Hodge “The Value of the Civilian Strand” in *Bailhache 800 Years* 42 – 43, 48.

<sup>140</sup> R Southwell “The Sources of Jersey Law” in *Bailhache 800 Years* 31.

<sup>141</sup> Southwell “Citation” 68 – 69, para 10.

<sup>142</sup> P Hodge “The Value of the Civilian Strand” in *Bailhache 800 Years* 49.

<sup>143</sup> Southwell “Citation” 67 – 68, para 8.

<sup>144</sup> Zimmermann *Obligations* 24.

such systems can be plundered for their structure, even where individual rules may differ.<sup>145</sup> The chapter of this thesis on real rights is an example of the use of foreign law to establish the structure of the law. When individual rules and statements are set against the backdrop of the civilian structure, it is seen that Jersey law fits readily into that structure.

With a view of the whole, dealing with new cases becomes a much easier task, as does assessing the law for suitability to its modern purpose<sup>146</sup> (avoiding taking “a medieval solution as if it were the last word in legal thought”).<sup>147</sup> Foreign law presents the principal options for development.

## K. CONCLUSION

Legislation, cases, juristic writing, and customary law provide the foundation for an account of property law. However, if looked at alone, the account is incomplete, in terms of individual rules, and particularly in terms of overarching structure. Therefore, the approach taken in this thesis is to use foreign law to assist in elucidating Jersey law. Sometimes, foreign law may be used to provide possible solutions where none exist.<sup>148</sup> However, even indigenous material is illuminated when set against the backdrop of the European civilian legal tradition.<sup>149</sup>

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<sup>145</sup> As they often do. P Hodge “The Value of the Civilian Strand” in Bailhache *800 Years* 42 – 43. Compare: *Vaudin v Hamon* [1974] AC 569, 582, per Lord Wilberforce (Guernsey appeal). Also: Southwell “Citation”; Dawes “Code” 281, para 68.

<sup>146</sup> Hanson “Jersey”.

<sup>147</sup> Dawes “Citation” 73 – 75, para 10. See similar comment: *In re Barker* 1985 – 86 JLR 186, 195, per Hoffmann, JA.

<sup>148</sup> For example: ch2 I(1), I(5), K; ch3 B; ch5 B; ch6 A(2)(a); ch7 H(2), K; ch8 F, I, J, K, L.

<sup>149</sup> For example: chs 2, 3, 5, 6, 7, 8, 9.

## **CHAPTER 2 – FEUDAL LAND TENURE**

- A. INTRODUCTION
- B. FEUDAL LAND TENURE
- C. DECLINE OF FEUDALISM
- D. REFORMS IN JERSEY
- E. MODERN LAW

### **A. INTRODUCTION**

What is feudal land tenure and what exactly of it remains in Jersey?<sup>1</sup> These questions are considered as a precursor to examining the transfer of immovable property *inter vivos*. The aim is to ascertain the content of the “ownership” of those holding feudal land: what is held and what transferred? The account of feudal law which follows is intended only to sketch the background to the current Jersey law. Consequently, it is brief.

In his *Medieval Land Tenures in Jersey*, de Gruchy describes the medieval method of transfer as a “non-feudal act”,<sup>2</sup> apparently because transactions took place without the necessary involvement of a feudal overlord (or *seigneur*).<sup>3</sup> If true, “non-feudal” must also describe modern land transactions.<sup>4</sup> Crucially, however, even if the mechanism is not feudal, the content of what is transferred still may be.

### **B. FEUDAL LAND TENURE**

Meaningful generalisations about feudalism and feudal land tenure are difficult or impossible to make, for both span many centuries and have been subject to

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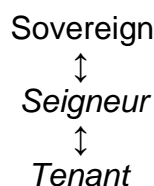
<sup>1</sup> See generally, for example: Tabuteau; Le Patourel, 26, 74 – 88; Ganshof; Lemasurier, 52 – 53, 115, 127 – 144, 307 – 315; Mautalent-Reboul, 443 – 463; Lesaffer, 150 – 155, 199 – 200, 227 – 232; chs 28 – 32, 44 GC (for example); Terrien, 5.2 *et seq*; arts 99 – 212 RC (and Poingdestre’s *Remarques*); Poingdestre *Lois* 308 – 309; *Code Le Geyt* 3.2 – 3.3; Le Gros, (for example) 135 – 144, 209 – 217, 385 – 391, 507. Of related interest: Falle & Kelleher; Dorey “Rights”. Also (Guernsey): Le Marchant, vol 1, book 5; Carey, 103; Jeremie; Dawes *Laws* 619 – 621.

<sup>2</sup> De Gruchy, 158, 131.

<sup>3</sup> Illustrated by: de Gruchy, 147, 151. On *seigneurs*, see: ch 2 B.

<sup>4</sup> See: ch 5.

continuing change.<sup>5</sup> However, the essence of feudalism could be described as a society structured entirely around rights and obligations intrinsically connected with the land. At the head of the system was the sovereign, of whom everyone held land, directly or indirectly, in exchange for services, analogous to a long lease.<sup>6</sup> The parcels of land were “fiefs”.<sup>7</sup> The *tenant*<sup>8</sup> of the sovereign could give rights to another over the land (or part of it) in exchange for services (“subinfeudation”).<sup>9</sup> “Feudal land tenure” describes the different types of relationship wherein possession of land is exchanged for particular obligations. The practice of subinfeudation meant that “chains” were built up, theoretically with no limit of length, although there is a limit beyond which lengthening is impractical, and in Jersey “chains” appear to involve no more than three persons,<sup>10</sup> as in the diagram below:



The person at the bottom of the feudal chain is the only person with the right actually to possess the land. A *tenant* (or vassal)<sup>11</sup> is someone who holds land of another in feudal tenure.<sup>12</sup> The sovereign is the ultimate superior,<sup>13</sup> and so *tenant* to no-one. The *seigneur* in the diagram above is *tenant* to the sovereign. A *seigneur* is a feudal

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<sup>5</sup> For example, the power of the sovereign or princes was not static: Le Quesne, 79. Types of tenure, their content, and their volume of use also varied from place to place and from time to time. For this reason, reference to non-Jersey works – such as Terrien, 5.2 *et seq* – must be made with caution.

<sup>6</sup> Of which there were approximately 33 in 1861: 1861 Report, viii.

<sup>7</sup> A fief is a piece of land held in feudal tenure, which piece has been granted – at least nominally – in the context of a reciprocal relationship between grantor and grantee. See: Pothier *Traité des Fiefs* paras 1, 2; (on the origin of fiefs and the word “fief”) de Ferriere *Fiefs* 6, 8. Mollet “Contrats” 195: “In the 11th century the land in Jersey was divided up into about 110 fiefs, each held by a Seigneur who had a manor and a feudal court. The land was then sub-let to tenants”. Kelleher, 16, and 17: “Between the twelfth and twentieth centuries 245 fiefs are said to have existed in Jersey, though not all simultaneously.”

<sup>8</sup> “Tenant” is the usual word in Jersey, where “vassal” is little-used: Le Quesne, 92 (but see: ch 2 n11). A *tenant* of the sovereign is called a *tenant in capite*: Le Quesne, 474. Also: Aubin, 260.

<sup>9</sup> On whether a vassal could subinfeudate without the consent of the *seigneur* in Normandy: Terrien, 172. Also: de Ferriere *Fiefs* 61.

<sup>10</sup> Not explicitly stated, but implied from: Le Quesne, 2; de Gruchy, generally, and 39; Aubin; Kelleher, for example. Compare: (Guernsey) Ogier *Reformation* 17 – 18. The power of the sovereign or princes was not always pre-eminent (for example: Le Quesne, 79).

<sup>11</sup> Poingdestre uses both terms: *Lois* 61.

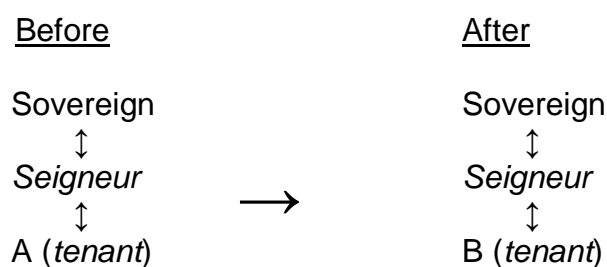
<sup>12</sup> On this relationship: Basnage *Oeuvres* vol 1, 291.

<sup>13</sup> See: 1861 Report, viii. Also: 1861 Report Evidence, 311, question 6963 *et seq*.

superior: someone of whom land is held. Thus, in the diagram, the sovereign is *seigneur* to “*Seigneur*”, who, in turn, is *seigneur* to “*Tenant*” at the bottom of the feudal chain.

Subinfeudation, although never prohibited by legislation, as it was in England, ceased to be practised in Jersey from about the seventeenth century.<sup>14</sup> Even before that time, subinfeudation must have been uncommon, given that all land today is either held directly of the Crown or of a *seigneur* who holds directly of the Crown.<sup>15</sup> In theory, it seems that subinfeudation is still possible, but the abolition of most feudal rights<sup>16</sup> has stripped it of any value. Contracts for the alienation of land in Jersey are substitutions, not subinfeudations.<sup>17</sup>

As well as subinfeudation, one *tenant* could be wholly substituted by another, hitherto unfeudated, party (a substitution): one steps out and another steps in.<sup>18</sup> The effect of this is to remove the original *tenant* completely from the feudal chain. In the diagram below, A makes a grant in favour of B, who now has the right to possess the land (as he is at the bottom of the chain) but also takes on A’s obligations to *Seigneur*. A is thus completely removed from the feudal chain.



The nature of the rights and obligations varied with geographical location and over time. Comparison between Normandy, Jersey, and Guernsey demonstrates this,<sup>19</sup> as does comparison with other areas to which feudalism spread, such as England,

<sup>14</sup> 1861 Report, viii; 1861 Report Evidence, 310, para 6952 *et seq.* Also: de Gruchy, 37.

<sup>15</sup> See: ch 2 n10.

<sup>16</sup> See: ch 2 D.

<sup>17</sup> 1861 Report, viii. Also: Falle, 160, para 10.

<sup>18</sup> The consent of the sovereign is required for transfer of the fiefs Haubert (see: ch 2 n21), but not of a *seigneur*: de Gruchy, 131. On whether a vassal could subinfeudate without the consent of the superior: de Ferriere *Fiefs* 42; Poingdestre *Lois* 181 – 183.

<sup>19</sup> De Gruchy, particularly 141. Also: Le Quesne, 51.

Scotland, and Quebec.<sup>20</sup> In Jersey, there appear to be a small number of different types of tenure, including homage and knight's service (the *fiefs de Haubert*),<sup>21</sup> *grand serjeanty* or *service de chevalrie* (a lesser form of knight's service),<sup>22</sup> *bordage* or *sergenté* (a peasant tenure),<sup>23</sup> and *aumône* (church tenure, where the giver of the land does not retain anything except "the lordship of patronage").<sup>24</sup> There have been suggestions that there might be pockets of allodial land – land not held in feudal tenure – but it may simply be that the "evidence of tenure has been lost".<sup>25</sup>

Even within a particular type of tenure, rights and obligations varied,<sup>26</sup> but some examples can be given. The *année de succession* was a right<sup>27</sup> of the *seigneur* to possess land for one year upon the death of the *tenant* without lineal heirs.<sup>28</sup> *Tenant's* obligations also included: payment in eggs, birds, and the like;<sup>29</sup> carting wine, hay, and wood;<sup>30</sup> money payments;<sup>31</sup> making an *aveu*, or record, of all the land held on the *seigneur's* fief and all *rentes* due on it (or face a penalty);<sup>32</sup> and the more colourful "annual dinner to the king at Michelmas" (taken by Bailiff, Viscount, and King's Clerk in the King's absence).<sup>33</sup> There is some evidence of a long-standing

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<sup>20</sup> (England) Pollock & Maitland *History* vol 1, 89 *et seq.*, for example; (Scotland) GL Gretton "The Feudal System" in Reid *Property*, KGC Reid "Property Law: Sources and Doctrine" in Reid & Zimmermann, vol 1, 186; (Quebec) Gall, 266 *et seq.* Feudal law was not adopted in Louisiana or South Africa.

<sup>21</sup> Le Quesne, 91; 1861 Report, viii – ix; de Gruchy, 114 – 115. On the privileges connected with this tenure (*droit de colombier, droit de Moulin*): Le Quesne, 92 – 93; de Gruchy, 86 – 87, 128 – 129). The *fiefs de Haubert* are St Ouen, Rozel, Trinity, and Samarès (Le Quesne, 93).

<sup>22</sup> Le Quesne, 93.

<sup>23</sup> See the various views of: Havet, 100 – 106; de Gruchy, ch2; Aubin.

<sup>24</sup> De Gruchy, 92.

<sup>25</sup> 1861 Report, viii; *ibid* 145 – 146.

<sup>26</sup> De Gruchy, 85.

<sup>27</sup> This is always characterised as a right, rather than an obligation, perhaps because it is passive on the part of the obliged.

<sup>28</sup> Le Quesne, 88 – 89; 1861 Report, x, xi; Le Gros, 135 – 144; de Gruchy, 124 – 126. De Gruchy, 125: "But the actual taking over of the tenement is now, and has long been, very rare, the practice being for the heir to settle for a lump sum in cash down, usually the gross rental value less 25%." It has now been abolished: ch 2 D.

<sup>29</sup> Le Quesne, 83, 263.

<sup>30</sup> *Ibid* 93; 1861 Report, ix; de Gruchy, 47, 138.

<sup>31</sup> Le Quesne, 83; 1861 Report, ix; de Gruchy, 48, 52.

<sup>32</sup> Le Quesne, 91 – 92; 1861 Report, x; de Gruchy, 50, 134. Also: Le Geyt *Manuscripts* vol 2, 132 – 133.

<sup>33</sup> Le Quesne, 83.

tendency towards commutation of feudal obligations for money.<sup>34</sup> All of these feudal rights and obligations have been abolished.<sup>35</sup>

Certain tenants (known as “franc tenants”)<sup>36</sup> holding of the Crown owe suit of court on the first day of term of the *Héritage* Court.<sup>37</sup> This obligation is still in existence, although it may be doubted whether three consecutive defaults would result today in escheat, as it once did.<sup>38</sup> Other obligations which do not appear to have been abolished pertain to the *fiefs de Haubert*. The *seigneurs* of Rozel, Fief des Augrès, and Samarès must ride on horseback into the sea up to the girth belt to meet the visiting sovereign, and the *seigneurs* of both Rozel and Fief des Augrès must act as the sovereign’s butler during the visit.<sup>39</sup> The *seigneur* of Trinity must present two mallards to the visiting monarch.<sup>40</sup>

### C. DECLINE OF FEUDALISM

Over time, feudal law became a decreasingly accurate reflection of society. With the French Revolution came its abolition in France.<sup>41</sup> Thereafter, Quebec followed suit.<sup>42</sup> In England, although subinfeudation was prohibited in 1290,<sup>43</sup> the coffin continues to elude the final nail. In Scotland, feudal law was finally abolished comparatively recently, in 2004,<sup>44</sup> by which point it had diminished to being nothing more than an outmoded and largely irrelevant aspect of the law relating to immovable property.

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<sup>34</sup> *Ibid* 83, 86, 263; 1861 Report, ix; de Gruchy, 125.

<sup>35</sup> See: ch 2 D.

<sup>36</sup> For a list: Le Quesne, 31.

<sup>37</sup> *Ibid* 31, 33; 1861 Report, ix; Havet, 68 – 74; Mollet “Assise”. De Gruchy records an amusing error made in the 19<sup>th</sup> century when homage was confused with suit of court (88).

<sup>38</sup> Le Quesne, 31.

<sup>39</sup> Perhaps on a rota? Le Quesne, 82, 83; de Gruchy, 68.

<sup>40</sup> De Gruchy, 75; Dalido, 333.

<sup>41</sup> By *arrêté* of 11 August 1789.

<sup>42</sup> Abolition of Feudal Rights and Duties in Lower Canada Act 1854.

<sup>43</sup> *Quia Emptores*.

<sup>44</sup> By the Abolition of Feudal Tenure etc (Scotland) Act 2000. “Real burdens” were preserved: Title Conditions (Scotland) Act 2003. Reasons for the endurance of the feudal system until that point are given in Reid *Abolition*, para 1.6. An instructive account of the Scottish feudal system in the 1990s is GL Gretton “The Feudal System” in Reid *Property*. A significant part of this account is of general application. Also, for comparison: Farran *Principles*.



From the nineteenth century onwards, legislative reforms have stripped away feudal law in Jersey, but – in spite of attempts to do so – feudalism has never been fully abolished. What now remains? Some significant statutory reforms are considered.

#### D. REFORMS IN JERSEY

In 1861, the view of the Royal Commissioners was that the “basis of the Law of Real Property in Jersey is the general Feudal Law, as qualified by local circumstances, but much less altered by legislation than in England.”<sup>45</sup> While the first part of this statement is still true, the second is no longer so.<sup>46</sup> As noted by the Commissioners, at the time that the 1861 report was written, the States had passed a *projet de loi* for the commutation of seignorial rights, which was awaiting Royal sanction, presumably the *Loi (1860) sur la Commutation des Droits Seigneuriaux*.<sup>47</sup>

The preamble to the 1860 law records that the States wished to encourage “autant que possible l’abolition des Droits Seigneuriaux”. These words paint a picture of a legislature desirous to dismantle entirely the remnants of feudalism in Jersey. The 1860 law provided a mechanism for discharge of feudal obligations by agreement between *seigneur* and *tenant*, in exchange for compensation.<sup>48</sup> Further legislation on the commutation of seignorial rights appeared in 1923 and in 1953. The *Loi (1923) sur la commutation des Droits Seigneuriaux* provided that all feudal obligations could be commuted by the payment of a certain percentage of the capital value of the land to the *seigneur*,<sup>49</sup> distinguishing between open land (4%) and land which had been built upon (3%).<sup>50</sup> The preamble to the 1923 Law expresses a sentiment similar to that in the 1860 Law, albeit in attenuated form, invoking the idea that the *tenant*’s ability to free himself of seignorial rights is in the public interest.<sup>51</sup> Under this law, the consent of the *seigneur* to the redemption was no longer required: the *tenant*

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<sup>45</sup> 1861 Report, viii.

<sup>46</sup> For example: Le Gros, *Préface*, IV; Dalido, 336 *et seq.*

<sup>47</sup> This *loi* was sanctioned, in accordance with the commissioners’ recommendation: 1861 report, 83.

<sup>48</sup> Art 1. Various feudal rights are described in 1861 Report, xi.

<sup>49</sup> Compare the fate of the French seigneurs: Maine *Early* 323 – 324.

<sup>50</sup> Art 1.

<sup>51</sup> “Considérant qu’il est d’intérêt public de donner aux propriétaires d’héritages en cette Ile la faculté de tenir leurs propriétés franches de tous droits, redevances et services Seigneuriaux”.

could initiate the process unilaterally.<sup>52</sup> Article 8 extends the application of the Law to tenants holding of the sovereign, but only in respect of the right of *année de succession*.<sup>53</sup> The Seigniorial Rights (Commutation) (Amendment) (Jersey) Law 1953 changed the percentages of land value given by the 1923 Law to 1½% and 1%, respectively.<sup>54</sup>

A further incursion on *seigneur*'s rights followed the introduction of the *Loi (1862) sur les teneures en fidéicommis et l'incorporation d'associations*.<sup>55</sup> The Law provided that juristic persons could own immovable property.<sup>56</sup> When this happens, the immovables are permanently purged of all seigniorial rights and obligations, excepting *rentes*, but the *seigneur* of the fief on which the land is situated is compensated.<sup>57</sup>

The States attempted to abolish feudal rights and obligations fully in 1886. In that year, a *projet de loi*<sup>58</sup> sought “completely [to] abolish feudal rights”,<sup>59</sup> with compensation to be paid to the *seigneurs*.<sup>60</sup> The lengthy preamble denounces the feudal system as, among other things, “contrary to any idea of natural equity and condemned by public opinion and by reason”.<sup>61</sup> The *projet* failed to receive Royal sanction following the filing of a petition against it by a number of *seigneurs*.<sup>62</sup>

The most recent law to impact on the feudal system is the Seigniorial Rights (Abolition) (Jersey) Law 1966. It abolished the remaining rights generative of significant revenue for the *seigneur*: the *année de succession*<sup>63</sup> and “the right to the

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<sup>52</sup> Art 1.

<sup>53</sup> See: ch 2 n28. This right has since been abolished entirely: ch 2 D.

<sup>54</sup> Art 2.

<sup>55</sup> The same year as the first full-scale UK Companies Act: Companies Act 1862.

<sup>56</sup> Art 1.

<sup>57</sup> Art 13.

<sup>58</sup> *Projet de Loi abolissant les Droits et Services Féodaux ou Seigneuriaux*.

<sup>59</sup> Preamble.

<sup>60</sup> Art 2. This course of action was suggested by Mr Gibaut in his evidence to the commissioners: 1861 Report Evidence, question 7082.

<sup>61</sup> Preamble to the 1885 *projet de loi*.

<sup>62</sup> See: Le Gros, 139, 140, 141, 370.

<sup>63</sup> Art 1, para 1(a).

possession of property during a ‘d<sup>é</sup>cret’ [a type of insolvency proceeding]”.<sup>64</sup> Tavernage dues were also abolished,<sup>65</sup> along with any restriction on the division or alienation of land that was consequential on a seignorial right.<sup>66</sup> The rights to property by escheat and rights to *choses gaives*,<sup>67</sup> and *varech*<sup>68</sup> now vest in the Crown.<sup>69</sup> Article 4 provides that “[i]n all contracts of alienation or division of land, the vingtaine [subdivision] of the parish,<sup>70</sup> instead of the fief, where the land is situated shall be stated.” The precise boundaries of the fiefs are, in many cases, already uncertain,<sup>71</sup> and the consequence of article 4 will be increasing uncertainty. In contrast to the earlier Laws, abolition of feudal rights and obligations under the 1966 Law required no action from either party, and no compensation was paid.

Why does feudalism remain in Jersey? Kelleher observes strong anti-seignorial feeling among the populace in 19<sup>th</sup> century Jersey.<sup>72</sup> This led to reform of the feudal laws of succession, and progressive abolition of *seigneurs*’ rights, but fell short of dismantlement of the entire structure. Kelleher notes the *seigneurs*’ desire to retain their (valuable) rights, and also that “legislative attempts at abolition were undermined by a fear that this would have a profound effect on property prices and the land laws.”<sup>73</sup> This explains why complete abolition was not achieved before 1966, but not why the 1966 Law, although abolishing the remaining seignorial rights of significant pecuniary value, did not eradicate the feudal edifice completely. Interestingly, the *projet de loi* was much broader in its scope. Article 1 called for the

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<sup>64</sup> *Ibid* para 1(b). See also: *Loi (1904) (amendement no. 2) sur la propri<sup>é</sup>t<sup>é</sup> fonci<sup>è</sup>re* art 7, which placed a time limit of a fortnight within which the *seigneur* had to enforce the right if he intended to exercise it. On *d<sup>é</sup>cret*: Matthews & Nicolle, 69 – 72, paras 7.1 – 7.19.

<sup>65</sup> Art 5. On tavernage, see also: *R<sup>è</sup>glement (1873) sur les Taverniers*; Licensing (Jersey) Law 1950; de Gruchy, 135 – 136.

<sup>66</sup> Art 3.

<sup>67</sup> Abandoned things of which the owner is unknown: Le Gros, 474.

<sup>68</sup> Wrecks of the sea: flotsam, jetsam and lagan.

<sup>69</sup> Art 2.

<sup>70</sup> Jersey is divided into twelve parishes. They are: St Ouen, St Peter, St Brelade, St Mary, St Lawrence, St John, Trinity, St Helier, St Saviour, St Clement, St Martin, and Grouville. See further: Le Patourel, 99 – 101; Lemasurier, 53, 144 – 161, 315 – 321; Kelleher, 20 – 26.

<sup>71</sup> 1861 Report, viii.

<sup>72</sup> 18, 150. Also: Aubin *Digest* “Feudal tenures.– Feudal exactions prevail to a more extensive and humiliating degree at present in Jersey than even they did centuries ago. The Royal Court lends itself to the influence of the feudal Lords, and in every instance sanctions their exactions. The enumeration of these feudal exactions would cause Englishmen and our neighbours from ‘la belle France’ to blush for our sake.”

<sup>73</sup> 209 (also: 211 – 212).

abolition of “[a]ll seignorial rights, dues and services [...] with the exception of rentes.” The 1966 Law as enacted provided for the abolition of specific, named rights only. The reason for this change appears to be that some of the *francs tenants* wished to retain the obligation of *suit* of court, and the legislature saw no evil in this. However, the final wording of the 1966 Law means that the feudal edifice is still in place, and that some obligations, in addition to suit of court, remain.<sup>74</sup>

## E. MODERN LAW

Although the rights of *seigneurs* are greatly reduced, they still have a right *in* the land, and ownership of land remains feudal. What does this mean in practice? The nature of the rights of *seigneur* and tenant has been the subject of debate among *ius commune* writers.<sup>75</sup> The growing influence of Roman law brought with it a desire to rationalise feudal “ownership” in the Roman form.<sup>76</sup> Thus, it was argued that the *tenant*’s right was a burden<sup>77</sup> on the *seigneur*’s ownership,<sup>78</sup> and even the converse: that it was the *seigneur*’s right which burdens the *tenant*’s ownership.<sup>79</sup> Another view was that ownership is divided between the *tenant*, the *seigneur(s)*, and the ultimate *seigneur*: the sovereign.<sup>80</sup>

This European debate does not appear to be recited in the Jersey sources. Two comments by Poingdestre could suggest that he saw the right of the tenant (he employs the civilian terminology: *dominium utile*)<sup>81</sup> as a burden on the *seigneur*’s ownership (*dominium directum*),<sup>82</sup> but the use of *dominium* in both cases suggests

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<sup>74</sup> See: ch 2 B, final para.

<sup>75</sup> Summarised by GL Gretton: “The Feudal System” in Reid *Property* para 50.

<sup>76</sup> Schrage, 42.

<sup>77</sup> Just as a servitude, usufruct or hypothec is a burden on ownership (see: ch 3 K).

<sup>78</sup> By Cujas. For example: JW Cairns “Craig, Cujas, and the Definition of a Feudum: Is a Feu a Usufruct?” in Birks *Perspectives*.

<sup>79</sup> This appears to be the view of Pothier: *Traité du droit de domaine de propriété* para 3. Also, for example: (Scotland) *Heritors of Strathblane v Corporation of Glasgow* (1899) 1 F 523, 531, per Lord President Robertson.

<sup>80</sup> For example: J Domat *Les Loix civiles dans leur ordre naturel* (1689) 1.4.10.6.

<sup>81</sup> *Remarques* art 508. Or *domaine utile*. Le Gros also uses this terminology: 135, 137. Also: Poingdestre *Lois* 76; Basnage *Oeuvres* vol 1, 291, where “le domaine direct” is described as “un droit incorporel”.

<sup>82</sup> Poingdestre *Lois* 304. Or *domaine direct*: the right of a mid-*seigneur*. The Crown has *dominium eminentis* or *domaine eminent*. See: ch 2 n79 (Pothier). See generally: Houard *Dictionnaire* vol 1, 549;

that both have ownership, and thus that feudal land in Jersey is land in which there is more than one right of ownership. Whatever the position, Le Gros, although occasionally employing the civilian (feudal) terminology of “dominium” and “domaine directe”,<sup>83</sup> uses “propriété” in a way which implies the modern civilian conception of (unitary) ownership.<sup>84</sup> Matthews and Nicolle do not refer to feudal tenure, but to “ownership of land” which “may be enjoyed by a single person as sole owner, or by two or more persons as co-owners.”<sup>85</sup> Arguably, this use of “propriété” or “ownership” is simply a convenient way of referring to the *dominium utile* of land, but it seems that a conceptual shift from *dominium utile* towards unitary ownership, although not complete, has accompanied the decline in significance of *seigneur*’s rights.

A legislative desire to abolish the feudal system is shown in the defeated *projet* of 1886 and in the *projet* relating to the 1966 Law, not to mention the less ambitious legislation that received Royal sanction. As *seigneurs*’ rights subside, the anomalousness of continuing to hold land in feudal tenure grows. What is the purpose of a right – the *seigneur*’s *dominium directum* – with no content? This criticism stands whether *dominium directum* is considered to be some form of ownership, or a burden upon ownership.

It may be that suit of court at the *Assize d’Héritage* and the services due to the visiting sovereign are considered to have value because they are the continuance of long-standing practice and tradition. Le Quesne saw “no advantage in abolishing old customs merely because they are old and of no great practical value, if they connect the present with the past, and produce no practical evil or impediment.”<sup>86</sup> There is, however, no reason why these traditions could not be maintained on a voluntary footing, and the feudal abolition programme completed.

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Feenstra *Fata* “Les origines du dominium utile chez les Glossateurs (avec un appendice concernant l’opinion des Ultramontani)”; R Feenstra “*Dominium* and *ius in re aliena*: The Origins of a Civil Law Distinction” in Birks *Perspectives*; Akkermans, 61 – 64.

<sup>83</sup> 135, 137.

<sup>84</sup> For example: 18, 173, 230.

<sup>85</sup> Matthews & Nicolle, 3 – 4, para 1.15, and ch 1 (generally); Nicolle *Immovable Property* 117.

<sup>86</sup> 33.

## CHAPTER 3 – REAL RIGHTS

- A. INTRODUCTION
- B. WHAT IS A REAL RIGHT?
- C. BRIEF HISTORY OF REAL RIGHTS
- D. RIGHTS *IN REM* AND RIGHTS *IN PERSONAM*, AND “REAL” AND “PERSONAL” IN ENGLISH LAW
- E. REAL RIGHTS IN JERSEY LAW: INTRODUCTION
- F. REAL RIGHTS IN JERSEY LAW: WRITERS
  - (1) Terrien (1574)
  - (2) Poingdestre (late 1600s)
  - (3) Le Geyt (late 1600s – early 1700s)
  - (4) Basnage (1709)
  - (5) Pothier (works produced between 1740 and 1772)
  - (6) Papon & Durell, Hemery & Dumaresq (1789)
  - (7) Le Gros (1943)
  - (8) Other Materials
- G. REAL RIGHTS IN JERSEY LAW: LAWS
- H. REAL RIGHTS IN JERSEY LAW: CASES
- I. REAL RIGHTS IN JERSEY LAW LISTED
  - (1) Ownership
  - (2) Servitude: General
    - (a) Real servitude
    - (b) Personal servitude: usufruct
  - (3) Right in security
  - (4) Lease
  - (5) Real Obligation?
  - (6) Rights of the Beneficiary and Trustee of a Trust?
  - (7) Possession?
- J. *NUMERUS CLAUSUS*
- K. SUBDIVISION OF THE CLASS OF REAL RIGHTS
- L. CONCLUSION

### **A. INTRODUCTION**

Property rights form a class distinct from rights arising in the law of obligations.<sup>1</sup> The former are known as “real rights” (*droits réels*), the latter as “personal rights” (*droits personnels*). This distinction is fundamental to private law in civil law systems, and to a lesser extent in common law systems (although the civilian

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<sup>1</sup> Both are patrimonial rights (see, for example: Yiannopoulos *Property* para 201). On the concept of patrimony see, for example: Pallot; (France) Malaurie & Aynès, 7 *et seq*, Patault, 101, para 85; (Louisiana) Yiannopoulos *Property* para 196; (Quebec) Lamontagne *Biens* 121 *et seq*, arts 2, 3 CC.

terminology is little used).<sup>2</sup> Property law is that part of the law concerned with real rights. Given this, one would expect the distinction between real rights and personal rights to be patent in the Jersey sources. In fact, it is not. On closer examination, however, the twin concepts of real right and personal right infuse much of the private law of Jersey.

What are the characteristics of a real right? How do real rights differ from the English law terminology of realty, real property, and rights *in rem*? What are the real rights in Jersey law? Is the list fixed (*numerus clausus*) or is it open, giving parties freedom to devise real rights of their own (*numerus apertus*)? In what ways can the class be subdivided?

## B. WHAT IS A REAL RIGHT?

A real<sup>3</sup> right is a right directly in a thing (an item with pecuniary value); a personal right is a right against a person or a fixed class of persons.<sup>4</sup> Classification of rights as either real or personal helps to explain their nature and content. However, a precise definition of a real right is difficult because there is more than one type of real right. (This is equally true of personal rights, which may arise in contract, tort, or unjust(ified) enrichment.)<sup>5</sup> Nonetheless, there are shared characteristics within the class of real rights.<sup>6</sup>

As already stated, a real right is a right mediated through a thing: it is a right directly in a thing. Of course, real rights are, like any other rights, ultimately enforced against

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<sup>2</sup> See, for example: (France) Larroumet, 11, para 11; (England) Stein *Dispute* 157, *Hill v Tupper* (1863) 2 H&C 121, 159 ER 51, discussion by Swadling (221 *et seq*); (Louisiana) Yiannopoulos *Property* 384; (Quebec) Lamontagne *Biens* 57 – 58; (Scotland) Reid *Property* 8 – 9, para 3; (South Africa) van der Merwe *Things* 35, para 42.

<sup>3</sup> “Real” is from Latin (“res”, meaning “thing”): *New SOED* vol 2, 2493.

<sup>4</sup> Le Geyt *Manuscripts* vol 1, 280. Basnage *Oeuvres* vol 1, 249, on art 171. Gretton & Reid “Thoughts” 289 – 290, para 9. See also, for example: (France) Larroumet, 18 – 19; (Louisiana) Yiannopoulos *Property* 384; (Quebec) arts 904, 911 CC; (Scotland) Reid *Property* 8, para 3; (South Africa) van der Merwe *Things* 37, para 44. “Thing” includes incorporeals (see: ch 4 B). See also: Basnage *Oeuvres* vol 2, 58, on art 378; (Scotland) MacCormick *Institutions* 139.

<sup>5</sup> On quasi-contract, see: ch 9 D(2).

<sup>6</sup> See, for example: van der Merwe *Things* 37 – 38, para 44.

persons, but they are primarily a relationship between person and thing.<sup>7</sup> With a real right, a person has a particular kind of control over a piece of property, from which a number of consequences flow. If another person's actions or omissions infringe that control, the real right can be enforced against that person, regardless of identity. In other words, real rights are in some sense good against "the world".<sup>8</sup> So, if the property is taken away from the owner unlawfully (such as by theft), the owner has a *droit de suite*.<sup>9</sup>

It is possible, and common, for there to be more than one real right in the same thing. All real rights other than ownership will be, of necessity, at least the second right in a thing, for they are rights in the thing of another (*jura in re aliena*) and if the thing is "of another" there must already be a right of ownership in it. Real rights other than ownership are often known as "limited" (*droits réels limités*), or "subordinate", real rights.<sup>10</sup> For example, a servitude gives a person who is not the owner of the servient tenement<sup>11</sup> a real right in that property. There are, therefore, two real rights in the servient tenement: ownership and the servitude. Similarly, immovable property burdened by a hypothec is the object of two real rights: ownership and hypothec. (In principle, there is no limit on the number of real rights that can exist in one thing. In practice, there are limits. For example, the offer to grant a tenth hypothec is unlikely to be accepted.) As real rights are enforceable against the world, if the owner of land subject to a servitude or hypothec transfers ownership of that land, the servitude or hypothec can be enforced against the new owner (the *droit de suite*). Real rights (other than ownership) are unaffected by a change in owner.<sup>12</sup>

Another consequence of real rights being enforceable against the world is that a creditor with a real right has a preference in insolvency. Thus a creditor who has a

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<sup>7</sup> Consider: Yiannopoulos *Property* 390, para 204. M Planiol's and S Ginossar's critiques of the traditional distinction between personal rights and real rights are summarised in Larroumet, 12 – 18. Of related interest: Hohfeld "Fundamental". See also: ch 3 D.

<sup>8</sup> See, for example: (France) M Laurier & Aynès, 97 – 98, para 368; (Louisiana) Yiannopoulos *Property* 387; (Quebec) Lamontagne *Biens* 61, para 103; (South Africa) van der Merwe *Things* 37 – 38, para 44; (Scotland) Reid *Property* 8 – 9, para 3; (England) Swadling, 220 – 221.

<sup>9</sup> JLC CP8, 16, 6.1(b). See also: art 2, al 3, 1880 Law; Le Gros, 323; Le Couteur 28. Additionally: van Vliet *Transfer* 29 – 30; Larroumet, 24, para 33; M Laurier & Aynès, 94, para 363.

<sup>10</sup> See: ch 3 K.

<sup>11</sup> See: ch 6.

<sup>12</sup> See, for example: art 442 RC; Poingdestre *Remarques* on art 442; Le Gros, 461.



(real) right in security (such as hypothec) in respect of money owed to him or her is in a much stronger position than a creditor of an unsecured debt. The creditor has a right to payment (personal right) in both cases, but when the debt is unsecured the creditor can only enforce that right against the debtor. If the debtor is insolvent, the creditor often gets little, or nothing. If the creditor has a real right in security of the debt, the insolvent debtor will still be unable to pay, but the creditor's real right of security gives a preference because it is a property right in the creditor's thing. A power of sale (where the proceeds will be used to satisfy the debt) is often associated with the right in security.<sup>13</sup> The different treatment of unsecured creditors and creditors with a real right demonstrates clearly the importance and utility of making a distinction between real rights and personal rights. Of course, a creditor with a real right is not totally secure. If the thing over which the security is held is destroyed, the security is destroyed also. (This is true of all real rights: destruction of the thing entails destruction of the right.)<sup>14</sup>

Additionally, real rights in security are affected by ante-dated real rights in security in the same thing. For example, if two hypothecs have been constituted over the same piece of land at two consecutive sittings of the Contract Court,<sup>15</sup> the hypothecs rank in order of creation: the first in time is strongest in right (*prior tempore potior jure est*).<sup>16</sup> If the hypothecs are enforced, the basic position is that the debt secured by the first-granted hypothec will be completely satisfied before any of the proceeds of sale are applied to the debt secured by the second-granted hypothec.<sup>17</sup>

### **C. BRIEF HISTORY OF REAL RIGHTS**

The twin concepts of real right and personal right developed from classical Roman law but are not found there (although the division between real and personal actions,

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<sup>13</sup> See: ch 3 I(3).

<sup>14</sup> Basnage *Oeuvres* vol 2, 58 on art 378 (destruction of a thing over which there is a usufruct means destruction of the usufruct).

<sup>15</sup> See: ch 5 A(2).

<sup>16</sup> Le Geyt *Manuscripts* vol 1, 282.

<sup>17</sup> In principle, this can be modified by contractual arrangement between the debtor and his two creditors: a ranking agreement.

or actions “*in rem*” and “*in personam*”, is).<sup>18</sup> Rather, they were formed, much later, by the commentators, based on the division between *actiones in rem* and *actiones in personam*.<sup>19</sup> The terms “real right” and “personal right” are derived from the less commonly used terms “*ius reale*” and “*ius personale*”. Robert Feenstra considers that the “first list of *iura realia* is probably to be found in Baldus” in the fourteenth century.<sup>20</sup> By this time, Norman law was both well-developed and well-entrenched in Jersey.<sup>21</sup> Like other systems of law, however, it was not immune to influence from Roman law, and the subsequent development of that law which began in the late eleventh century, following the rediscovery of the full text of Justinian’s *Digest*.<sup>22</sup>

Broadly speaking, this later development of Roman law (together with the simultaneous, and reciprocal, development of Canon law)<sup>23</sup> is known as the *ius commune*, and it lasted until the eighteenth century. The Roman law of this period was a “learned, professorial law”,<sup>24</sup> taught in universities across Latin Europe, and it was in that sense a “common law” (*ius commune*). Ultimately, it was highly influential upon the laws as applied in practice in Latin Europe, and beyond.<sup>25</sup> Norman customary law’s adoption of the classification of incorporeals as either moveable or immoveable (attributed by Le Geyt to Bartolus),<sup>26</sup> and the inclusion of a chapter on (real) servitudes in the Reformed Custom of Normandy, are two obvious examples of *ius commune* influence on Norman law.

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<sup>18</sup> G.4.2, G.4.3, G.4.5; Justinian *Institutes* 4.6.1; Schrage, 41; Akkermans, 23, 64 – 65.

<sup>19</sup> For a summary account: Yiannopoulos *Property* 385 – 386, para 202; Zimmermann *Obligations* 6 – 7. Also Nicholas *Roman* 99 – 105.

<sup>20</sup> R Feenstra “Dominium and *ius in re aliena*” in Birks *Perspectives* 112. He also provides another instance of the use of *iura realia*, and one of *ius reale*. Baldus de Ubaldis: 1327 – 1400. Generally: Schrage, 40.

<sup>21</sup> Nicolle *Origin* sections 3 – 11.

<sup>22</sup> See, for example: Lesaffer, 252 *et seq.*

<sup>23</sup> On which: Hibbs “Canon”.

<sup>24</sup> Lesaffer, 260.

<sup>25</sup> See, for example: Bellomo *Past* chs 3, 5, 7; Lesaffer, 235 – 288; Robinson & Fergus *European Legal History* ch 7; Stein *Roman* ch 3; Gretton & Reid “Thoughts” 286 – 287, paras 2 – 3. Also of interest is Vinogradoff *Roman* 32 *et seq.*

<sup>26</sup> Le Geyt *Manuscripts* vol 1, 68. See: ch 4 H.

#### D. RIGHTS *IN REM* AND RIGHTS *IN PERSONAM*, AND “REAL” AND “PERSONAL” IN ENGLISH LAW

English law uses the terms “realty” and “real property”, which are synonymous, and “personalty” and “personal property”, also synonymous.<sup>27</sup> In this context, “real” and “personal” broadly correspond to the civilian “immoveable”<sup>28</sup> and “moveable”.<sup>29</sup>

Excluded from this synonymity are rights *in rem* and rights *in personam*. A right *in personam* is “a right exigible against certain or determinate persons.”<sup>30</sup> Consequently, “rights *in personam*” is a synonym of “personal rights” in the civilian sense. Rights *in rem* can be defined either by stating that they are enforceable against the world, or as rights in things,<sup>31</sup> which partially mirrors the civilian equivalent. (Defining a right *in rem* as a right enforceable against the whole world is inclusive of real right in the civilian sense, but encompasses other rights also, such as the right to one’s reputation.)<sup>32</sup>

These two conceptions of rights *in rem* in English law are paralleled by two theories of the distinction between real rights and personal rights in civilian writing. The “personalist” theory, like the first (broad) definition of rights *in rem*, defines real rights by their exigibility against the world, and personal rights by their exigibility against a person or fixed class of persons. But according to the “classical” theory the defining feature of a real right is that it is a legal relationship between a person and a thing, not between persons (a personal right).<sup>33</sup> The classical theory is the orthodoxy in civilian systems.

Even if English rights *in rem* are defined as rights in things, their scope is broader than civilian real rights because equitable rights are also included. For each common

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<sup>27</sup> See, for example: Lawson & Rudden, 13; Swadling, 226, paras 4.14, 4.15.

<sup>28</sup> Including heirlooms, advowsons, tithes, franchises, and suchlike: Swadling, 226, para 4.15; Gray & Gray, 13, para 1.2.12.

<sup>29</sup> Leases are personal property. See, for example: Swadling, 226, para 4.15; Harpum & Bridge, 7.

<sup>30</sup> Swadling, 227, para 4.17; Pretto.

<sup>31</sup> Swadling *ibid.* See further: Hohfeld “Fundamental”; Pretto. The term “real right” is occasionally used in English law in this way: Lawson & Rudden, 14.

<sup>32</sup> Swadling, 227, para 4.18. Also: Cyprian Williams “Terms” 396; Pretto.

<sup>33</sup> Van der Merwe *Things* 36 – 37, para 43. See also (on Roman law): Cyprian Williams “Terms” 395.

law right *in rem* there is a corresponding right in equity, but the reverse is not true: for example, an option to purchase may be an equitable right *in rem*, but it cannot have that nature as a common law right.<sup>34</sup> Additionally, equitable rights *in rem* are probably not real rights in the civilian sense.<sup>35</sup> All this is apt to confuse. “Right *in rem*” has also been criticised on a linguistic level.<sup>36</sup>

## E. REAL RIGHTS IN JERSEY LAW: INTRODUCTION

To what extent has the concept of real right – in the civilian sense – been received into Jersey law? There is evidence of both “real” and “personal” being used in the civilian sense in Jersey sources and other sources which are relevant to Jersey law. The examination which follows is of legal writing, laws, and cases, in that order. Bearing in mind that exposition of Jersey law has typically not been concerned with meta-analysis,<sup>37</sup> references to “real” and “personal” (in the civilian sense) are relatively plentiful.

Unsurprisingly, “real” and “personal” are also used in a variety of other senses. “Real” is often used, in the English sense, to mean “immoveable” and “personal” to mean “moveable”,<sup>38</sup> a usage which has been criticised.<sup>39</sup> Sometimes the words are given their lay meanings of “actual”, “genuine”, or “not virtual”.<sup>40</sup> In at least one instance, “real” appears to be used in the English and Roman sense of a real remedy: that something will be given back.<sup>41</sup> Yet other uses are unclear.<sup>42</sup>

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<sup>34</sup> See further: Swadling, 229 – 230, para 4.26.

<sup>35</sup> For example: *Webb v Webb* [1991] 1 WLR 1410; Case C-294/92 *Webb v Webb* [1994] ECR I-1717.

<sup>36</sup> MacCormick *Institutions* 136; Markby *Elements* 98 – 99, section 165.

<sup>37</sup> Consider, for example, the works of Poingdestre, Le Geyt, and Le Gros.

<sup>38</sup> Poingdestre *Lois* 63, 237, 327 – 328; Poingdestre *Remarques* 40, on article 145; Le Geyt *Manuscripts* vol 2, 421, 490, and vol 3, 317; Basnage *Oeuvres* vol 1, 445 (on art 275), 196 (on art 142), 249 (on art 171), and vol 2, 185 (on art 417), 235 (on art 433), 257 (art 442), 307 (on art 472), 360 (on art 520) 445 (on art 575) 446 (on art 576) 320 (on art 485) 321 (on art 485), 360; Le Gros, 21, 65 – 66; JLC CP6 in title, introduction at (g) and (h), and under headings A, E, F, H, I, J; JLC CP8, 1, para 2.1. Also: Dawes “Code” 273 – 274, para 42, and 276 – 277, nn 57, 59; Howitt, 172 (n1), 174 (para 6), 175 (n7), 176 – 177 (para 10), 178 (para 16), 181 (para 21), 183 (n38), 184 (para 33 – 35), 189 (para 47), 190 (para 49), 197 (n90); JLC CP8, 1 (para 2.1), 6 (para 3.1), 10 (para 4.2), 11 (paras 4.3 – 4.4), 12 (para 4.5), 23 (para 7.17), 44 (para 13.1), 50 (para 15.1).

<sup>39</sup> Le Couteur, 14, n1.

<sup>40</sup> Poingdestre *Lois* 250, 332; Le Geyt *Manuscripts* vol 3, 22, 264; Basnage *Oeuvres* vol 2, 207 (on art 427), 259 (on art 446), 276 – 277 (on art 452), 301 (on art 467), 353 (on art 513); Le Gros, 197.

<sup>41</sup> Le Geyt *Manuscripts* vol 3, 536.

## F. REAL RIGHTS IN JERSEY LAW: WRITERS

### (1) Terrien (1574)

Terrien refers to *actiones in personam* and *actiones in rem* in the following passage:

“Ce texte comprend la division sommaire des actions mobiles: c’est à sçavoir que les vnes procedent de dette, c’est à dire, de toute obligation causee par contrat: *quæ sunt actiones in personam*, selon droict, les autres de choses adirees, c’est à dire des choses dont on auoit perdu la possession, & qu’on veut vendiquer, comme à soy appartenans: *quæ sunt actiones in rem*. Les autres de nantissement de choses qu’on poursuit comme obligees à sa dette, ou qu’on a pour gage & assurance de sa dette, *quæ sunt pignoratitiæ actiones*. Les autres procederoyent *ex delicto vel quasi delicto*, c’est à sçavoir *de damno dato, de vi bonorum raptorum, & de furto*. De toutes lesquelles actions, & obligations est particulièrement parlé aux Institutions de Iustinian.”<sup>43</sup>

Which is commentary on part of his chapter on “possessory complaints”<sup>44</sup> relating to moveables:

“De ces querelles de meuble les unes sont de dette, les autres des choses adirees, les autres de dommage fait, les autres de choses tollues, les autres de larcin, les autres de nantissement.”<sup>45</sup>

In the first passage, *actiones in personam* and *actiones in rem* clearly anticipate the modern civilian division between personal rights and real rights. The terms are employed to subdivide the category of moveable actions, demonstrating that “moveable” and “personal” cannot be used as synonyms in this context. The further explanation given in the passage confirms this: moveable actions can be divided into those arising from debt or contractual obligation (which are personal actions) and those which concern things lost, that is, things of which a person has lost possession and wishes to vindicate as belonging to him or her (which are real actions).

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<sup>42</sup> Poingdestre *Lois* 56, 59, 64; Poingdestre *Commentaires* 7; Le Geyt *Manuscrits* vol 1, 281, vol 2, 417 (also: Houard *Dictionnaire* vol 2, 596 – 597); Basnage *Oeuvres* vol 1, 249 (on art 171), 290 (on art 203), 291 (on art 204), and vol 2, 13 (on art 368), 115 (on art 399), 360 (on art 521), 367 (on art 521); Basnage *Hypoteques* 85 (for a definition of “discussion”: Houard *Dictionnaire* vol 1, 494); Le Gros, 232 (quoting Basnage).

<sup>43</sup> Terrien, 8.1, 258.

<sup>44</sup> Everard’s translation: 354.

<sup>45</sup> Terrien, 8.1, 257.

The reader is expressly referred to Justinian's *Institutes*, wherein the division between *actiones in personam* and *actiones in rem* is described as the primary division of actions.<sup>46</sup> *Actiones pignoratitiae* are *actiones in personam*,<sup>47</sup> as are actions proceeding *ex delicto vel quasi delicto*, which are the province of the law of obligations.<sup>48</sup> The content of the second passage indicates why these terms are mentioned, and also shows that Terrien's principal concern was not to set out the fundamental difference between *actiones in personam* and *actiones in rem*: essentially he provides a Roman-law gloss on the passage on which he is commenting.

In this part of his commentary, Terrien does not explore the personal rights and real rights correlative to *actiones in personam* and *actiones in rem*. (That would have been outside the scope of a Roman-law gloss.) Here and elsewhere,<sup>49</sup> however, Terrien's references to the Roman law *actiones* and to Justinian's *Institutes* demonstrate familiarity with and reliance on Roman law, and provide an expression in sources authoritative in Jersey of a division which underpins civilian private law.

In light of the above, it is of interest that, in an earlier passage of Terrien's commentary,<sup>50</sup> reference is made to "Droits reels" in the printed marginal notes (the authorship of which is unclear).<sup>51</sup> The part of his commentary to which this note relates appears to be:

"C'est à sçavoir, que si elles [actions] competent<sup>52</sup> & appartiennent pour chose mobil, elles sont tenues & reputees pour meuble: si pour chose immobil, elles sont mises au conte des biens immeubles: comme aussi sont tous droicts dependans de fons, comme usufruit d'heritage, rentes foncieres, & servitudes reelles."<sup>53</sup>

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<sup>46</sup> Justinian *Institutes* 4.6.1.

<sup>47</sup> See, for example: Zimmermann *Obligations* 221, *et seq.*

<sup>48</sup> See, for example: Justinian *Institutes* 4.1, 4.6.1.

<sup>49</sup> Other references to Roman law are frequent, for example: Terrien, 12, 16, 19, 25, 34, 48, [...] 702, 712, 713.

<sup>50</sup> Terrien, 5.1, 169. And see also Terrien, 7.12.

<sup>51</sup> Related to this, see: Dawes *Terrien* 21 – 23.

<sup>52</sup> 3<sup>rd</sup> person plural of "competer". *Le Dictionnaire de l'Academie Françoise* (1694) vol 1, 221: "COMPETER.v.n. Appartenir. Terme de Pratique, qui n'est en usage qu'en cette phrase. *Ce qui luy peut competere & appartenir en la succession de son pere.*"

<sup>53</sup> Terrien, 5.1, 169.

It seems likely that the “Droits reels” of the marginal note is a reference to the “droits dependans de fons” and the “[servitudes] reelles” in the passage above. “Real” in this context is a reference to the praedial or land-related nature of the rights listed, and so not to real rights in the civilian sense. The term is particularly attached to “servitude” in order to distinguish between servitudes which are real in this sense (such as a right of access) and servitudes which are personal (such as usufruct). In spite of the appellation “personal servitude”, usufruct is, in common with a real servitude, a real right. The difference between real servitudes and personal servitudes is discussed below.<sup>54</sup>

## **(2) Poingdestre (late 1600s)**

Unsurprisingly, given the nature and length of the work, the greatest number of references to “real” and “personal” in Poingdestre’s legal writing are found in his *Lois et Coutumes*. Poingdestre expressly sets out his own – unusual – definitions (although there is also evidence of other meaning being attributed to those words). He states that there are some rights which are not capable of cession (or transfer) “par ce que (comme les Jurisconsultes parlent) elles sont attachées a la personne qui cede le droit, & a ses os”.<sup>55</sup> He continues that there are two types of right pertaining to persons: personal and real. Personal rights are those which attach to that particular person only; real rights are those which can be held by anyone.<sup>56</sup> This is an unexceptional use of “personal”, but to use “real” in opposition to it in this context is unusual. (A better way of making this distinction is to call these rights called “personal” in this instance “non-patrimonial rights”, and real rights “patrimonial rights”). Poingdestre appears to attribute these meanings to “real” and “personal” in several other parts of his commentary also,<sup>57</sup> particularly in relation to tithing.<sup>58</sup>

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<sup>54</sup> See: ch 3 I(2).

<sup>55</sup> Poingdestre *Lois* 112.

<sup>56</sup> *Ibid* 112: “Distinguons donc, & disons que les Droits appartenants a une personne sont ou Personels ou Reels; J’entends par droict personels ceux qui appartiennent a quelquun par raison de sa personne seulement; et par les Reels ceux qui peuuent competer a tout autre, aussy bien qu’a luy; & qui ne luy competent qu’a cause de la chose”. On “competer”: ch 3 n52.

<sup>57</sup> *Ibid* 71, 113, 114, 318.

<sup>58</sup> *Ibid* 37, 276 – 277.

Poingdestre does use the civilian concepts of real rights and personal rights, but tends to do so in Latin, often referring to writers of the *ius commune* development of Roman law:

“[...] Jus in re (selon la distinction des Docteurs) un Droict en la chose; & ainsy il suyt inseparablement la chose chargée de la rente, & son possesseur, quel qu’il soit.”<sup>59</sup>

Which is contrasted with:

“ius ad rem, ung Droict a la chose, mais il suit proprement la personne obligée, & non le fonds sinon apprez discussion, & diligences faites.”<sup>60</sup>

This is the civilian distinction. The *jus in rem* is a right in a thing: a real right; the *jus ad rem* is a right in respect of a thing, enforceable against a person: a personal right. Civilian use of “real” and “personal” is in evidence in a number of other passages also.<sup>61</sup>

### **(3) Le Geyt (late 1600s – early 1700s)**

There are no references to real rights in Le Geyt’s *Code*. “Real” and “personal” are found in his *Manuscripts*, but their use is less frequent than in Poingdestre’s *Lois et Coutumes*. At no time does Le Geyt attempt a definition of “real” or “personal” and, although they are used as terms of art, the meaning attributable to them varies. However, there is some evidence of “real” and “personal” being used in the civilian sense.<sup>62</sup> In common with Poingdestre, there is also evidence of use of “personal” to mean “non-patrimonial”.<sup>63</sup>

### **(4) Basnage (1709)**

In his commentary on article 522 of the Reformed Custom, Basnage provides a short exposition of the division between real and personal actions with reference to

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<sup>59</sup> *Ibid* 85 (also 105, 142).

<sup>60</sup> *Ibid* 86.

<sup>61</sup> *Ibid* 59, 64, 76, 77, 85, 88, 124 (probably), 173, 308.

<sup>62</sup> Le Geyt *Manuscripts* vol 1, 82 (on this topic generally: 1861 Report, xi; Le Gros, 469, 503, 509; Stair, 2.7.15, 4.15; Maine *Early* 297); *Manuscripts* vol 1, 82, 207, 280. See also: Pesnelle, 173, n1.

<sup>63</sup> Le Geyt *Manuscripts* vol 2, 418, and vol 3, 621.



Justinian's *Institutes* (from which the *ius commune* position on real rights and personal rights developed).<sup>64</sup> Article 522 itself is worthy of note, being an instance in which "personnelle" is used in the civilian sense in the text of the Reformed Custom: "Toutes actions personnelles & mobilières sont prescrites par trente ans."<sup>65</sup> "Real" is not consistently used in the civilian sense in the Reformed Custom.<sup>66</sup>

There is evidence of the civilian concepts of real and personal rights in Basnage's work. Perhaps most notably, in his treatise on hypothecs he makes some observations on the nature of a hypothec, from which the following points can be drawn. Having a real right means having a *droit de suite* or the right to follow property no matter into whose hands it falls.<sup>67</sup> This is a consequence of a real right being a right in a thing. A real right only subsists for as long as the object of it exists.<sup>68</sup> A hypothec can only be in a thing which is in commerce (true of all real rights);<sup>69</sup> and a hypothec can only be created in a thing which is owned by the creator (also true of all real rights and more generally stated in the maxim from the *Digest* that no one can give a greater right than he himself has).<sup>70</sup> Elsewhere, Basnage illustrates the difference between a personal right to repayment and a real right,<sup>71</sup> and makes the point that it is possible to have more than one real right in a single thing.<sup>72</sup>

Commenting on the Reformed Custom, Basnage says that a woman's dower<sup>73</sup> is a "droit réel".<sup>74</sup> According to article 378<sup>75</sup> of the Reformed Custom, the heir is only bound to give *douaire* to the extent of the succession, no more. Basnage comments that this means that if the thing over which the usufruct is held perishes, the usufruct

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<sup>64</sup> Basnage *Oeuvres* vol 2, 373. See: ch 3 C.

<sup>65</sup> Basnage *ibid.* See also: Bérault, Godefroy, & d'Aviron *Commentaires* vol 2, 488 (Bérault), 493 (Godefroy).

<sup>66</sup> Compare arts 51, 353, 442 RC.

<sup>67</sup> Basnage *Hypoteques* 16. See also: Basnage *Oeuvres* vol 2, 424 (on art 546), 289 (on art 453), 365 (on art 521). See: ch 3 B.

<sup>68</sup> Basnage *Hypoteques* 16.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.* D.50.17.54: *nemo plus juris ad alium transferre potest quam ipse haberet*. Also: *Mendonca v Le Boutillier* 1997 JLR 142.

<sup>71</sup> Basnage *Hypoteques* 86 – 87.

<sup>72</sup> Basnage *Oeuvres* vol 2, 336 (on art 502).

<sup>73</sup> See now: Wills and Successions (Jersey) Law 1993, art 5(1).

<sup>74</sup> Basnage *Oeuvres* vol 1, 167, and vol 2, 14 (on art 368), 56 (on art 377), 58 (on art 378).

<sup>75</sup> "L'heritier n'est tenu de douier la femme de son prédécesseur, fors de ce qu'il a eu de la succession."

perishes as well.<sup>76</sup> All of this points to use of “droit réel” in the modern civilian sense.<sup>77</sup>

Yet there is much fluidity in the meanings attributed to “personal” and “real” within Basnage’s text. In other places he uses those terms to mean “non-patrimonial” and “patrimonial”<sup>78</sup> (like Poingdestre),<sup>79</sup> uses their lay meanings, uses them in relation to servitudes, and uses them to mean moveable and immoveable.<sup>80</sup>

### **(5) Pothier (works produced between 1740 and 1772)**

Moving to mainstream civilian writing, such as that of Pothier, the distinction between personal rights and real rights is clear:

“Les jurisconsultes définissent ces *obligations* ou *engagements personnels*, un lien de droit, qui nous astreint envers un autre à lui donner quelque chose, ou à faire ou à ne pas faire quelque chose”<sup>81</sup>

“Le *jus in re*, est le droit que nous avons dans une chose, par lequel elle nous appartient, au moins à certains égards.

“Le *jus ad rem*, est le droit que nous avons, non dans la chose, mais seulement par rapport à la chose, contre la personne qui a contracté envers nous l’obligation de donner.

“C’est celui qui naît des obligations, et qui ne consiste que dans l’action personnelle que nous avons contre la personne qui a contracté l’obligation [...]”<sup>82</sup>

“Il y a plusieurs espèces de *jus in re*, qu’on appelle aussi *droits réels*.”<sup>83</sup>

Pothier presents the culmination of the real rights theory before codification in France. The theory of real rights, although present to some degree, was never fully elaborated in Norman law. Poingdestre – and to some extent Le Geyt also – took

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<sup>76</sup> Basnage *Oeuvres* vol 2, 58 (on art 378).

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid* 199 (on art 422) (on the same page, Basnage refers to D.34.3.8.3, but note that both his citation of it and his quotation of it contain errors).

<sup>79</sup> See: ch 3 F(2).

<sup>80</sup> See also, for example: Basnage *Oeuvres* vol 2, 4 (on article 367) 190 (on art 422) 254 (on art 441) 320 (on art 485) 321 (on art 485) 404 (on art 539). Connected to this: Terrien, 5.1, 170; Le Geyt *Manuscrits* vol 4, 220; *Code Le Geyt* 3.7.8; Le Gros, 459. On this subject, also: Matthews “Choice”.

<sup>81</sup> Pothier *Traité des obligations* para 1.

<sup>82</sup> Pothier *Traité du droit de domaine de propriété* para 1.

<sup>83</sup> *Ibid* para 2.

account of *ius commune* developments of Roman law and applied these to their exposition of Jersey law. For Jersey, Pothier is a natural successor to the work of Poingdestre and Le Geyt, at least in as much as his work uses these *ius commune* concepts.

### **(6) Pipon & Durell, Hemery & Dumaresq (1789)**

Writing in the late eighteenth century, Pipon and Durell, and Hemery and Dumaresq, provided accounts of court procedure for the Privy Council.<sup>84</sup> In these, “real” is consistently used to mean “immoveable”,<sup>85</sup> and “personal” to mean “moveable”.<sup>86</sup> Such usage is unsurprising, given that they were writing for an audience with some expertise in English law.

### **(7) Le Gros (1943)**

Throughout Le Gros’s treatise there are references to the work of Terrien, Poingdestre, Le Geyt, Basnage, and Pothier, but mention of real rights and personal rights is absent from his work.<sup>87</sup> This absence is particularly remarkable in some chapters, such as those on servitudes, the customary law usufructs in favour of widow (*douaire*) and widower (*viduité*), and the *Loi (1880) sur la Propriété Foncière*. Basnage is clear that the usufructs are real rights,<sup>88</sup> and the 1880 Law describes hypothec as a “droit réel”.<sup>89</sup> Why are the concepts of real right and personal right not present in Le Gros’s treatise?

A likely explanation stems from the fact that Le Gros does not deal in abstract terms at all – he is a practising lawyer concerned with collating individual rules of customary law and reciting parts of relevant court decisions. He is not seeking to systematise, but to gather. Systematisation involves some degree of abstraction, but without it there is no need to seek overarching concepts and principles. Similarly,

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<sup>84</sup> Both reports were entitled: *A Statement of the mode of proceeding, and of going to trial, in the Royal Court of Jersey in all causes, Criminal, Civil, and Mixed* (1789). See: *Foster v Attorney General* 1992 JLR 6, 15 – 16, per Le Quesne, JA, for “the unusual circumstances in which these [reports] were produced” (quotation from R Southwell, “Sources” 225 – 226).

<sup>85</sup> Pipon & Durell, 28, 34, 35. Hemery & Dumaresq, 5, 6, 7, 16, 26, 27, 30, 32.

<sup>86</sup> Hemery & Dumaresq, 6, 7, 16, 27, 30, 32.

<sup>87</sup> The ambiguous term “charges réelles” is used (21, 45).

<sup>88</sup> See: ch 3 F(4).

<sup>89</sup> Arts 2, 15.

although reference is made to real rights and personal rights by – for example – Poingdestre, Le Geyt, and Basnage, the concepts are not systematically applied (this observation also applies, to a lesser extent, to Pothier). Consequently, their utility would not be obvious from these materials. Thus, Le Gros – not engaged in systematisation – was unlikely to discover this for himself. Further, Le Gros’s lack of reference to real and personal rights suggests that these were not terms in common parlance among the lawyers of his day.

## **(8) Other Materials**

As one might expect, the various uses of “real” and “personal” and references to “in rem” and “in personam” are also seen in modern legal writing. Concerning use of the civilian concepts of real right and personal right, among the more significant are the Jersey Law Review’s reprint of Advocate P Le Couteur’s “Hypothecation and Guarantee: Lecture Given to an Audience of Bankers on the 6<sup>th</sup> December 1955”,<sup>90</sup> and the Jersey Law Commission’s Consultation Paper, *Security on Immoveable Property*.<sup>91</sup>

The earlier of these – Advocate Le Couteur’s lecture – makes the connection between “droit réel”, “jus in re” and “real right”, defining such a right as one which “can be enforced against all the world”, and applying the term unequivocally to Jersey law in the context of a discussion of the real right of hypothec.<sup>92</sup> While the terms “real property” and “personal property” appear many times in the lecture, and “real estate” and “realty” are also used,<sup>93</sup> Advocate Le Couteur made it clear at the time the lecture was published that these were used only because they would be more familiar than the Jersey terms (“*immeubles* and *meubles*”) to the lay audience.<sup>94</sup> This clear and (historically) relatively recent application of civilian “real right” terminology is strongly supportive of the legitimacy of analysing Jersey law in this way.

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<sup>90</sup> (1998) JLR 14.

<sup>91</sup> JLC CP8. See also: (Jersey) *In re Esteem* 2002 JLR 53, 139 – 140, per Birt, DB, on real, personal, and mixed actions; (Guernsey) Howitt, 172 (paras 1, 2, and n3), 173 (para 4), 174 – 175 (n6), 187 (para 40), 191 (n67), 195 (para 61), 198 (para 69), 200 (para 72).

<sup>92</sup> Le Couteur. See: ch 3 I(3).

<sup>93</sup> Le Couteur.

<sup>94</sup> *Ibid* 14, n1.

The Jersey Law Commission Consultation Paper *Security on Immoveable Property*<sup>95</sup> (2006) contains a definition of real rights:

“a hypothec is a *droit réel accessoire*<sup>96</sup> attached to the debt itself. It is a real right (*jus in re*) in that it subsists in the property on which it operates as a charge, but it is merely an ‘accessory’ or supporting right, existing for no other purpose than to effect the charge. These, says Basnage, are the principles to be inferred from the practice of his time with regard to hypothecs:

“Le premier [de ces principes]<sup>97</sup> est que l’hypothèque emporte de soy un droit réel & un droit de suite sur le fond hypothéqué, *jus reali quod fundum sequitur adversus quemcumque possessorum* . . .

“Le second est que l’hypothèque ne peut subsister si la substance de l’obligation principale ne demeure & ne subsiste . . .”<sup>98</sup>

In a footnote to this text, “droit réel” is translated as “real right”.<sup>99</sup> Reference is made to Basnage and to Pothier. The reference to Pothier lays bare the concept’s civilian heritage.

Other writing on Jersey law also uses “real” and “personal” in the civilian sense.<sup>100</sup>

## G. REAL RIGHTS IN JERSEY LAW: LAWS

The *Loi (1880) sur la Propriété Foncière* makes reference to “droit réel” in articles 2 and 15. Article 2 defines hypothec as a real right (*droit réel*), and lists the benefits of hypothec, which include preference in insolvency (subject to ranking with other hypothecs),<sup>101</sup> and the *droit de suivre* the burdened property into the hands of a third party.<sup>102</sup> Both are commonly recognised characteristics of real rights.<sup>103</sup> Article 15 describes a judicial hypothec as a real right. Articles 2 and 15 make clear application

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<sup>95</sup> JLC CP8.

<sup>96</sup> See: ch 3 K.

<sup>97</sup> This insertion appears in the text of the Consultation Paper.

<sup>98</sup> JLC CP8, 9, para 3.6.

<sup>99</sup> In n10.

<sup>100</sup> Pallot, 259 – 260, quoting Nicholas *French* (2<sup>nd</sup> edn) on the definition of a patrimony. Langlois “Hypothecs” 23 and 27, quoting arts 2 and 15 of the 1880 Law. Falle, 162, para 16. Gretton & Reid “Thoughts” 289 – 291, paras 9, 10, 11. See also reference to “rights *in rem*”: Dicker & Ismail “Corporate” 290.

<sup>101</sup> Art 2(1).

<sup>102</sup> Art 2(3). Also called the *droit de suite*.

<sup>103</sup> See: ch 3 B.

of the civilian concept of real right to Jersey law. The *Loi (1991) sur la copropriété des immeubles bâtis* also employs the civilian concept of real right<sup>104</sup> and it appears that the *Trade Marks (Jersey) Law 2000* does so also, albeit that it uses the term “rights in rem”.<sup>105</sup>

Some legislation uses the terms “in rem” and “in personam” in relation to the rules of international private law.<sup>106</sup> In common with the meanings attributed to these terms in English international private law, these terms may not be considered as directly related to “real right” and “personal right”. For instance, the result of article 2(2) of the *Judgments (Reciprocal Enforcement) (Jersey) Law 1960* is that, *inter alia*, matrimonial matters are *in rem*. Such matters concern the status of a person, not a right in a thing. “In rem” and “in personam” in international private law do not correspond to “real right” and “personal right” in private law.

## H. REAL RIGHTS IN JERSEY LAW: CASES

Given that “real” and “personal” are used in the civilian sense (as noted above), it is only to be expected that this usage is also present in case-law. Mostly, this is done by reference to some other source,<sup>107</sup> but independent use of the concepts of “real right” and “personal right” is made by the Court of Appeal in *Haas v Duquemin*.<sup>108</sup>

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<sup>104</sup> Arts 5(6), 12(1).

<sup>105</sup> Schedule (“Provisions of Community Trade Mark Regulation Applied to Jersey”), art 19: “Rights in rem (1) A Community trade mark may, independently of the undertaking, be given as security or be the subject of rights in rem.” For civilian terminology, see also the preamble to the *Judgments (Reciprocal Enforcement) (Jersey) Law 1960*.

<sup>106</sup> *Judgments (Reciprocal Enforcement) (Jersey) Law 1960*, art 6(2)(b). *State Immunity (Jersey) Order 1985*, schedule, *State Immunity Act 1978*, ss10(2)(a), 10(2)(b), 10(3), 10(4)(a), 10(4)(b), 12(7), 13(2)(b). *Merchant Shipping (Oil Pollution) (Jersey) Order 1997*, schedule 3, *Merchant Shipping Act 1995*, s166(2)(b).

<sup>107</sup> *Birbeck v Midland Bank Ltd* 1981 JLR 121, 125, per Hoffmann JA (on art 2 of the 1880 Law. *In re Désastre Intersub* 1985-86 JLR 202, 206 – 207, per Crill, DB (discussion of maritime lien as an action *in rem*, in which specific instance the latter is synonymous with “real right”). *Beghins Shoes Limited and Island Gift Shops Limited v Avancement Limited* 1994 JLR 15, 22, per Le Marquand, Judicial Greffier (quoting Nicholas *French* 1<sup>st</sup> edn). *Ansbacher (Channel Islands) Limited v HSBC Bank PLC* 2007 JLR 593, 596, para 6, per Vos JA (referring to JLC CP8, 9, para 3.6). *Cotillard and others v O’Connor* [2007] JRC005, para 16, per Birt, DB; *La Petite Croatie v Ledo* 2009 JLR 116, 121, para 9, per Clyde-Smith, Commr (both quoting *Haas v Duquemin* 2002 JLR 27, 35, para 20, per Hodge, JA). See also: Case Summaries (2009) JGLR 367, Land Law, Review of *La Petite Croatie*.

<sup>108</sup> 2002 JLR 27, 35, para 20, and 36, para 27, per Hodge JA.

“Real” or “realty” is used in a number of instances to mean “immoveable”, and “personal” to mean “moveable”.<sup>109</sup> “*In rem*” and “*in personam*” are used in a number of cases with an international private law aspect.<sup>110</sup>

## I. REAL RIGHTS IN JERSEY LAW LISTED

All civil law systems recognise the following core real rights: ownership, servitude, usufruct, and some form of right in security.<sup>111</sup> What are the real rights in Jersey law? A brief survey follows.

### (1) Ownership

In all civilian systems, ownership is a real right.<sup>112</sup> It may also be described as the primary real right, for all other real rights are derived from it.<sup>113</sup> Although there is no direct Jersey authority that ownership is a real right, there is authority that other rights are real.<sup>114</sup> Given that ownership is a real right in civilian systems, this is likely to be so in Jersey law also.

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<sup>109</sup> *Jackson v Jackson* (1965) 1 JJ 463, 464, 474, per Le Masurier, Bailiff. *Birbeck v Midland Bank Ltd* 1981 JLR 121, 123, 126, 128, 129, 130, per Hoffmann JA. *Lane v Lane* 1985-86 JLR 48, 53, 62, Crill DB. *In re Harbours and Airport Committee* 1991 JLR 316, 342, per Tomes, DB (referring to *Jackson v Jackson* (1965) 1 JJ 463, 474).

<sup>110</sup> See: ch 3 G, 2<sup>nd</sup> para. *Lane v Lane* 1985-86 JLR 48, 62, 71, per Crill, DB. *Abdel Rahman v Chase Bank* 1990 JLR 59, 70, Tomes, DB. *In re Illinois Dist Ct* 1995 JLR N10b, per Bailhache, DB. *In re Esteem Settlement* 2000 JLR 119, 132, per Birt, DB. *In re Batalla-Esquivel* 2001 JLR 160, 162 – 163, para 4, 164, para 8, 165, para 9, 166, paras 13 and 14, per Bailhache, Bailiff. Case summary of *re Batalla* (2001) JLR 202. *In re Batalla-Esquivel* 2002 JLR 192, 193, para 3, Bailhache, Bailiff. *Sinel Trust v Rothfield Investments* 13 December 2002, unreported, paras 35, 54, 57, 64, per Birt DB. *Re Garden Trust* 2 May 2003, unreported, paras 6, 8, 9, 11, per Hamon, Commissioner. *Baroque Trust Company v Hindelang* 15 April 2004, unreported, para 2, per Birt, DB. *Att Gen v Smith* 2004 JLR 346, 354, para 22, per Birt, DB. *Jaiswal v Jaiswal* 2007 JLR 305, 327, para 67, and 328, para 71, per Beloff JA. *Brunei Inv v Fidelis* 2008 JLR 337, 342 – 343, para 11, 349, para 32, 355, para 48, and 356, para 49, per Clyde-Smith, Commr. On *Brunei Inv v Fidelis* 2008 JLR 337, see also: Birt “Trusts and Divorce” particularly 15, para 30. See also: Case summary of *Brunei Investment Agency v Fidelis* (2009) JGLR 102, 104. *In re Kaplan* 2009 JLR 88, 98, para 18, per Bailhache, Bailiff (commenting on *Batalla-Esquivel*). *AG v Bhojwani* 2010 JLR 128, 148, para 57, per Clyde-Smith, Commr.

<sup>111</sup> See also: (France) Pothier *Traité du Droit de Domaine de Propriété* para 2: ownership, feudal superiority, *rente foncière*, servitudes, usufruct, and hypothec; (France) Larroumet, 25 – 28; (Louisiana) Yiannopoulos *Property* 427 *et seq*; (Quebec) Lamontagne *Biens* 65 – 67; (South Africa) Badenhorst & Pienaar, 48; (Scotland) Reid *Property* 10 – 11, para 5.

<sup>112</sup> (France) art 544 CC; (Scotland) Reid *Property* 10, para 5; van der Merwe *Things* 98, para 104; (Louisiana) art 477 CC; (Quebec) art 911 CC.

<sup>113</sup> (Scotland) Reid *Property* 10, para 5. See: ch 3 K.

<sup>114</sup> See: ch 3 I(2), (3).

The content of ownership is fluid and flexible, depending on the property to which it relates. In particular, there is a significant difference between land and other property, because – at least notionally – land is still held on feudal tenure, meaning that ownership of land is never absolutely in one person.<sup>115</sup> Against this feudal backdrop, and bearing in mind that historically land was the most important kind of property, it is unsurprising that a unitary concept of ownership (that is, ownership that is not divided among several persons: *tenant*, *seigneur*, and crown) is not central to the writing of the authors considered above. The present state of feudalism in Jersey is discussed elsewhere,<sup>116</sup> where it is concluded that feudal land tenure remains, more or less, in name only.<sup>117</sup> In view of this, the concept of ownership of land has really ceased to be one of fragmentation, and so it should be possible to give a single definition of ownership for any type of property. This development having come in relatively recent times, it has not impacted greatly on written accounts of Jersey property law, and it is necessary to look elsewhere for an account of ownership.

Although writing before the abolition of feudal land tenure in France, Pothier gives a definition of ownership which formed the substance of the same in the French Civil Code.<sup>118</sup> This was possible because Pothier thought of *dominium utile* (the right of the vassal) as ownership and *dominium directum* (the right of the superior) as a burden on that ownership.<sup>119</sup> Pothier writes:

“Ce droit de propriété, considéré par rapport à ses effets, doit se définir « le droit de disposer à son gré d’une chose, sans donner néanmoins atteinte au droit d’autrui, ni aux lois: *Jus de re libere disponendi*, ou *Jus utendi et abutendi* » .”<sup>120</sup>

This is a form of the standard civilian analysis of ownership, which stretches back at least as far as Bartolus.<sup>121</sup> From the broad statement of rights to dispose of freely, to

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<sup>115</sup> See: ch 2.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*

<sup>118</sup> Art 544. See also: Dawes “Code”, particularly 272 – 273, paras 39 – 42.

<sup>119</sup> Pothier *Traité du droit de domaine de propriété* para 3.

<sup>120</sup> *Ibid* para 4.

<sup>121</sup> Schrage, 43.



use or to exhaust,<sup>122</sup> Pothier elaborates further. Ownership – where unfettered – gives the right to: have all fruits proceeding from the thing whether they are the result of the owner’s industry or of the industry of another having no right; use the thing for any purpose; change the nature of the thing, even where detrimental to its value; destroy the thing; prevent others from using the thing (except where contrary rights have been granted); and alienate the thing.<sup>123</sup> An owner may be prevented from exercising the full incidents of ownership, either by “quelque imperfection de son droit de propriété”, or by “défaut de sa personne”,<sup>124</sup> such as minority or insanity.<sup>125</sup> Ownership is “imperfect” if it is burdened by another real right<sup>126</sup> and it is from this that Pothier expands on the phrase “sans donner néanmoins atteinte au droit d’autrui”.<sup>127</sup>

This civilian conception of ownership starts with an absolute: an owner has absolute power over the thing.<sup>128</sup> This absolute power is reduced by the rights of others and by laws and regulations. In practice, an owner will never have unfettered power, particularly in the case of land. For this reason, the starting point of the definition may seem artificial. Van der Merwe provides an alternative definition for South African law, based on Roman-Dutch sources:

“Ownership is potentially the most extensive private right which a person can have with regard to a corporeal thing. [...] In principle, ownership entitles the owner to deal with his thing as he pleases within the limits allowed by law.”<sup>129</sup>

In essence, this conveys the same idea as Pothier and article 544 of the French Civil Code, but without an absolute starting point. Schrage argues that, although the wording of Bartolus’s and subsequent early definitions of ownership is in terms of an

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<sup>122</sup> Often given as “use, enjoy, and dispose”, enjoyment including the right to fruits (see for example: (Louisiana) art 477 CC; and, (Quebec) art 947 CC). The DCFR extends this list to include “modify” also: VIII – 1:202.

<sup>123</sup> Pothier *Traité du droit de domaine de propriété* para 5.

<sup>124</sup> *Ibid* para 6.

<sup>125</sup> *Ibid* para 7.

<sup>126</sup> *Ibid* para 8.

<sup>127</sup> *Ibid* para 13. “Droit d’autrui” is stated to include rights in *voisinage* (on which see: ch 9).

<sup>128</sup> Schrage, 43.

<sup>129</sup> Van der Merwe *Things* 98, para 104.

absolute right, it is wrong to take too literal a reading, which view he supports by reference to the wider social context.<sup>130</sup> Nonetheless, the absolutist language persisted up to the French Revolution and from there to the present day.

## **(2) Servitude: General**

Servitudes have been received into modern legal systems from Roman law.<sup>131</sup> Bartolus divided servitudes into three types: real, mixed, and personal.<sup>132</sup> The real servitude linked two pieces of land, one (the servient tenement) subjugated to another (the dominant tenement).<sup>133</sup> The mixed servitude subjugated a piece of land to a person. The three examples of mixed servitudes were usufruct, use, and habitation.<sup>134</sup> Personal servitude subjugated one person to another person. This was slavery.<sup>135</sup> In modern times, only a two-fold distinction is used: real and personal.<sup>136</sup> “Personal servitudes” is the term applied to what were, for Bartolus, “mixed servitudes”.

Both real servitudes and personal servitudes (in the modern sense) are real rights, specifically rights in land.<sup>137</sup> The qualifiers “real” and “personal” describe what is at the other end of the right: for the real servitude it is also land; for the personal servitude it is a person. Of course, land cannot hold rights, only people can, but, concerning a real servitude, the relationship between the owner of the dominant tenement and the owner of the servient tenement is mediated at both ends through a piece of land. With the personal servitude, the relationship is mediated at one end only through land.

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<sup>130</sup> Schrage, 45 – 47.

<sup>131</sup> Justinian *Institutes* 2.3 – 2.5.

<sup>132</sup> Bartolus *Commentaria in Digestum Veteris* 183, 183. For early Jersey usage, see: Poingdestre *Lois* 217, 221; Poingdestre *Rermarkes* 153 (on art 504). See also: Basnage *Oeuvres* vol 2, 485.

<sup>133</sup> Basnage *Oeuvres* vol 2, 485.

<sup>134</sup> Justinian *Institutes* 2.4; Basnage *Oeuvres* vol 2, 485. For modern law, see: (France) art 625 CC *et seq*; (Louisiana) arts 630, 639 CC; (Quebec – “use” only) arts 1119, 1172 – 1176 CC; (South Africa) Badenhorst & Pienaar, 339 *et seq*. See also: ch 3 n142.

<sup>135</sup> Basnage *Oeuvres* vol 2, 485.

<sup>136</sup> Matthews & Nicolle, 10, para 1.38; Nicolle *Immovable Property* 53. Case Summaries (2004) JLRev 273, Land Law, Review of *Russell & Caine v Gillespie & Ford*. Dawes “Code” 273 – 274, para 42. (France) not prominent in the Civil Code, but see, for example: Pothier *Coutume d’Orléans, Introduction au titre des servitudes réelles* para 2; (Louisiana) art 533 CC; (Quebec) Lamontagne *Biens* 210; (South Africa) Badenhorst & Pienaar, 322; (Scotland) Cusine & Paisley, 32 – 33, for a good summary.

<sup>137</sup> Falle, 162, para 16; (France) Pothier *Traité du droit de domaine de propriété* para 2, Malaurie & Aynès, 249, 338; (Louisiana) art 476 CC; (Quebec) art 1119 CC; (South Africa) Badenhorst & Pienaar, 321; (Scotland) Reid *Property* 10, para 5.

“Servitude” unqualified means “real servitude”.<sup>138</sup> The term “personal servitude”, it seems, did not find favour with the drafters of the French Civil Code, who sought to remove terminology redolent of feudalism from the law.<sup>139</sup> Presumably, this contributed to the decline in popularity of the term.

*(a) Real servitude*

As stated above, a real servitude is a real right.<sup>140</sup> Servitudes are considered more fully elsewhere.<sup>141</sup>

*(b) Personal servitude: usufruct*

Of the personal servitudes, only usufruct appears to have been received into Jersey law.<sup>142</sup> Usufruct is a real right.<sup>143</sup> The name is a composition of *usus* (use) and *fructus* (fruits), which describes the content of the right: the usufructuary (or *usufruitier*) is entitled to the use and the fruits of the burdened property.<sup>144</sup> As this makes up most of the content of ownership, what remains is referred to as “bare-ownership” or “nu-propriété”.<sup>145</sup> A usufruct may burden moveable or immoveable property, but usufructs of land are the most common, not least because they can arise in the context of succession.<sup>146</sup> Indeed, *douaire* and *viduité* (usufructs in favour of a widow or widower, respectively, and arising by operation of law) are discussed by

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<sup>138</sup> See, for example: *Colesberg Hotel v Alton Hotel* 2003 JLR 176. The same is true in Scotland: Reid *Property* 354, para 439.

<sup>139</sup> This is why real servitudes are also described as “services fonciers”. See, for example: Jourdain, 190, para 137.

<sup>140</sup> See: ch 3 n137.

<sup>141</sup> See: chs 6, 7, 8.

<sup>142</sup> Habitation is recognised in Guernsey law: Dawes *Laws* 672; 1854 Rapport.

<sup>143</sup> (France) art 578 CC; (Louisiana) arts 535, 550 CC; (Quebec) art 1119 CC; (South Africa) Badenhorst & Pienaar, 339; (Scotland, where it is commonly known as “lifereit”) Reid *Property* 10, para 5.

<sup>144</sup> See, for example: Matthews & Nicolle, 5 – 6, para 1.22; Nicolle *Immovable Property* 117 and 129; (France) art 578 CC; (Quebec) art 1120 CC.

<sup>145</sup> See, for example: *Loi (1919) sur la Location des Biens-Fonds*, art 2; Le Gros, 325; Matthews & Nicolle, 6, paras 1.23 – 1.25; Nicolle *Immovable Property* 117; (France) arts 595, 759, 815-5, 815-18, 819 CC.

<sup>146</sup> Wills and Succession (Jersey) Law 1993, art 5. For an account of the law immediately preceding this enactment, see: Matthews & Nicolle, 102 – 104, paras 8.86 – 8.96. Also: 1861 Report, xv; Nicolle *Immovable Property* 17.

the writers on Norman customary law, where it is clearly stated that these rights are real rights.<sup>147</sup>

In some jurisdictions, (particular) personal servitudes cannot be transferred.<sup>148</sup> Inalienability of personal servitudes can be explained as an instance of *delectus personae*.<sup>149</sup> It is unclear whether usufruct is transferable in Jersey, but most likely it is.<sup>150</sup>

### **(3) Right in Security**

In the legal systems of the western world, rights in security are rights which support the performance of an obligation, such as payment of money. Broadly speaking, once the performance falls due, the creditor has the right to enforce the security. Rights in security increase the likelihood of eventual payment as they are rights parallel to the creditor's personal right to repayment, either against another person (thus a personal right in security, in other words, guarantee),<sup>151</sup> or in a thing (thus a real right in security). A right to sell the burdened thing and recover the debt from the proceeds is commonly associated with a real right in security, and this is the case in Jersey law.<sup>152</sup> A security in Jersey law is accessory to a debt:<sup>153</sup> once the debt is paid off the right in security is extinguished.<sup>154</sup>

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<sup>147</sup> Basnage *Oeuvres* vol 1, 167; Basnage *Oeuvres* vol 2, 56, 58, 336; Pesnelle, 352, n2. Also: Le Gros, 147, 437; (Guernsey) 1854 Rapport; Falle, 162, para 16. Generally: 1861 Report Evidence, 318, questions 7121 – 7129; Le Gros, 40 – 57 (also: Wills and Succession (Jersey) Law 1993, art 6; Bankruptcy (*Désastre*) (Jersey) Law 1990, art 46).

<sup>148</sup> For example: (France) art 595 CC (usufruct is transferable) 631, 634 (use and habitation are non-transferable); (Louisiana) arts 567, 643 (usufruct and “right of use” are transferable) 630 CC (habitation is non-transferable); (Quebec) Lamontagne *Biens* 340 (usufruct is transferable) art 1173 CC (limitations on when use can be transferred); (Scotland) SC Styles “Liferent and Fee” in *SME* vol 13, 673, para 1646, Stair, 2.6.7; (South Africa) Badenhorst & Pienaar, 322, 338 – 339; (Guernsey) 1854 Rapport, art 37 (habitation not transferable without express power to do this in the grant).

<sup>149</sup> “The rule that when personal relations are important, a person cannot be compelled to associate with another person.” Garner *Black's* 459.

<sup>150</sup> Basnage *Oeuvres* vol 2, 336, on art 502: “La vente d'un usufruit est aussi retraiable”.

<sup>151</sup> See Le Gros, 218.

<sup>152</sup> See, for example: Basnage *Hypoteques* 16; JLC CP8, 16. But note the partial exception in art 26 of the 1880 Law (on which see: Le Couteur; JLC CP8, 16, 6.1(b)).

<sup>153</sup> See, for example: Bérault, Godefroy, & d'Aviron *Commentaires* vol 2, 494 (Godefroy); Basnage *Hypoteques* 47 – 48; Le Couteur, 18; JLC CP8, 9, para 3.6 (quoted in *Ansbacher (Channel Islands) Limited v HSBC Bank PLC* 2007 JLR 593, 596, para 6, per Bailhache, Bailiff).

<sup>154</sup> D.46.3.43. Also: Steven, “Accessoriness”; (Quebec) art 2661 CC; (Louisiana) art 3282 CC.

Hypothec is a non-possessory security: the debtor is in possession of the thing.<sup>155</sup> In Jersey, expressly created hypothecs are governed by the *Loi (1880) sur la Propriété Foncière* and the *Loi (1996) sur l'hypothèque des biens-fonds incorporels*, and are real rights.<sup>156</sup> They can be constituted over immovable property only.<sup>157</sup> However, a hypothec over moveable property is possible where the creditor is the debtor's landlord. This security, sometimes known as the "landlord's hypothec", came into customary law from Roman law.<sup>158</sup> The landlord's hypothec is a tacit security, arising by operation of law. It cannot be constituted expressly. It is created in favour of a landlord over the corporeal moveable property of the tenant when that property is brought on to the leased immovable.<sup>159</sup> The landlord's hypothec can extend to the corporeal moveables of a third party.<sup>160</sup> (This was the case in Scotland, but is so no longer, and it has been questioned whether such scope is compatible with Article 1, Protocol 1 of the European Convention on Human Rights.)<sup>161</sup> Presumably, the landlord's hypothec may be prevented from arising by the express agreement of the parties – for the landlord can extinguish it by consenting to removal of moveables

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<sup>155</sup> For example: JLC CP8, 7, 9.

<sup>156</sup> 1880 Law, arts 2 – 29, particularly arts 2, 15; JLC CP8, 9, para 3.6. Of comparative interest is: Hinteregger & Borić *Sicherungsrechte*.

<sup>157</sup> Terrien, 8.1: "Et est entendue que meubles n'a point de suite par hypothèque". 1880 Law, arts 3, 4; *Loi (1996) sur l'hypothèque des biens-fonds incorporels*, art 1(1), definition of "bien-fonds incorporel". Also: Matthews & Nicolle, 61 – 62; Nicolle *Immovable Property* 166. *Radio and Allied Industries v Gordon Bennett Wholesale (Jersey) Ltd* (1959) 252 Ex 43, 46; *Re Désastre G Lawrence Ltd* (1963) 1 JJ 341. But hypothecation of ships is possible: Matthews & Nicolle, 64, para 6.50; Nicolle *Immovable Property* 166; Dessain & Wilkins, 16.

<sup>158</sup> Pothier *Traité du Contrat de Louage* para 228; D.20.2.7.

<sup>159</sup> Terrien, 7.9: "Et sont les biens du conducteur apportez en la maison louee, tacitement obligez au prix du louage, suyant disposition de droict." ("tacite hypothèque" is used later); (Guernsey) *Le Marchant*, vol 1, 274 – 276; *Le Geyt Manuscripts* vol 1, 202 "Tous les meubles des fermiers, aussi bien que des locataires, sont tacitement hypothéquez"; *Le Gros*, 343, 346, and 322 "Tous les biens du locataires et du fermier qui garnissent l'immeuble sont frappes d'une hypothèque tacite au profit du loyer." Matthews & Nicolle (62) call this right the landlord's "droit de gage", after Pothier; Dessain & Wilkins, following the terminology of English law, call it the "Landlord's Right to Distrain" (15). See generally: Matthews & Nicolle, 62 – 64. Cases (for example): *Henry v Falle*, *Le Boutillier intervenante* (1897) 218 Ex 433 (referring to "le gage légale"); *Le Boutillier v Falle* (1897) 218 Ex 434; *Jersey Agencies v Allenby* (unreported, 1999/171) 11 Oct 1999. And: Pothier *Traité du Contrat de Louage* paras 226 – 276. See also: (Scotland) AJM Steven "Rights in Security over Moveables" in Reid & Zimmermann, 348 – 349; Steven "Landlord's" (comparing laws of South Africa, Scotland, Louisiana, Quebec, and England); (Scotland) Skea & Steven "Difficulties"; (France) Pothier *Traité du Contrat de Louage*; (France) art 2332 CC; (Louisiana) Yiannopoulos *Property* 471 – 475, para 234, arts 2707, 2709, 2710 CC.

<sup>160</sup> *Le Gros*, 323. See also: Pothier *Traité du Contrat de Louage* paras 241 – 243. Clearly, confusion prevents a right in security arising in the landlord's own corporeal moveables.

<sup>161</sup> Steven "Goodbye" 178 – 179; Rook *Property* 56 – 58, 184 – 191; Human Rights (Jersey) Law 2000, art 2(1), schedule, art 1, Protocol 1.

from the leased premises –<sup>162</sup> although it cannot be created by agreement. (For example, it cannot be created over moveable property which has never been on the leased property during the term of the lease, because an expressly created hypothec over moveables is impossible.)<sup>163</sup>

If moveables are removed from the leased premises, the landlord must seek their return, or exercise a claim against them within forty days.<sup>164</sup> Generally speaking, however, the hypothec gives a preference over other creditors in respect of a moveable affected by the hypothec<sup>165</sup> and over unsecured creditors in a *désastre*.<sup>166</sup> In view of this, and the description of “hypothec” which is certainly a real right, it seems that the landlord’s hypothec is a real right.

In Jersey, two further rights in security over corporeal moveable property are pledge and lien.<sup>167</sup> Unlike hypothec, both are possessory securities.<sup>168</sup> Pledge<sup>169</sup> is an express security, created when the debtor delivers some moveable to the creditor on the basis that it is in security for the debt.<sup>170</sup> There is little commentary on lien, although it is referred to in recent laws and cases.<sup>171</sup> This suggests a relatively recent reception of the concept, most probably from English law. It appears to arise when the creditor has some moveable property of the debtor’s at the time that a debt is

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<sup>162</sup> Le Gros, 323. Also: Terrien, 7.9.

<sup>163</sup> See: ch 3 n157.

<sup>164</sup> Le Gros, 323, 343; Matthews & Nicolle, 63, para 6.41; Dessain & Wilkins, 15 – 16, para 2.3.2.3, (consider also: “Excluded Assets” 105 – 106, para 5.3.2).

<sup>165</sup> Le Gros, 345; Matthews & Nicolle, 63, para 6.41. But compare: Le Geyt *Manuscrits* vol 1, 203 – 204.

<sup>166</sup> Bankruptcy (*Désastre*) (Jersey) Law 1990, art 32(1)(c)(ii); Le Gros, 343; Matthews & Nicolle, 63, para 6.41; Dessain & Wilkins, 149.

<sup>167</sup> See: Dessain & Wilkins, 15; Matthews & Nicolle, 60 – 61. Also: 1861 Report, lxxviii; *Loi (1884) sur le prêt sur gages* (both concerning the regulation of pawnbrokers). For incorporeal moveables: Security Interest (Jersey) Law 1983.

<sup>168</sup> Matthews & Nicolle, 60, para 6.30 (paraphrasing Pothier). See also: Steven, 102 – 104 (pledge), 186 – 188 (lien).

<sup>169</sup> Note that “pleiges”, “plège”, and similar in the *Grand Coutumier de Normandie*, ch 60, have a different meaning: they refer to a personal right in security (Everard, 252 *et seq*). On this usage, see: Steven, 9, para 2-12.

<sup>170</sup> Dessain & Wilkins, 15. See also: Steven, ch 6, particularly 64, para 6-01.

<sup>171</sup> For example: [legislation] Cheques (Jersey) Law 1957, art 2; Security Interests (Jersey) Law 1983, art 11; Bankruptcy (*Désastre*) (Jersey) Law 1990, art 21; Companies (Jersey) Law 1991, arts 174, 180; Financial Services (Jersey) Law 1998, arts 32 – 34; Foundations (Winding Up) (Jersey) Regulations 2009; [cases] *Bass v Pickersgill & Le Cornu* 2000 JLR N3b; *In re Belgravia* 2010 JLR 247; *Cunningham v Sinels* [2011] JRC015, unreported.

incurred, and on the basis of some pre-existing relationship, such as when the creditor is the debtor's banker or lawyer, or has repaired the moveable.<sup>172</sup>

Are these real rights? In the case of pledge, this seems certain. Pledge is the simplest form of security, and a descendant of the Roman *pignus*,<sup>173</sup> and is everywhere a real right.<sup>174</sup> For lien the position is less clear. In English law, lien is a personal right; in civilian jurisdictions there are examples of lien as a real right.<sup>175</sup> In Jersey, there is statutory provision that a lien over certain documents will not prevail in the debtor's insolvency.<sup>176</sup> It is a stateable construction of these provisions that they are exceptions to the general rule that the holder of a lien is entitled to continue to retain the moveables. If that is so, lien too is a real right. However, no view has emerged in Jersey law on this point.

#### **(4) Lease**

Lease,<sup>177</sup> which applies only to corporeal immoveable property, can be distinguished from hire, which applies to corporeal moveable property. Classification of a lease as either real or personal is difficult because it appears to have features of both. Thus what, if any, protection is afforded to the tenant on transfer of the property by the landlord is a recurring question in European legal science.<sup>178</sup> In many jurisdictions (and also in classical Roman law)<sup>179</sup> leases are merely contracts, meaning that, in principle, the tenant has only a right against the person with whom he or she contracted (the original landlord), not a right in the land itself.<sup>180</sup> However, some protection for the tenant should the landlord transfer the property is common in such

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<sup>172</sup> For example: Cheques (Jersey) Law 1957, art 2 (banker); *Cunningham v Sinels* [2011] JRC015, unreported (lawyer); *Le Sueur v Vincent* (1870) 9 CR 88 (repairer – the word “lien” is not used). Also: Dessain & Wilkins, 15; Steven, chs 9 – 17.

<sup>173</sup> See, for example: Justinian *Institutes* 2.8.1, 3.14.4, 4.1.14, 4.6.7.

<sup>174</sup> The consequence of Justinian *Institutes* 4.1.14. (Louisiana) art 3133 CC, Yiannopoulos *Property* 11; (Quebec) arts 2660, 2665 CC; (South Africa) Badenhorst & Pienaar, 393; (Scotland) Steven, 95.

<sup>175</sup> Steven, ch 14, particularly 200 – 201, paras 14-13 – 14-15.

<sup>176</sup> Bankruptcy (*Désastre*) (Jersey) Law 1990, art 21; Companies (Jersey) Law 1991, arts 174; Dessain & Wilkins, 15.

<sup>177</sup> Generally: Terrien, 7.9; Le Gros, 318 *et seq*; Matthews & Nicolle, 17 – 19, paras 1.68 – 1.78; Nicolle *Immovable Property* 144 *et seq*.

<sup>178</sup> Schrage, 40.

<sup>179</sup> See: G.3.142 – G.3.147; Zimmermann *Obligations* 377 – 379. Also (of later historical interest): Terrien, 244 – 245.

<sup>180</sup> See: Poingdestre *Lois* 110.

jurisdictions.<sup>181</sup> In other jurisdictions, lease is recognised as a real right – or as capable of being made real.<sup>182</sup> For Jersey law, two questions present themselves: does a lease bind a successor to the landlord; and, if so, why? Jersey sources on these questions are few,<sup>183</sup> and detailed consideration is beyond the scope of this thesis. Some preliminary thoughts follow. Contract leases (leases for more than nine years which must be passed before the Contract Court for validity) are considered first.<sup>184</sup>

In *Basden Hotels v Dormy Hotels*,<sup>185</sup> a contract lease contained an option to purchase, which the court held to be binding on a successor to the original landlord. The option was held to be part of the “single agreement”<sup>186</sup> that was the lease, and as the lease was binding, so too was the option.<sup>187</sup> Why did the contract lease bind? The court’s justification was that: “the defendant company purchased it [the property] in full knowledge of the terms of the lease”,<sup>188</sup> which is suggestive that it was notice of the lease which caused the successor to be bound.<sup>189</sup>

In what way is notice given? A typical clause in a hereditary contract for the transfer of land binds the transferee to all obligations and burdens to which the transferor was

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<sup>181</sup> Lease as a personal right: (France) art 1743 CC (and see art 1709), but see Troplong vol 2, 17, and compare the *bail à construction* (loi du 16 décembre 1964), which is a real right (art 3); (France) Pothier (*Traité du contrat de louage* para 1) defines lease as “un *contrat* par lequel l’un des deux contractants s’oblige de faire jouir ou user l’autre d’une chose pendant le temps convenu et moyennant un certain prix que l’autre, de son côté s’oblige de lui payer” [emphasis added]; (Louisiana) Yiannopoulos *Property* 435 – 442, para 226; (Louisiana) art 2711 CC; (Louisiana, see also) Stadnik “Doctrinal” in which 1101 – 1105 are of particular interest for Jersey law re significance of nine-year period for leases (on which see also C Hugo & P Simpson “Lease” in Zimmermann & Visser *Mixed* 303 – 304; Le Gros, 318).

<sup>182</sup> Consider: (Scotland) Leases Act 1449, Land Registration (Scotland) Act 1979, s3(3), Reid *Property* 10, para 5, (but compare: Webster *Tenant and Successor Landlord* 8); (Quebec) arts 1851, 1886; (South Africa) C Hugo & P Simpson, “Lease” in Zimmermann & Visser *Mixed* 302 – 306; (England) Harpum & Bridge, 96, 4–019.

<sup>183</sup> As in Guernsey: Dawes *Laws* 684 (but see Howitt). Other Jersey laws affecting leases are: *Loi (1919) sur la location des biens-fonds* (which regulates, for leases of all durations, notice to quit where nothing has been agreed, and what happens when the lease is of a usufruct and the usufruct comes to an end); *Loi (1996) sur l’Hypothèque des Biens-Fonds Incorporels* (which provides for the hypothecation of immovable (contract) leases).

<sup>184</sup> See: ch 4 H(4); ch 5 A(1), n10.

<sup>185</sup> (1968) 1 JJ 911.

<sup>186</sup> *Ibid* 918, 920, per Bois, Deputy Bailiff. Options to purchase and options to renew, while not to be “part of the relationship of landlord and tenant”, were part of a “single agreement”, thus avoiding the possibility that the option was without *cause* (918).

<sup>187</sup> *Ibid* 919, per Bois, Deputy Bailiff. Also: Matthews & Nicolle, 17 – 18, para 1.70.

<sup>188</sup> (1968) 1 JJ 911, 919, per Bois, Deputy Bailiff.

<sup>189</sup> Compare: Poingdestre *Lois* 110 – 111 (consider also 111 – 112).



subject, in relation to the land. What if this clause were omitted? Would the transferee take free of the lease? The court in *Basden* held that it would not.<sup>190</sup> Registration of the lease provides notice of it<sup>191</sup> – that is, registration means that a successor landlord is deemed to have knowledge of the lease – rather than anything in the hereditary contract conveying the landlord’s ownership. The lease acquired its binding force on successor landlords by virtue of registration.

Is lease a personal right or a real right? If a lease is a real right, it follows that it binds successor landlords for the tenant has a right in the land itself. If a lease is a personal right, following *Basden*, its binding force is provided by notice or knowledge of it (registration). Lease as a personal right may present a problem for the dichotomy between personal right and real right. Normally, mere knowledge of a personal right does not make it binding on third parties: the essence of a personal right is that it is binding on the parties to its constitution only. This is also a difficulty presented by real obligations.<sup>192</sup>

Leases for more than nine years (“contract leases”)<sup>193</sup> are distinguished from leases for nine years and fewer (“paper leases”).<sup>194</sup> Dividing leases by reference to this duration is a practice not limited to Jersey.<sup>195</sup> Leases for terms in excess of nine years have been analysed by Basnage as a form of alienation (and also in French doctrinal writing),<sup>196</sup> which fits with the requirement in Jersey that a contract lease is passed before the court, for this is also required of voluntary conveyances of land *inter*

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<sup>190</sup> (1968) 1 JJ 911, 919, per Bois, Deputy Bailiff: “If the contract of purchase had not bound the defendant company to allow the plaintiff company to occupy the property in accordance with the contract of lease, the lease would nevertheless have held good.”

<sup>191</sup> *Ibid*: “the defendant company purchased it in full knowledge of the terms of the lease; the defendant company cannot claim otherwise for the lease is entered in the Public Registry”.

<sup>192</sup> See: ch 3 I(5).

<sup>193</sup> See: Matthews & Nicolle, 17, para 1.69; Nicolle *Immovable Property* 149. The nine-year division is also present in art 595 FCC.

<sup>194</sup> 1861 Report Evidence, 317, questions 7105, 7106.

<sup>195</sup> For example: (France) art 595 CC; (Louisiana) Stadnik “Doctrinal” 1101 – 1105; (South Africa) C Hugo & P Simpson “Lease” in Zimmermann & Visser *Mixed* 303 – 304. Basnage suggests Canon law as the source of the practice: *Oeuvres* vol 2, 335, on art 502. See also: Troplong, vol 2, 19 – 20, para 478, vol 1, 62, 105 *et seq*.

<sup>196</sup> Basnage *Oeuvres* vol 2, 335, on art 502 (quoted, in part, in Le Gros, 321); Larroumet, 285 – 286, para 439.

*vivos*.<sup>197</sup> This could support the view that a contract lease, once passed and registered, constitutes a real right in favour of the tenant.<sup>198</sup>

What of paper leases? In the evidence to the 1861 Report, it is suggested that a paper lease may bind a successor if that successor has had notice of the lease in his hereditary contract.<sup>199</sup> If this is correct, this particular form of notice can make a paper lease bind a successor. However, notification of a paper lease in a hereditary contract is not the same as the entire lease being available for viewing in the Public Registry. How much of the (unregistered) paper lease would bind the successor? Arguably, the successor, once informed of the lease, is deemed to have knowledge of that whole agreement, because he could have asked to see a copy of it. Thus, a successor bound by a paper lease could also be bound by an option to purchase (or to renew) in it, following the “single agreement” analysis in *Basden*.<sup>200</sup> It appears that it is possible to register a paper lease. Arguably, where this has been done a successor to the landlord would be bound by it.<sup>201</sup>

Alternatively, if a contract lease creates a real right in favour of the lessee, is it possible that registration of a paper lease also creates a real right? In principle, this is possible. However, on one reading, article 50 of the 1880 Law could be construed as against this conclusion. The article concerns the position of a:

“détenteur de bonne foi d’un bien-fonds ou d’une servitude foncière – soit à fin d’héritage, soit pour un terme d’années certain excédant 9 années, ou pour une ou plusieurs vies, ou pour tout autre terme dont la durée est conditionnelle ou éventuelle – en vertu d’un contrat passé devant Justice [...]”

after a *dégrèvement*:<sup>202</sup> such a person can choose whether to give up his or her right in respect of the property. If a person elects to keep the right, he or she must pay off

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<sup>197</sup> See: ch 5.

<sup>198</sup> See also: Falle 162, para 16.

<sup>199</sup> 1861 Report Evidence, 317, questions 7105 – 7111.

<sup>200</sup> (1968) 1 JJ 911, 918, 920, per Bois, Deputy Bailiff.

<sup>201</sup> These conclusions may be derived from: 1861 Report Evidence, 317, questions 7015 – 7113 (particularly 7112).

<sup>202</sup> *Dégrèvement* is the method by which hypothecs are enforced: 1880 Law, art 1. Also mentioned in art 50 are *liquidation* and *décret*. *Liquidation* was abolished by the *Loi (1904) (Amendement No. 2)*

all the charges on the property. This article bears the reading that holders of a hypothec, real servitude, usufruct, and contract lease all have this choice. This is interesting: hypothec, real servitude, and usufruct are all real rights, and contract lease has been assimilated to their number. It seems, however, that paper lessees are excluded. Thus, it could be that contract leases are real rights, but paper leases cannot be, whether registered or not.

Although it is clear that a contract lease will bind third parties, and so afford some protection to the tenant, it is unclear whether a contract lease is a real right. The position in relation to the binding (or otherwise) nature of paper leases is more uncertain: they may be capable of binding third parties, but do not appear to be real rights, even if registered. The position that a paper lease binds a successor if notice of it is given is attractive, because it would mean that the effect of notice is consistent across the whole class of leases.

## (5) Real Obligation?

In addition to lease, other rights do not bear easy classification as either real or personal. Examples in Jersey law include the *rente* (“an annual payment charged on land”)<sup>203</sup> and an obligation – at issue in *Jersey Hotels v Inglebert Properties Ltd*<sup>204</sup> –

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*sur la propriété foncière*, although this reference to it in the 1880 Law has never been removed. *Décrets* are now extremely rare: Matthews & Nicolle, 69, para 7.2, 72, para 7.19; Nicolle *Immovable Property* 164.

<sup>203</sup> Matthews & Nicolle, 2, para 1.6. On *rente* generally, see: Terrien 7.12 and 7.13; Poingdestre *Lois* 75 – 87; Le Geyt *Manuscrits* vol 1, 171, 192, 314, and vol 2, 60, 74, 484; Pothier *Traité du Contrat de Constitution de Rente, Traité du Contrat de Bail à Rente*; de Gruchy, 36; 1861 Report, xvi – xviii, xxi – xxiv; Planiol, *Treatise* vol 1, part 2, 768 – 772; Le Gros, 201 – 208, 452 – 453; Matthews & Nicolle, 2 – 3, para 1.6 – 1.14, 55 – 56, paras 6.4 – 6.7; Nicolle *Immovable Property* 185 *et seq*; ch 4 H(3). See also the similar rights alluded to by van der Merwe, 38, para 45; Swadling, 256, para 4.97. *Rentes* are no longer commercially significant and the Jersey Law Commission has proposed their abolition (JLC CP6, H). The right to payment is secured by a hypothec (1861 Report, xxii; 1880 Law, art 2, art 19; Matthews & Nicolle, 55, para 6.4. On this analysis, see: Basnage, *Oeuvres*, vol 1, 111), which is a real right (see: ch 3 I(3)).

<sup>204</sup> (1980) JJ 23. Jersey Hotels sold a field to Mr HG Evans, under the condition that he was to pay 6% of the value of any house built upon that field to Jersey Hotels. Mr Evans sold the field to Inglebert Properties who wished to sell it to the States. The condition was repeated in the conveyance from Mr Evans to Inglebert Properties, but the latter had deliberately omitted it from the draft contract of sale to the States. Jersey Hotels sought reinstatement of the condition and “to prevent any sale which does not do this” ((1980) JJ 23, 25, per Whitworth, JA ). Oddly, given this demand, it was admitted by Jersey Hotel’s advocate that a burden which ran with the land did not need to be recited in every hereditary contract of transfer in order to preserve the burden ((1980) JJ 23, 26, per Whitworth, JA). The Court of Appeal held that Jersey Hotels had failed to establish a right to insist on full recital of the condition.

to pay a sum on the occurrence of a particular event, which ran with the land.<sup>205</sup> Both are affirmative obligations to perform, which obligations are enforceable against a single debtor. The corresponding rights cannot be real rights because the obligation correlative to a real right is passive, not affirmative.<sup>206</sup> *Rente* and the obligation in *Jersey Hotels* must thus be personal rights.<sup>207</sup> However, it is by virtue of ownership of a particular piece of land that one becomes debtor. Therefore, the examples possess a “real” aspect (essential connection to property), but are not “real” in the conventional sense.<sup>208</sup> This “real” aspect means that these obligations stand apart from other personal rights.

Reflecting this characteristic, such obligations are sometimes classified as “real obligations”, “obligations réelles”, or obligations “propter rem”,<sup>209</sup> which class is recognised in civilian scholarship as lying between real rights and personal rights. The label signals a change in perspective from right (personal or real) to obligation. The right correlative to a real obligation is a personal right:<sup>210</sup> the “real” aspect relates only to the obligation. For present purposes, the principal point is that the “right” end of a real obligation is not a real right.

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<sup>205</sup> Other examples are feudal rights such as to suit of court, and of the visiting sovereign to two mallards although it is perhaps unlikely that these will be enforced in the future. See, for example: KGC Reid “Real Rights and Real Obligations” in Bartels & Milo *Contents* 32; ch 2.

<sup>206</sup> Consider the nature of ownership (ch 3 I(1)) servitudes (ch 3 I(2)) and rights in security (ch 3 I(3)). See also: Poingdestre *Lois* 76.

<sup>207</sup> *Rente* is secured by a hypothec. A hypothec is a real right (ch 3 I(3)) but this does not determine the nature of the *rente* itself, which is the underlying right to payment.

<sup>208</sup> See also: Planiol *Treatise* vol 1, part 2, 769 – 770.

<sup>209</sup> “Real obligation” is used by the court in *Jersey Hotels v Inglebert Properties* (1980) JJ 23, 26, per Whitworth, JA. See: (France) Aberkane *Essai*, J Hansenne “De l’obligation réelle accessoire à l’obligation réelle principale” in *Etudes dédiées à Alex Weill* (1983) 325, Scapel *Notion*, Malaurie & Aynès, 103, para 379; (Louisiana) Yiannopoulos *Property* 388; (Quebec) Lamontagne *Biens* 68. See also: (Scotland) Reid “Real Burden” (compare *rente* with the type 2 real burden), particularly 10 (using the term “perpetually personal”); (Scotland, with comparative references) KGC Reid “Real Rights and Real Obligations” in Bartels & Milo *Contents*; (Louisiana) Lovett “Creating”, J Lovett “Title Conditions in Restraint of Trade” in Palmer & Reid *Mixed*; (Quebec) Lamontagne *Biens* 68; (South Africa) van der Merwe “Numerus” (using the term “onera realia”); van Erp & Akkermans *Towards*. Contrast the usage of “real obligation” in art 1763 LaCC.

<sup>210</sup> KGC Reid “Real Rights and Real Obligations” in Bartels & Milo *Contents* 45.

## (6) Rights of the Beneficiary and Trustee of a Trust?

The number of civil law jurisdictions which recognise some form of trust has increased greatly in the last 150 years.<sup>211</sup> As part of this general movement, any doubt over the existence of trusts in Jersey law<sup>212</sup> was removed by the *Trusts (Jersey) Law 1984* (“TJL”).<sup>213</sup> Unlike in England, there is no separate equitable jurisdiction in Jersey: equity – as “fairness” – infuses the law as a whole.<sup>214</sup>

In fact, many legal systems which have the trust have a civilian property law (either because they are fully civilian jurisdictions or are mixed jurisdictions), and do not recognise the English-law separation of Law and Equity.<sup>215</sup> In this context, other doctrinal bases for the trust have developed, which do not follow the English-law model of vesting some kind of ownership of the trust property in both the trustee and the beneficiary.<sup>216</sup>

What is the position in Jersey? Matthews and Sowden take the view that the trustee is “owner” of the trust property.<sup>217</sup> What of the beneficiary? On the basis of the TJL, and following a comparative survey, they conclude that the beneficiary has a “proprietary interest in the trust property, and not merely a personal right against the trustees”.<sup>218</sup> Thus, in spite of a broadly civilian property law, and the “mixed” nature of Jersey’s legal system, the present position is that “a Jersey trust is essentially the same animal as is found in English law, subject to certain local modifications.”<sup>219</sup>

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<sup>211</sup> Summarised in Reid “Conceptualising” 2 – 3.

<sup>212</sup> 1861 Report, xxiv – xxvi. On the history of trusts in Jersey see: Matthews & Sowden; *Midland Bank Trust v Fps* 1995 JLR 352, 371 – 372, per Le Quesne, JA. See also: (Guernsey) Robilliard “Foundation”.

<sup>213</sup> Art 3: “Subject to this Law, a trust shall be recognized by the law of Jersey as valid and enforceable.” But see art 11(2). See also: GTL 2007, art 11(2).

<sup>214</sup> *Ex parte Viscount Wimborne* (1983) JJ 17, 19 – 22, per Crill DB.

<sup>215</sup> See, for summary: Reid “Conceptualising” 2 – 3.

<sup>216</sup> See, for example: (Scotland) Gretton “Trusts”, Gretton & Steven *Property* 333 – 335, Reid “Trust”; (South Africa) T Honoré “Trust” in Zimmermann & Visser *Southern*, de Waal “Uniformity”; (Quebec) Lamontagne *Biens* 127 – 130, para 187; Gretton & Reid “Thoughts” 291, para 12; Reid “Conceptualising” 2 – 3. Consider also the French *fiducie*, on which see, for example: Matthews “Fiducie”.

<sup>217</sup> Matthews & Sowden, 2, para 1.3, 9, para 1.24.

<sup>218</sup> *Ibid* 8, para 1.20.

<sup>219</sup> *Ibid* para 1.21. Consider also, for example: *Abdel Rahman v Chase Bank* 1991 JLR 103; *West v Lazard Brothers & Co (Jersey) Limited* 1993 JLR 165, 309 – 310, per Hamon, Commissioner; *In re Rabaiotti 1989 Settlement* 2000 JLR 173; *Fiduciary Management Ltd v Sheridan* 2002 JLR N11; *In re Esteem Settlement* 2002 JLR 53; *In re Fountain Trust* 2005 JLR 359.

Can the beneficiary's right be described as a real right? The trustee, subject to the terms of the trust, has the power to deal with the trust property as though it were her own.<sup>220</sup> The beneficiary has no such right. Therefore, the beneficiary's right does not appear to be ownership in the civilian sense. Could it be a subordinate real right? Perhaps so, but the nature of such a subordinate right is not clear: the right of a beneficiary to a trust does not wholly resemble any of the recognised subordinate real rights. It may be that the right is merely a personal one, enforceable against the trustee. This is an area which merits greater attention, but is outside the scope of this work.

### **(7) Possession?**

Possession is certainly a fact. Is it also a right in a thing? This is a long-standing question in European legal thought,<sup>221</sup> exploration of which cannot be made here, but it can be noted that the position of jurisdictions in the French tradition appears to be against treating possession as a real right.<sup>222</sup>

## **J. NUMERUS CLAUSUS**

The list given above may not be exhaustive, and in any case it is open to the legislature to add to it. A separate question is whether it is possible for private parties to add to the list by contracting between themselves. In a legal system in which this is not possible there is said to be a *numerus clausus* – a fixed list – of real rights. In a system which does allow this, there is a *numerus apertus* – an open list – of real rights. Where *numerus apertus* is advocated, it is tempered by “considerations of public policy”,<sup>223</sup> such as the requirement for publicity.<sup>224</sup> Third parties, acquiring

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<sup>220</sup> Art 24(1) TJL.

<sup>221</sup> For some history: Schrage, 50 – 55.

<sup>222</sup> (France) Larroumet, 49 – 50 (para 78), Malaurie & Aynès, 137 (para 482), Pothier *Traité de la possession* paras 2, 3; (Louisiana) Yiannopoulos *Property* 598 *et seq*, para 301 *et seq*; (Quebec) Lamontagne *Biens* 438, para 653. But note: (Scotland) Reid *Property* 10, para 5 (possession is listed among the real rights). Generally: R Carabie “Saisine, possession, propriété, dans les coutumiers normands” in *Semaine de Droit normand* (1952).

<sup>223</sup> Yiannopoulos *Property* 415.

<sup>224</sup> (South Africa) Deeds Registries Act 1937, ss16, 102 (“real right”). See: ch 5 A(2) (discussion of publicity principle).

burdened property, should not find themselves subject to conditions, the content of which they had no means of discovering.<sup>225</sup>

The traditional civilian position is that the list of real rights is closed: there is a fixed list.<sup>226</sup> This position has even been advocated for English law, albeit relatively recently.<sup>227</sup> The existence of, or need for, a *numerus clausus* of real rights continues to stimulate debate.<sup>228</sup> The position in Jersey is unclear. Such evidence as there is of real rights indicates that the apple has not fallen far from the civilian tree. It seems probable that Jersey follows the traditional civilian position, but the question is not settled.

## K. SUBDIVISION OF THE CLASS OF REAL RIGHTS

The class of real rights may be subdivided. For example, the primary real right (ownership) is distinguishable from those which are subordinate to it: the subordinate or limited real rights.<sup>229</sup> The latter are rights in the thing of another, or *jura in re aliena*. Where there is a subordinate real right, there always exists at least two real rights in one thing: ownership and the subordinate real right.

Real rights can also be separated according to whether they are “principal” or “accessory”, as in French doctrinal writing.<sup>230</sup> Principal real rights relate to the nature of the thing itself (ownership, servitude, usufruct) whereas real rights which are accessory (to a debt) relate to the pecuniary value of a thing (rights in security).<sup>231</sup> Principal real rights are further divided into ownership and dismemberments of ownership.<sup>232</sup> “Dismemberment” reflects the notion that those subordinate real rights

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<sup>225</sup> For example: Smits, 250.

<sup>226</sup> For example: Smits, 249 – 252; Akkermans, 7 – 8, ch 2.

<sup>227</sup> B Rudden “Economic Theory v Property Law: The *Numerus Clausus* Problem” in Eekelaar & Bell *Essays* 239.

<sup>228</sup> See: Smits, 252 – 254; Akkermans, generally. And: (France) Mauraie & Aynès, 89 – 93, paras 355 – 361; (England) Swadling, 223 – 224, paras 4.09 – 4.11; (Louisiana) Yiannopoulos *Property* 414 – 417, para 217; (Quebec) Lafond *Précis* 187 *et seq.*

<sup>229</sup> For example: Reid *Property* 11 – 12, para 6.

<sup>230</sup> For example: Larroumet, 22 – 24.

<sup>231</sup> JLC CP8, 9, para 3.6 (quoted in *Ansbacher (Channel Islands) Limited v HSBC Bank PLC* 2007 JLR 593, 596, para 6, per Bailhache, Bailiff); Le Couteur 18. See: ch 3 I(3).

<sup>232</sup> For example: Jourdain, 189 – 190; Larroumet, 22 – 23.

which may be called “principal” (that is, real servitudes, personal servitudes, and – sometimes – leases) are parts of ownership which have been broken off and given to someone other than the owner.

<b>Primary</b>	Ownership	<b>Principal</b>	Ownership
			Dismemberments of ownership: servitude, usufruct, (lease)
<b>Limited</b> <i>(jura in re aliena)</i>	Servitudes, usufruct, rights in security, (lease)	<b>Accessory</b>	Rights in security

## L. CONCLUSION

It is likely that the relative absence of the concepts of real right and personal right in the Reformed Custom of Normandy contributed to the same in the works of Poingdestre and Le Geyt. The enduring influence of their work, of the work of the continental commentators on the Reformed Custom, and of Terrien’s commentary helps to explain why reference to real right and personal right continues to be sparse in Jersey. The increasing influence of English law thereafter provides another aspect to this explanation.

Nonetheless, references to civilian concepts of real right and personal right can be found in Jersey sources. These concepts make sense of the behaviour of certain rights in certain situations, and operate as tools to analyse uncertainties. Although the concepts can be, and have been, criticised, and although real obligations challenge their neat dichotomy, it is necessary to provide an account of Jersey law at this foundational level. Doing so provides the platform from which – internally – future advances in legal thinking are likely to be possible, and – externally – full participation in civilian property discussions can be made.





## **CHAPTER 4 – CLASSIFICATION OF PROPERTY**

- A. INTRODUCTION
- B. ARE RIGHTS THINGS?
- C. CORPOREAL AND INCORPOREAL
- D. MOVEABLE AND IMMOVEABLE
- E. CHANGE OF CLASSIFICATION: ACCESSION
  - (1) Moveable-to-Immoveable Accession
    - (a) Attachment
    - (b) Intention
    - (c) Effect of removal
    - (d) Function
  - (2) The Test for Accession
  - (3) Compensation
  - (4) Accession of Fruits
- F. CLASSIFICATION BY ANTICIPATION
  - (1) Moveables by Anticipation
  - (2) Immoveables by Anticipation
  - (3) Comparison
- G. FISH AND OTHER ANIMALS
- H. CLASSIFICATION OF RIGHTS
  - (1) Real Rights
  - (2) Personal Rights
  - (3) Real Obligation: *Rente*
  - (4) Leases
  - (5) Deeds
- I. CONCLUSION

### **A. INTRODUCTION**

The substance of the law of property is the relationships between persons and objects, in particular where those relationships affect third parties. In this way, the law of property can be distinguished from other areas of law, such as the law of contract.<sup>1</sup> There are many ways of classifying property; for example, as moveable or immoveable, corporeal or incorporeal, in commerce or out of commerce, in public ownership or in private ownership, fungible or non-fungible, and consumable or non-consumable.<sup>2</sup> Which of these a legal system adopts or gives prominence to, and how

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<sup>1</sup> See: ch 3 B.

<sup>2</sup> (France) arts 537 (in commerce/out of commerce) 518 – 529, 531 – 536 (moveable/immoveable and corporeal) 526, 529 (incorporeal) 587, 589 (consumable) 1291 CC (fungible). (Louisiana) arts 448

that system applies the distinction, all contribute to the shape of the law of property. Two of these distinctions (made since at least the time of Gaius)<sup>3</sup> are examined in this chapter: the distinction between moveables and immoveables, to which is given particular attention in modern expositions of property law, and the distinction between corporeals and incorporeals, which is frequently applied in combination with the first to generate a fourfold classification:<sup>4</sup>

Corporeal moveable property (such as a horse or a car)	Corporeal immoveable property (such as land or a building)
Incorporeal moveable property (such as a (personal) right to repayment of a loan)	Incorporeal immoveable property (such as a usufruct of land)

Yiannopoulos describes the purpose of classification as “facility of understanding and regulation”.<sup>5</sup> Understanding and regulation can be cross-border as well as internal. For instance, classification of property is important for international private law. Also, by using, to some extent, a common language of classification, legal systems may more easily be compared with one another. Classification is also important when the applicable rules differ between categories. For example, classification as moveable or immoveable determines, in part, whether transfer must

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(division of things) 449 – 450, 452, 453 (public, common, and private things) 461 (corporeal/incorporeal), 536, 537 CC (consumable/non-consumable); Yiannopoulos *Property* 49 – 51, para 29 (fungible/non-fungible), Yiannopoulos *Property* 52 – 59, paras 30 – 34 (other classifications). (Quebec) arts 899 (corporeal/incorporeal and moveable/immoveable) 916, 919, 2876 CC (out of commerce), Lamontagne *Biens* 22 – 25, paras 30 – 41 (fungible, consumable, and other classifications). (South Africa) van der Merwe *Things* 15 – 30, paras 21 – 37. (Scotland) Reid *Property* 17, para 11 (corporeal/incorporeal, moveable/immoveable). Also: (England) Harpum & Bridge, 7 – 8, para 1–013. Poingdestre *Lois* 115; Le Gros, 20, 195 “res nullius”.

<sup>3</sup> (Corporeal/Incorporeal) G.2.12. For example: Terrien, 5.1. (“Corporeal” and “incorporeal” are used in preference to “tangible” and “intangible” because the former pair is better known internationally, and is present in the sources of Jersey law.) (Moveable/Immoveable) Implicit in G.2.42. The distinction between moveables and immoveables rose later to greater importance: Maine *Early* 335 – 338.

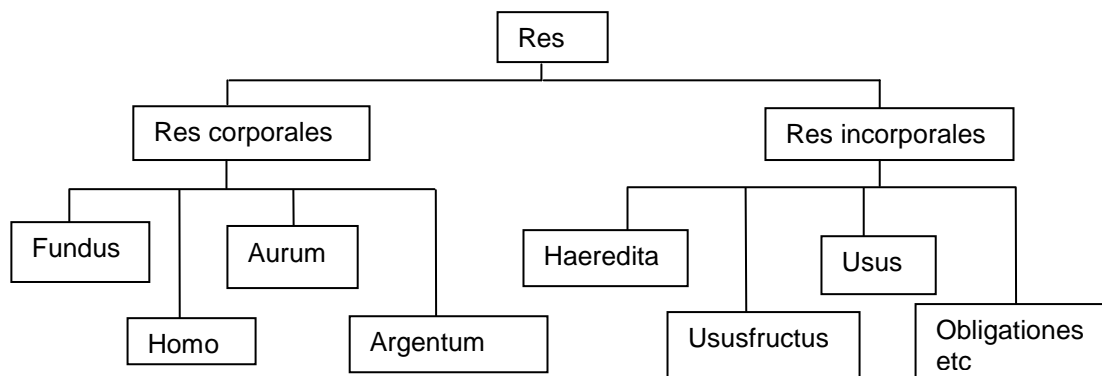
<sup>4</sup> For example: (France) Jourdain, titles 2, 3; (Louisiana) Yiannopoulos *Property* ch 7, 42 – 46, paras 25 – 27; (Quebec) Lamontagne *Biens* 28 – 31, paras 46 – 55; (South Africa) van der Merwe *Things* 20, para 29, 24 – 28, paras 34 – 36; (Scotland) Reid *Property* ch 13. See: ch 4 C, D.

<sup>5</sup> Yiannopoulos *Property* 25, para 18 (also: 241 – 248, paras 106 – 108). Also, for example: Zimmermann *Obligations* 24 – 25; van der Merwe *Things* 15, para 21.

be made before the Royal Court;<sup>6</sup> it is also central to succession, for moveable and immovable property are treated separately.<sup>7</sup> The corporeal/incorporeal distinction in combination with the moveable/immovable distinction (as in the table above) is further determinative of which rules of transfer apply to a transaction, for incorporeal moveable property is transferred by a process known as assignment,<sup>8</sup> whereas transfers of corporeal moveable property are governed either by the customary law, or by the Supply of Goods and Services (Jersey) Law 2009.

## B. ARE RIGHTS THINGS?

“Do we own physical things? Or rights? Or both?”<sup>9</sup> In his article “Ownership and its Objects”,<sup>10</sup> Gretton discusses some problems with the Gaian scheme, that is, the structure of the objects of property law which is derived from Gaius’s exposition of the law of things in book two of his *Institutes*.<sup>11</sup> Gretton presents Gaius’s scheme thus:



In the same article, Gretton conducts a survey of a number of European jurisdictions (including – significantly for Jersey – England and France) and of some outside

<sup>6</sup> See: ch 5.

<sup>7</sup> For example: Wills and Succession (Jersey) Law 1993, arts 6, 7.

<sup>8</sup> Matthews & Nicolle, ch 3. Also, for example: Terrien, 7.6; Anderson *Assignment*.

<sup>9</sup> Gretton “Ownership” 804.

<sup>10</sup> Gretton “Ownership”.

<sup>11</sup> 2.12 – 2.14.

Europe, but which are in the European tradition.<sup>12</sup> He concludes that each of the surveyed systems follows the Gaian scheme (to which he is opposed). It comes as no surprise, therefore, that it is applied also in Jersey. “Corporeal” and “incorporeal” are not found in the *Grand Coutumier*, but this terminology is used both by Terrien<sup>13</sup> and by Poingdestre.<sup>14</sup>

The prevailing view, for good or for ill, is thus that rights are things (*res incorporales*).<sup>15</sup> This is liable to lead to a problem of perpetual regression in respect of ownership, if ownership itself is conceived of as a(n incorporeal) right. Put another way, the first premise is that rights are things. Therefore, all rights found in the patrimony of a person are owned. In the same way as a person is said to own a car, that person is said to own a right of (for example) usufruct. The second premise is that ownership is a right. Consequently, the right of ownership (a thing) is itself owned. But that second-level ownership is also a thing; it too must be owned. This creates third-level ownership. And so it continues. One solution is to state simply that ownership is an exception among incorporeals and cannot itself be owned.<sup>16</sup> Gretton is unhappy with this and other analyses. Nevertheless, the position in Jersey law appears to be that rights are (incorporeal) things.<sup>17</sup>

### C. CORPOREAL AND INCORPOREAL

Corporeal property is that which has a physical presence, incorporeal property that which does not have such a presence.<sup>18</sup> This division admits of some uncertainty (for

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<sup>12</sup> Including: Austria, France, Italy, Spain, Germany, some mixed jurisdictions, and England.

<sup>13</sup> Terrien, 5.1.

<sup>14</sup> Poingdestre *Lois* 57, 95, 134.

<sup>15</sup> See also, for example: Bankruptcy (*Désastre*) (Jersey) Law 1990, art 15(1).

<sup>16</sup> Reid *Property* 23, para 16.

<sup>17</sup> See, for example: Terrien, 5.1 “Et sont ces *choses* appelees en droict incorporelles” [emphasis added]. Also: Pothier *Traité des Personnes et des Choses* para 248.

<sup>18</sup> (Louisiana) art 461 CC; (France) The Civil Code contains no definition of corporeal and incorporeal, but see arts 518 – 525, 528 (corporeal), arts 526, 529 (incorporeal); (France) Pothier *Traité des Personnes et des Choses* para 232; (Quebec) The Civil Code also contains no definition of corporeal and incorporeal, but see arts 899, 906; (Guernsey) Carey, 68; (Guernsey) Le Marchant, vol 1, 131; (Scotland) Reid *Property* 18 – 19, paras 12, 13; (South Africa) van der Merwe *Things* 20 – 21, para 29; (England, for example) Blackstone *Commentaires* 2.1.17.

example, what is the status of electricity?),<sup>19</sup> but such issues are not discussed in Jersey sources, and are not presently under examination.

Division of property as corporeal or incorporeal, present in Gaius' *Institutes*<sup>20</sup> and in Justinian's *Institutes*,<sup>21</sup> is made by Terrien:

“Et sont ces choses appelees en droit incorporelles, comme qui ne se peuuent toucher, à la difference des corporelles, & qui se peuuent toucher.”<sup>22</sup>

In view of this, it is interesting that the division is not made in the *Grand Coutumier* (mid-thirteenth century),<sup>23</sup> which makes no mention of incorporeals. It appears that classification of property as either corporeal or incorporeal has come to Jersey law, through Terrien (circa 1574), from Roman law. Le Geyt acknowledges Jersey law's acceptance of Terrien's Romanised exposition of rights as either moveable or immoveable, and identifies the link between Roman law and Terrien as Bartolus (1313/1314 – 1357).<sup>24</sup> Terrien does not mention Bartolus, but is explicit that his re-working of the customary law divisions is based on Roman law.<sup>25</sup> Classification of property as corporeal or incorporeal is present in modern legislation and in commentary on Jersey law.<sup>26</sup>

#### **D. MOVEABLE AND IMMOVEABLE**

Identifying property as moveable or immoveable is of primary importance. Such classification affects, for example, which rules are to be applied to transfers of

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<sup>19</sup> For example, in Louisiana, Yiannopoulos has expressed the view that electricity is corporeal, like all “energies” (*Property* 43 – 44, para 26). Art 461 of the Louisiana Civil Code holds to be corporeal anything which can be perceived by the senses (“felt or touched”). Electricity may be so perceived. The Louisiana court took this view: *Sommers v Secretary, Dept of Revenue and Taxation* 593 So2d 689, 692, per Carter, Judge (application for appeal denied: 594 So2d 877).

<sup>20</sup> G.2.12 – 2.14, but consider: Zimmermann *Obligations* 25 – 26.

<sup>21</sup> Justinian *Institutes* 2.2, 2.2.1 – 2.2.2.

<sup>22</sup> Terrien, 5.1.

<sup>23</sup> See: ch 87 GC. On the date, see: Everard “Introduction” xviii – xx.

<sup>24</sup> Le Geyt *Manuscripts* vol 1, 68. Bartolus's views are discussed in Schrage, 43 – 44.

<sup>25</sup> Terrien, 5.1.

<sup>26</sup> Matthews & Nicolle, 2.3; *Loi (1996) sur l'hypothèque des bien-fonds incorporels*, art 1 definition of “bien-fonds incorporel”; Nicolle *Immovable* ch 2. Also: JLC CP8, 24, para 7.19. An earlier instance: Hemery & Dumaresq, 30.

property<sup>27</sup> (and what is included in that transfer),<sup>28</sup> the laws of succession,<sup>29</sup> how security may be constituted over property,<sup>30</sup> and which process a creditor can use to pursue his debtor's property.

Fundamentally, every corporeal thing is capable of movement: “*Les planètes sont-elles meubles ou immeubles?*”<sup>31</sup> Perhaps that question is flippant, but it demonstrates the problem. Where the line is to be drawn is a matter of perspective. From the human perspective the Earth is immovable. This is the starting point. What is attached to the Earth becomes equally immovable, in the eyes of the law at least. Thus, it is generally considered that land and that which is connected to it (such as buildings, trees, and plants) is immovable,<sup>32</sup> and all else (such as clothes, animals, and furniture) is moveable.<sup>33</sup> Nonetheless, the division is not always clear-cut. Questions concerning what is moveable and what is immovable are present in the sources, and these are discussed below.<sup>34</sup> By way of introduction, the following observations can be made.

Of the cases,<sup>35</sup> the most significant decision is *Moser v Waldon*<sup>36</sup> because the court engages with the sources in its judgment. In addition, a great body of relevant material is found in the *Grand Coutumier*, the Reformed Custom of Normandy, and

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<sup>27</sup> See: ch 5.

<sup>28</sup> See: ch 4 E.

<sup>29</sup> Wills and Successions (Jersey) Law 1993, arts 5 – 7.

<sup>30</sup> See: ch 3 I(3).

<sup>31</sup> Ledoux *Introduction* back cover, and 175: “Que sont les astres et les planètes sinon des *meubles de très grand taille*, puisqu'enfin aujourd'hui plus personne ne conteste qu'ils soient en perpétuel mouvement?”

<sup>32</sup> Ch 87 GC. This view is affirmed by RP Marett in his *Lettre Explicative du Projet de Loi Amendé sur la Propriété Foncière* (logé au greffe le 23 Janvier 1878), available in (1999) JLR 41, 43: “[...] immeubles; les biens-fonds, c'est-à-dire le sol et ce qui y est adhérent [...]”. Also: Interpretation (Jersey) Law 1954, art 4(1), schedule 1 “‘land’ shall include houses and other buildings”. But note that these sources speak of corporeal immovables only (see: JLC CP8, 13, para 5.2). See also: Justinian *Institutes* 2.1.29; D.41.1.7.10; (Guernsey) 1852 Ordinance, 232, item 6.

<sup>33</sup> Ch 87 GC. See, for example: (Scotland) Reid *Property* 17, para 11; SLC CM 26; (France) arts 516, 518, 528 CC; (Louisiana) arts 448, 462, 463, 470, 471, 473 CC; (Quebec) arts 899, 900, 905, 907 CC; (South Africa) van der Merwe *Things* 24, para 34. (England, for example) Gray & Gray, 31, 1.2.47. Also: Le Geyt *Manuscrits* vol 1, 68.

<sup>34</sup> See: ch 4 E – H.

<sup>35</sup> For example: *Succession Poingdestre* (1758) 2 CR 124; *Succession Le Montais* (1782) 118 Ex 50; *Le Retilley v Richards and de Lisle* (1838) (a copy of this judgment has not been located. It is the subject of a letter to the editor of the JGLR: D Ogier (2008) JGLR 392); *Godfray v Baudains* (1889) 10 CR 416; *Arbaugh v Leyland* (1967) 1 JJ 745; *Moser v Waldon* (1971) 1 JJ 1927.

<sup>36</sup> (1971) 1 JJ 1927.

the commentaries thereon. The *Grand Coutumier* suggests an overarching principle with which to consider the nature of any piece of property: all is moveable which can be taken from one place to another; immoveables cannot be so taken.<sup>37</sup> This is the basic position. By contrast to the single statement of the *Grand Coutumier*, the multiple articles of the Reformed Custom – articles 504 to 520 – read more like a list of individual instances (in keeping with the title to the chapter: “Quelles choses sont censées Meubles, quelles choses immeubles”).<sup>38</sup>

In his *Remarques et Animadversions sur la Coustume Reformée de Normandie*, commenting on article 504, Poingdestre notes that articles 504, 506 to 510, 515, and 518 of the Reformed Custom are drawn from Terrien’s commentary on the *Grand Coutumier*, which indeed is readily observable. The relevance of the Reformed Custom to Jersey law in this area is reinforced by Le Geyt, who remarks upon the “penchant que les habitans [de Jersey] ont pour suivre les nouveutez de la province voisine”, which can be seen in relation to a specific provision of which there is no trace “ni dans le Vieux Coûtumier, ni dans la Glose, ni dans Terrien”.<sup>39</sup> In spite of Poingdestre’s systematic commentary on the Reformed Custom, his work is overshadowed by that of Le Geyt, which provides a deeper account of the law.<sup>40</sup> Le Gros adds little to the discussion.

Poingdestre describes the articles under the title “Quelles choses sont censées Meubles, quelles choses immeubles” as having the nature of an appendix to the Reformed Custom,<sup>41</sup> and, given the emphasis on transmission of property on death in Norman customary law, it is hardly surprising that the policy underlying the Custom’s determination of particular property as either moveable or immoveable is at times driven by consideration of who will inherit that property on the death of its owner.<sup>42</sup> The intertwining of the classification of things and the law of succession is

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<sup>37</sup> Chs 87, 92. Everard, 354 – 356, 376 – 379. Terrien, 5.1, 8.1. Also (Guernsey): 1852 Ordinance, 231 – 232, items 3 – 5; Le Marchant, vol 1, 129, 130; Carey, 68, 70.

<sup>38</sup> [Emphasis added] See also: Pesnelle, 497.

<sup>39</sup> Le Geyt *Manuscrits* vol 1, 69.

<sup>40</sup> *Ibid* 68 *et seq*; *Code Le Geyt* 3.6.

<sup>41</sup> *Remarques* on art 504.

<sup>42</sup> See, for example: Terrien, 5.1, from: “Selon ce que dit est, se faut regler un partage & diuision des biens” to “& reputez estre du territoire auquel ils sont trouuez.”



also evident in Le Geyt's work: to some extent in his comments on "Meubles" in his *Manuscrits*,<sup>43</sup> and particularly so in his *Code* 3.6, "Des Meubles & des Partages qu'on en Fait".<sup>44</sup>

Generally in this area, the influence of the Roman law tradition is palpable. Le Geyt, the continental commentators on the Reformed Custom of Normandy, and Pothier (whose work on this subject has been referred to by the Royal Court)<sup>45</sup> make a number of references to Roman law, principally to the *Digest*.<sup>46</sup> Houard states that the Reformed Custom title on classification of property as moveable or immoveable is taken from Roman law.<sup>47</sup> The later development of Roman law has had some influence also.<sup>48</sup>

In Guernsey several ordinances have been passed on the subject.<sup>49</sup> The 1852 Ordinance *Des Biens Meubles et Immeubles* contains, *inter alia*, lists of things which are moveable, and things which are immoveable, and gives greater detail than any of the Jersey sources. The substance of the 1852 Ordinance is suggestive of influences in common with Jersey: Terrien<sup>50</sup> (unsurprisingly) and, more notably, the Reformed Custom. Consequently, the Guernsey sources are of particular comparative interest.

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<sup>43</sup> Vol 1, 68 *et seq.*

<sup>44</sup> 54 – 56.

<sup>45</sup> *Moser v Waldon* (1971) 1 JJ 1927.

<sup>46</sup> See, for example: Le Geyt *Manuscrits* vol 1, 70; Pesnelle, 501; Pothier *Traité de la Communauté* paras 48 – 63 (also: *Traité des Personnes et des Choses* arts 232 – 272). Compare the lists of corporeals in G.2.13 and in Justinian's *Institutes* 2.2 with the list of moveables in ch 87 GC.

<sup>47</sup> *Dictionnaire* vol 1, xlii.

<sup>48</sup> See: ch 4 C.

<sup>49</sup> See also: 1888 Ordinance, concerning potatoes and tomatoes (which refers to an "Ordonnance provisoire relative aux Biens meubles passée le 6 Février 1886 et renouvelée jusqu'aux Chefs-Plaids d'après Noël tenus le 16 Janvier 1888", but neither original nor renewal has been found). On the nature of ordinances: Dawes *Laws* 32, also 168 – 170 on "Meubles and Immeubles".

<sup>50</sup> For example, the familiar principle of international private law in item 2 of the 1852 Ordinance: "Les Meubles suivent la personne, et les Immeubles le territoire." Terrien's statement is identical (5.1). The maxim is also quoted by commentators on the Reformed Custom. This is unsurprising as the existence of many distinct legal systems in pre-Revolution France was apt to generate occasions for its application. Also (Guernsey): item 22 of the 1852 Ordinance; Le Marchant, vol 1, 129; Carey, 68, 69, 70.

Also worthy of comment are similarities between particular aspects of the 1852 Ordinance and the French Civil Code, not only in substance, but also in wording.<sup>51</sup> This is suggestive of influence from the French Civil Code, which geographic and temporal proximity renders likely. This is a point of difference with Jersey law, the sources of which largely pre-date the *Code civil*.

## E. CHANGE OF CLASSIFICATION: ACCESSION

Accession, or *accessio*, is a doctrine with its roots in Roman law, by which one thing attached to another thing becomes part of that thing. This may result in a change in classification, a change in ownership, or both, depending on the circumstances. Accession operates in three instances: immovable to immovable; moveable to immovable,<sup>52</sup> and, moveable to moveable.<sup>53</sup> The second of these is of present interest, for it is in such cases that a change in classification of property occurs.

### (1) Moveable-to-Immovable Accession

What is the test employed to determine when accession has taken place? Does the intention of the owner of the moveable matter?<sup>54</sup>

In *Arbaugh v Leyland*,<sup>55</sup> the main issue was whether a negative servitude prohibiting further building had been breached by the erection of a shed. If the shed had acceded to the land, the servitude would certainly have been breached. The shed rested “on

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<sup>51</sup> Compare: 1852 Ordinance, item 1, with (France) art 516 CC (although the phrase is also present in Carey, 68, the writing of which predates the French Civil Code). Also compare the 1852 Ordinance and French Civil Code as follows: item 5, art 518; item 6, art 519; item 7, art 520; item 15, art 524; item 16, art 526.

<sup>52</sup> Accession of fruits is an example of this. See: G.2.70, 2.73 – 2.77; Justinian *Institutes* 2.1.19, 2.1.20, 2.1.29 – 2.1.34, 2.1.37; Nicholas *Roman* 133 – 136. Also: Matthews & Nicolle, 15, para 1.60; Bérault, Godefroy, & d’Aviron *Commentaires* vol 2, 437 – 439 (Godefroy). On this type of accession generally: van Vliet “Accession I”; van Vliet “Accession II”.

<sup>53</sup> Logically, there is a fourth category (immovable to moveable), but this is an empty category as no law admits of immovable property acceding to that which is moveable.

<sup>54</sup> For example, compare: (Scotland) Reid *Property* 458 – 459, para 572; (England) Harpum & Bridge, 1069 – 1071, para 23–006 – 23–009; (France) art 525, al 1 CC; (South Africa) Badenhorst & Pienaar, 147 – 154; (Louisiana) arts 493, 493.1, 494 CC; (Quebec) art 955 CC, Lamontagne *Biens* 500 – 505, para 768 – 773.

<sup>55</sup> (1967) 1 JJ 745.

granite blocks, [was] not attached to the soil and [could] be moved in one piece.”<sup>56</sup> After listing, but not discussing, several authorities,<sup>57</sup> the court had “no hesitation in finding that the structure is a moveable.”<sup>58</sup>

The court had recourse to a number of the same authorities in *Moser v Waldon*,<sup>59</sup> and consideration was given to them in the judgment. In *Moser*, the parties made an agreement “in anticipation of the dissolution of their marriage”.<sup>60</sup> Following this agreement, ownership of the matrimonial home, which had been in the plaintiff’s name, was transferred to the defendant. The plaintiff sought a court order that the defendant should allow her to remove two items from the house: a glass-fronted bookcase-cum-drinks cabinet, and a washing machine. The defendant claimed that “ownership was [...] transferred to him” with the house.<sup>61</sup> The agreement between the parties provided that the defendant would get the house “together with the improvements and additions made thereto”.<sup>62</sup> It also provided that “all effects of household use or ornament situate in the premises above mentioned are the property of the wife [the plaintiff]” unless otherwise agreed.<sup>63</sup> The agreement did not refer to the bookcase or washing machine specifically, nor did the contract passed before the court which transferred ownership of the house from the plaintiff to the defendant.

In relation to the bookcase, the defendant relied upon three alternative grounds: that it was a fixture (that is, that it had acceded to the house); that there had been an oral agreement between the parties for the transfer of the bookcase to him; that the plaintiff was estopped from claiming the bookcase.<sup>64</sup> Only the first is of interest to the present discussion. The following facts were established. The bookcase was

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<sup>56</sup> *Arbaugh v Leyland* (1967) 1 JJ 745, 747, per Bois, Deputy Bailiff.

<sup>57</sup> *Ibid*: “Terrien, Coutume de Normandie, Book V, Chapter I, p. 169, Basnage, Coutume de Normandie, 1778 edition, p.412, Art. 515, Pothier, 1831 edition, Tome 15, p.16 (1861 edition, Tome I, p.12) and *Godfray v. Baudains, Le Galle et au. à la cause* (1889) 10 CR 416”. In *Godfray v Baudains*, the court held that a construction in wood is moveable, but the court record provides no details of the nature of the constructions in question.

<sup>58</sup> *Ibid*. For the result, see: ch 7 B(1).

<sup>59</sup> (1971) 1 JJ 1927.

<sup>60</sup> *Moser v Waldon* (1971) 1 JJ 1927, 1928, per Ereat, Deputy Bailiff.

<sup>61</sup> *Ibid*.

<sup>62</sup> *Ibid*.

<sup>63</sup> *Ibid*.

<sup>64</sup> *Ibid* 1929.

composed of parts purchased separately, but designed to fit together by screws to form the desired shape. Parts of the skirting board and architrave over a door were removed to accommodate it,<sup>65</sup> and the door was refitted to open outwards. Screws fastened some of the upper units to the wall.<sup>66</sup>

The court noted that the “tests to be applied in deciding whether an article is to be considered as forming part of the structure have been considered in several Norman, Jersey, and English authorities”,<sup>67</sup> and commenced examination of a selection of these with a quotation from Basnage:

“Utensiles d’hôtel soit aux champs ou à la ville sont réputez meubles: mais s’ils tiennent à fer, clou, ou sont scellez à plâtre, et mis pour perpétuelle demeure, ou ne peuvent être enlevez sans fraction ou deterioration, sont réputez immeubles.”<sup>68</sup>

The text given is paraphrased by Le Geyt in his *Code*,<sup>69</sup> and is, in fact, article 506 of the Reformed Custom. The former point was noted in the judgment; the latter was not. Article 506 had been used by the Royal Court in *Re Succession Poingdestre*, a decision of 1758: a clock was sufficiently firmly attached to a house that it was held to have been put there “pour perpétuelle demeure” and so to have acceded.<sup>70</sup>

In *Moser*, Pothier was also considered. The court’s attention focussed on the first three of six rules given by him “for determining whether an article is deemed to form part of a building”.<sup>71</sup> The first rule is that things inside a house or other edifice for

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<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid* 1930.

<sup>67</sup> *Ibid.*

<sup>68</sup> Basnage *Oeuvres* vol 2, 342. The *Moser* judgment incorrectly gives the date of the third edition as 1719.

<sup>69</sup> *Code Le Geyt* 3.6.3. Noted in *Moser v Waldon* (1971) 1 JJ 1927, 1930, per Ereat, Deputy Bailiff. See also (Guernsey): 1852 Ordinance, 233, item 14; *Le Marchant*, vol 1, 129 – 130; Carey, 69 – 70, 71 – 72.

<sup>70</sup> (1758) 2 CR 124. This may also have been the case in *Re Succession Le Montais* (1782) 118 Ex 50, but it is not clear from the court record: “l’Horloge en question est clouée dans l’appartement où elle a été placée; La Cour a jugé qu’elle doit tenir nature d’Immeubles”.

<sup>71</sup> *Moser v Waldon* (1971) 1 JJ 1927, 1930, per Ereat, Deputy Bailiff. The citation from the judgment is “Pothier (Nouvelle Edition—1819), in Tome IX, entitled ‘Communauté—Donations entre mari et femme””.

perpetuity are part of it,<sup>72</sup> which Pothier identifies as having been taken from *Digest* 19.1.17.7.<sup>73</sup> Pothier's second rule, which aids interpretation of the first, is that things attached to an edifice from which they cannot easily be removed are deemed to be there for perpetuity and so form part of it.<sup>74</sup> Again, reference is made to the *Digest*.<sup>75</sup> The third rule is that things which are easily moved are still part of a house if they complete it in some way, but if they are mere ornament or furniture, or tools of the trade of the person living there, they are not part of the house.<sup>76</sup> Again, he links this rule back to the *Digest*,<sup>77</sup> which is also done for rules four and five.<sup>78</sup>

From Pothier's text, the influence of Roman law is obvious. Also apparent are similarities between Pothier and the Reformed Custom, suggesting a link between Norman customary law and the *Digest*.<sup>79</sup> The influence of the *Digest* can also be seen in the commentators on the Reformed Custom.<sup>80</sup>

The court in *Moser* also considered an English text – the third edition of Megarry and Wade's *The Law of Real Property* – where two rules are set out.<sup>81</sup> The first relates to the degree of annexation. Something resting by its own weight “is prima facie not a

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<sup>72</sup> Pothier *Traité de la Communauté* para 48: “Les choses qui sont dans une maison ou autre edifice pour perpétuelle demeure, en font partie; *secùs* si elles n’y sont que pour un temps.”

<sup>73</sup> Watson's translation is: “Labeo writes that in general things inside structures for permanent use are part of the structure, but things there temporarily are not part of the structure. For example, pipes in place temporarily are not part of the building, but if they are permanently in place, they are part of the building.” Mommsen & Krueger, vol 2, 551. Compare (Guernsey) 1852 Ordinance, item 13.

<sup>74</sup> Pothier *Traité de la Communauté* para 49: “les choses qui sont tellement attachées à un edifice, qu’il ne serait pas facile de les en détacher, sont présumées y être pour perpétuelle demeure, et faire partie de la maison et edifice où elles sont attachées.”

<sup>75</sup> D.19.1.17.

<sup>76</sup> Pothier *Traité de la Communauté* para 53: “Les choses qui peuvent facilement être déplacées du lieu où elles sont, ne laissent pas d’être censées faire partie de la maison, lorsqu’elles y servent à compléter la partie de la maison où elles sont placées [...] mais, si elles n’y servent que d’ornement et d’ameublement, ou pour l’exercice du métier de la personne qui habite la maison [...] elles ne sont pas censées faire partie de la maison, et sont de simples meubles.” See also: Le Geyt *Manuscrits* vol 1, 74. Compare: (Guernsey) Carey, 70, 72.

<sup>77</sup> D.19.1.13.31; D.19.1.17.3; D.33.7.12.23.

<sup>78</sup> Four (on constructive fixtures): Pothier *Traité de la Communauté* para 60, D.19.1.7, D.19.1.17.8. Five (on destination, on which see: ch 6 C): Pothier *Traité de la Communauté* para 62, D.19.1.17.10, D.19.1.17.5, D.19.1.18.1. Rule six (*Traité de la Communauté* para 63) is an exception to the normal rule for things attached by usufructuaries or tenants.

<sup>79</sup> Compare: Pothier *Traité de la Communauté* paras 48 – 50, with art 506 CR; Pothier *Traité de la Communauté* para 53, with Basnage *Oeuvres* vol 2, 342 on art 506 CR (“Cet article a beaucoup de conformité à la disposition du Droit Civil”).

<sup>80</sup> For example: Basnage *Oeuvres* vol 2, 338 *et seq*; Pesnelle, 497 *et seq*.

<sup>81</sup> (1966). *Moser v Waldon* (1971) 1 JJ 1927, 1931, per Ereat, Deputy Bailiff. Megarry & Wade, 716. Also: Harpum & Bridge, 1068.

fixture”,<sup>82</sup> but something with a substantial connection to land or a building “is prima facie a fixture”.<sup>83</sup> The second relates to the purpose of annexation, which (if the moveable object is to become a fixture) has to be an intention to effect a permanent improvement.<sup>84</sup>

Finally, two English cases were examined, *Norton v Dashwood* being the more significant.<sup>85</sup> From that case, the court in *Moser* focused on a passage containing three “tests” or criteria: the mode and degree of annexation; intention (temporary or permanent placement?); and the effect of removal on the immovable.<sup>86</sup>

The bookcase was held not to be a fixture, for five reasons. First, it was essentially freestanding as the screws were for safety (thus discarding the physical attachment as irrelevant on the facts).<sup>87</sup> Second, it was intended to be an item of furniture or ornament. Third, the units could be used elsewhere. Fourth, there would be no damage caused by its removal, and the adverse effect of removal (exposing the missing skirting board and architrave) was negligible. Fifth, other improvements and additions had been made to the building so the wording of the agreement between the parties made sense even if the bookcase was ignored.<sup>88</sup>

In relation to the washing machine, the defendant had pled that it “was plumbed into the building as a fixed and permanent item”, but at the hearing “withdrew his claim that the washing machine passed with the property”<sup>89</sup> and that appears to have been the end of the court’s consideration of the point. The court “authorise[d] the plaintiff to remove it”,<sup>90</sup> which suggests that it was thought not to have acceded, but there is no discussion of the point.

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<sup>82</sup> Megarry & Wade, 716. Also: Harpum & Bridge, 1068.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.* A second qualification relates to tenants’ property (717). Also: Harpum & Bridge, 1069 – 1071.

<sup>85</sup> (1896) 2 Ch 497. The other is *Leigh v Taylor* (1902) AC 157. See: *Moser v Waldon* (1971) 1 JJ 1927, 1932, per Ereaut, Deputy Bailiff.

<sup>86</sup> *Moser, ibid*, citing *Norton v Dashwood* (1896) 2 Ch 497, 500, per Chitty, J.

<sup>87</sup> *Moser, ibid* 1933.

<sup>88</sup> *Ibid* 1934.

<sup>89</sup> *Ibid* 1935.

<sup>90</sup> *Ibid* 1936.

In its judgment, the court does not expressly synthesise the authority it sets out, but this can be done. From the parts of sources used in the judgment, four criteria can be extracted, all of which informed the decision. These are considered in turn, below.

*(a) Attachment*<sup>91</sup>

Physical attachment is at the heart of the straightforward case of accession. Land is immovable. What is attached to land, or to a building which is itself part of the land, becomes effectively part of the land or building and so is also immovable. This criterion is present universally in the sources, including sources in many other legal systems.<sup>92</sup>

An exception to the requirement of attachment is made for things which are of great bulk and weight and cannot be moved without disassembly. This is the substance of article 515 of the Reformed Custom,<sup>93</sup> which Le Geyt and Poingdestre identify as in conformity with Terrien's commentary, thus giving the article more weight in Jersey.<sup>94</sup> On a practical level, Le Geyt expresses scepticism about whether there are any containers on the island sufficiently large and weighty to be properly called immovable, but notes that "il est certain que dans les derniers jugemens on a constamment suivi Terrien et la Nouvelle Coûtume à la lettre."<sup>95</sup>

In both his *Manuscripts* and in his *Code*, Le Geyt links the subject of large containers to that of much smaller things which, because of their intimate connection with immovables, are considered to be immovable, despite little or no physical

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<sup>91</sup> *Ibid* 1933: the first reason for the decision.

<sup>92</sup> Art 506 RC and commentators thereon; Le Geyt *Manuscripts* vol 1, 71; *Code Le Geyt* 3.6.3; *Succession Poingdestre* (1758) 2 CR 124; *Succession Le Montais* (1782) 118 Ex 50; *Le Retilley v Richards and de Lisle* (1838) (see: ch 4 n35); Pothier *Traité de la Communauté* para 49 (second rule); Megarry & Wade, 716; *Norton v Dashwood* (1896) 2 Ch 497, 500, per Chitty, J. Also: D.19.1.17; Terrien, 5.1; (France) art 525 CC; Reid *Property* 465 – 466, para 580; (Quebec) arts 901, 903 CC; (Louisiana) art 482 CC; (South Africa) Badenhorst & Pienaar, 147; (Guernsey) 1852 Ordinance, item 6, item 14.

<sup>93</sup> "Un Moulin & un pressoir, cuves & tonnes sont réputées immeubles, quand ils ne peuvent être enlevés sans désassembler." Compare (Guernsey) 1852 Ordinance, item 6 ("Les Moulins" and "Les Pressoirs").

<sup>94</sup> Poingdestre *Remarques* on art 515; Le Geyt *Manuscripts* vol 1, 73. Also: Terrien, 5.1. Compare (Guernsey): Le Marchant, vol 1, 131; Carey, 72.

<sup>95</sup> Le Geyt *Manuscripts* vol 1, 73.

connection.<sup>96</sup> These are considered below, in relation to the function of objects,<sup>97</sup> for while the great size or weight of tanks, vats, presses, and the like may be considered to be equivalent to physical attachment, it is the functional subordination of smaller items with no physical attachment that forms the primary justification for their classification as immovable.

*(b) Intention*<sup>98</sup>

Although the rules of accession are similar in many legal systems, the criterion of intention is not a constant.<sup>99</sup> Intention that the moveable be affixed on a permanent basis is a requirement in all but one of the sources cited by the court in *Moser*. Curiously, the exception is Le Geyt's *Code*, and that may be the reason the court elected to quote article 506 of the Reformed Custom from Basnage, rather than Le Geyt's paraphrase of it,<sup>100</sup> particularly in view of the fact that (presumed) intention informs its decision.<sup>101</sup> The absence of any allusion to intention in Le Geyt's *Code* is all the more notable in view of the fact that he does consider the point – albeit briefly – in his *Manuscripts*: of article 506 of the Reformed Custom, he says that the word “perpetual” apparently puts owner and tenant (or usufructuary) in opposition; their presumed intention differs.<sup>102</sup>

Possibly, Le Geyt's omission of reference to perpetuity (and thus to intention) in his *Code* was accidental. In any event, in view of its presence in many of the sources relevant to Jersey law in this area, and the decisive role it has played in case-law,<sup>103</sup> intention may fairly be asserted as a criterion to be taken into account when considering moveable-to-immovable accession. Specifically, the presumed intention arising from the actions of one who owns the immovable is different from that

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<sup>96</sup> *Ibid*; *Code Le Geyt* 3.6.4. Also: Poingdestre *Remarques* on art 506.

<sup>97</sup> See: ch 4 E(1)(d).

<sup>98</sup> *Moser v Waldon* (1971) 1 JJ 1927, 1933 – 1934, per Ereaut, Deputy Bailiff: the second reason for the decision.

<sup>99</sup> For example, it is absent in Scotland, where accession is purely mechanical: Reid *Property* 458 – 459, para 572.

<sup>100</sup> *Code Le Geyt* 3.6.3, 54.

<sup>101</sup> *Moser v Waldon* (1971) 1 JJ 1927, 1933 – 1934, per Ereaut, Deputy Bailiff.

<sup>102</sup> Le Geyt *Manuscripts* vol 1, 71.

<sup>103</sup> See: *Moser v Waldon* (1971) 1 JJ 1927; *Re Succession Poingdestre* (1758) 2 CR 124 “l'Horloge en question, entre les Parties, est tellement clouée & fixée, qu'elle a été destine par le Pete pour perpetuele demeure”.



arising from the actions of someone for whom possession of the immovable is likely to be temporary. Intention to fix a moveable to the immovable in perpetuity is presumed in the case of an owner, and not in the case of a tenant or usufructuary.<sup>104</sup> Thus intention is objective in character: it depends not on subjective thought or will, but on a person's relationship to the property. As such, "objective intention" is a misnomer, for what a person actually intended has nothing to do with it.<sup>105</sup>

The reason for the criterion of intention appears to be a desire that someone with a temporary right to an immovable will not lose ownership of moveables that are affixed to it. Consequently, the presumptions may need to be interpreted with flexibility. For example, a tenant under a one-year lease can hardly be said to be in the same position as a tenant under a lease for a term of years in excess of a human life-span. As the latter will not see the expiry of that term, his position is closer to that of an owner. It seems logical, therefore, that a tenant will be presumed to intend to put a thing in place for perpetuity if the lease by virtue of which he or she occupies the property is for a great number of years. How long a great number is, is a matter of difficulty. In Jersey, a long lease is one for a term in excess of nine years.<sup>106</sup> Perhaps this is the obvious division. Usufructs could follow the same rule. However, perhaps the period to be considered is not the number of years for which the lease was originally granted, but the number of years it has left to run at the time of the fixing.

The sources give little in the way of detail. It is clear that the relevant intention is that the object is put in place permanently, or "mis pour perpetuelle demeure".<sup>107</sup> It is not clear whose intention is relevant. If the affixer is the owner of the moveable the answer is clear, but what if the affixer is not the owner of the moveable? In that instance, the owner's intention alone ought to be taken into account, if, in certain

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<sup>104</sup> Pothier *Traité de la Communauté* paras 53, 63. See also: art 518 RC; Basnage *Oeuvres* 358 (on art 518); Le Geyt *Manuscripts* vol 1, 71; Pesnelle, 500; *Le Retilley v Richards and de Lisle* (1838) (see: ch 4 n35). Compare: (Guernsey) 1852 Ordinance, item 15; and (Guernsey) Carey, 70; with Le Geyt, who is emphatic that "engrais" are moveable (*Manuscripts* vol 1, 72).

<sup>105</sup> See also: van Vliet "Accession I" 69.

<sup>106</sup> See: ch 3 I(4).

<sup>107</sup> Art 506 RC. For this conceptualisation of intention, see also: (England) *Deen v Andrews* (1986) 52 P&CR 17, 22, per Hirst, J.

cases, it is accepted that the function of the criterion of intention is to prevent loss of ownership of the moveable.<sup>108</sup> The owner of the moveable would be presumed not to have intended it to accede.

Can the presumed intention be varied by consent? Onerous transferees and creditors ought to be protected from deception as to the value of the land. Thus, if variation is possible, adequate publicity is required. For example, where a tenant under a short lease<sup>109</sup> affixes a moveable not belonging to the lessor, accession will not operate. For a tenant under a long lease, accession will operate. In either case, it could be argued that the operation of accession should be capable of variation by contract, where there is adequate publicity of that agreement. A lease for more than nine years requires to be registered for its validity, which ensures publicity.<sup>110</sup> If variation was desired under a short lease, a rule that that lease should be registered in order for the variation to be valid would satisfy publicity requirements.

Although intention is only one factor in judging whether a moveable has acceded, it can be determinative. This is equally true where the affixer is the owner of both moveable and immovable. TB Smith, in his *Short Commentary on the Law of Scotland*, provides the example of seats bolted into the floor.<sup>111</sup> If this is done for a one-off occasion such as a boxing match, the seats have not acceded. If the same seats are bolted to the floor in the same fashion for permanent use in a cinema, they have acceded (and so would pass with the building if it were sold). In both cases, the degree of attachment and of functional subordination, and the effect of removal are the same. What differs is that in the first instance it is presumed that the intention is not to put the seats in permanently, whereas the opposite is presumed in the second instance.

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<sup>108</sup> See: (South Africa) van der Merwe *Things* 127, para 144. On the intention criterion in South African law: van Vliet "Accession II" 205 – 212.

<sup>109</sup> That is, sufficiently short that no presumption of intention arises.

<sup>110</sup> See: ch 3 I(4).

<sup>111</sup> Smith *Commentary* 504.

(c) *Effect of removal*<sup>112</sup>

The effect of removal is a criterion mentioned in a number of the sources, most of which admit some ambiguity over whether the relevant deleterious effect is one suffered by the moveable, or by the immovable.<sup>113</sup> Pesnelle's commentary is suggestive that it is damage to the moveable that matters.<sup>114</sup> The judgment in *Moser* indicates that damage to the immovable is relevant, but appears at that point only to be repeating the argument of the defendant rather than giving its considered opinion on the matter.<sup>115</sup> Logically, it seems correct to conclude that damage to either thing is relevant. Utter destruction of, or significant damage to, either moveable or immovable upon their separation is proof of a material degree of physical attachment.

That the effect of removal is an element of the test for accession illustrates one of the policy bases underpinning the doctrine: destruction of, or damage to, things is to be avoided. Therefore, where this would be the result, the law deems one thing to have been subsumed by another, preferring the concomitant consequences for ownership and classification over impaired or destroyed utility. Similarly, if removal means loss of utility even without physical damage, the law often prefers to deem the things united, rather than encourage their separation. For example, if the bookcase in *Moser* had not been composed of separable units but was a solid whole, unlikely to suit any space other than that wall in that house, the decision of the court might have been in favour of accession. Clearly, this criterion is linked to that of function, discussed below.<sup>116</sup>

The effect of removal was one of several factors used in *Moser*, but the commentators on the Reformed Custom discuss whether it is actually an alternative stand-alone test. Article 506 provides:

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<sup>112</sup> *Moser v Waldon* (1971) 1 JJ 1927, 1934, per Ereat, Deputy Bailiff: the fourth reason for the decision.

<sup>113</sup> For example: art 506 RC; *Code Le Geyt* 3.6.3; Basnage *Oeuvres* vol 2, 342.

<sup>114</sup> Pesnelle, 500.

<sup>115</sup> *Moser v Waldon* (1971) 1 JJ 1927, 1934, per Ereat, Deputy Bailiff.

<sup>116</sup> See: ch 4 E(1)(d).

“à fer, clou, ou sont scellés à plâtre & mis pour perpetuelle demeure, ou ne peuvent être enlevés sans fraction ou deterioration”

The comma after “demeure” together with the word “ou” which follows it appear to separate two alternatives: the first is attachment with the intention that it be permanent; the second makes no reference to intention but perhaps requires a greater level of attachment than the first. Pesnelle asserts that, nonetheless, two elements are always required for accession under article 506: attachment, and intention to attach the thing for perpetuity.<sup>117</sup> Basnage does not appear to agree, and analyses article 506 in the way given above, that is, that the article provides two different possibilities:

“qu’ils tiennent à fer, clou, ou qu’ils soient scellez à plâtre, & mis pour perpetuelle demeure, *ou* qu’ils ne puissent être enlevez sans fraction ou deterioration, ou sans les desassembler, comme en l’art. DXV.”<sup>118</sup>

It appears, therefore, that although an element of intention can play a part in the operation of article 506, this is not a necessary component if the item cannot be removed without damage or without being broken. Again, this illustrates the policy underlying accession: things ought not to have their utility significantly diminished by separation.

#### *(d) Function*<sup>119</sup>

The fourth criterion is the function of the object. Furniture and ornaments with minimal physical attachment<sup>120</sup> can be contrasted with items which have equivalent physical attachment but in some way complete the immovable, such as a door, a window, or a fireplace.<sup>121</sup> This criterion may be described as “functional subordination”. A door is useless as a door without a structure around it, such as a building. The door is functionally subordinate to the building. A bed functions as a bed wherever it is located, even if typical weather conditions make an uncovered

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<sup>117</sup> Pesnelle, 500.

<sup>118</sup> [emphasis added] Basnage *Oeuvres* vol 2, 342.

<sup>119</sup> *Moser v Waldon* (1971) 1 JJ 1927, 1933 – 1934, per Ereat, Deputy Bailiff: the second reason for the decision.

<sup>120</sup> Pothier *Traité de la Communauté* para 53. See also: D.33.7.26 (referred to by Pesnelle, 501); Bérault, Godefroy, & d’Aviron *Commentaires* vol 2, 440 (Godefroy). Ornament or furniture will accede if there is a sufficient level of physical attachment: Le Geyt *Manuscrits* vol 1, 73 – 74.

<sup>121</sup> *Keenan v Keenan v Timber Tech* 1999 JLR N6c.

location inadvisable. Extreme examples of functional subordination are seen in things – such as keys – which are not physically attached to an immovable at all, but nevertheless are treated as though they have acceded in the normal fashion. Le Geyt renders these as “dépendances”;<sup>122</sup> they can also be described as “constructive fixtures”.<sup>123</sup> Some Roman law influence is evident on this point. Overlapping examples are given in the *Digest*,<sup>124</sup> and by Le Geyt,<sup>125</sup> Poingdestre,<sup>126</sup> Basnage,<sup>127</sup> and Pothier,<sup>128</sup> of items with little or no physical attachment to an immovable, but which nonetheless accede to it.

The policy underlying accession is also seen in this criterion. Not only does the law seek to avoid significant reduction in utility by favouring the *status quo* for things which are decisively joined together, it also seeks the same end in a virtual sense, favouring the continued unity of things which are functionally “joined”.

## **(2) The Test for Accession**

The quadripartite test for accession extracted from *Moser*, and set out above, is workable and coheres well with the earlier sources. If it is to be applied in future cases, however, some further points should be noted.

In general, the absence of one criterion does not of itself negate the conclusion that accession has taken place. Rather, it is a balancing exercise: the strong presence of one criterion will make up for the relative lack of another. The exception is the effect of removal. If the effect of removal is total destruction of property, it seems that a conclusion of accession is inevitable. Therefore, if a transient occupier wants to take something away at the end of his or her occupation, that person must make sure that the thing is not so attached to the immovable as to result in great damage when it is removed.

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<sup>122</sup> Le Geyt *Manuscripts* 73. On accession of physically unattached things generally: Bérault, Godefroy, & d’Aviron *Commentaires* vol 2, 440 – 441 (Godefroy).

<sup>123</sup> Reid *Property* 461 – 462, para 576. On the meaning of “fixture”: *Brand’s Trs v Brand’s Trs* (1876) 3 R (HL) 16, 23, per Lord Chelmsford.

<sup>124</sup> D.19.1.17, D.19.1.17.8.

<sup>125</sup> Le Geyt *Manuscripts* vol 1, 73. Also *Code Le Geyt* 3.6.4.

<sup>126</sup> *Remarques* on art 504.

<sup>127</sup> Basnage *Oeuvres* vol 2, 342.

<sup>128</sup> Pothier *Traité de la Communauté* para 60.

The elements of the test for accession demonstrate clearly that this is a pragmatic doctrine, which seeks to promote overall utility: things ought not to be destroyed or significantly damaged; and things ought to remain where they are most useful and can best fulfil their purpose (the justification for inclusion of the criterion of intention is part of this: someone with a temporary right to an immovable will not lose ownership of moveables that are affixed to it). Although the detail of the tests may differ, these policy considerations underpin the doctrine of accession in many jurisdictions. With the exercise of appropriate caution, reference may reasonably be made to, for example, English law (as in *Moser*), Scots law,<sup>129</sup> and civilian systems, for the law of accession is Roman-derived in each.

One potentially undesirable consequence of accession is that a tenant, for example, can force a “benefit” on an owner, by causing a moveable to accede to the leased land. Where the “benefit” can be removed with damage only to it, there is less difficulty. Where removal occasions damage to the immovable, an action for breach of contract may be available, on the basis of an implied term. Otherwise, tortious liability may arise.

### **(3) Compensation**

If accessory and principal belong to different people, the question may arise as to whether the owner who has benefited from accession is obliged to compensate the owner who has lost out (the former owner of the moveable). Poingdestre appears to endorse the possibility of a claim by stating that a tenant who is not entitled to remove the trees he has planted at the end of the lease would be able to claim for the improvement made to the land.<sup>130</sup> A claim for compensation in respect of loss of ownership consequential to accession could be based in unjust(ified) enrichment.

Darryl Ogier has traced the customary law maxim *celui qui bâtit sur la terre d'autrui perd ses mises*, referred to in the Guernsey case *Le Retilley v Richards and de Lisle*,

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<sup>129</sup> On the similarity between Scots and English law in accession (with some caveats): Smith *Commentary* 500; Reid *Property* 464, para 578.

<sup>130</sup> Poingdestre *Remarques* on art 517. See: ch 4 E(4).

back to Justinian's *Institutes*.<sup>131</sup> In turn, it finds expression in modern legal systems.<sup>132</sup> In cases where compensation is claimed, reference may be made to these rules as a starting point for development of a modern law.

#### (4) Accession of Fruits

Article 505 of the Reformed Custom provides, reasonably enough, that wood is never considered to be moveable until it has been severed.<sup>133</sup> Commenting on article 505, Godefroy says that “encore que cet article ne reserve que les bois, il y a parité de raison pour les pierres & mineraux.”<sup>134</sup> This is rather an obvious point: the basic rule is that all which is attached to the land – or part of it – is immovable until severed from it. The fruit of the land is in the same position as an object which has acceded. The same article provides a significant exception (discussed below) in relation to the moment of detachment.<sup>135</sup>

Articles 516<sup>136</sup> and 517<sup>137</sup> contain provisions supplementary to article 505 for the benefit of widows and heirs,<sup>138</sup> and of tenants, respectively. Under article 517, tenants can take half of the trees with them on expiry of the lease provided that the planting was done six years or more before the end of the lease.<sup>139</sup> Poingdestre approves of this latter provision.<sup>140</sup> In his *Code*, Le Geyt does not reproduce articles 516 and 517, instead simply stating:

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<sup>131</sup> DM Ogier, Letter to Editor, (2008) JGLR 392.

<sup>132</sup> Justinian *Institutes* 2.1.29, 2.1.30, 2.1.35. Also: (France) art 555 CC; (Louisiana) arts 493.2 – 498 CC; (Quebec) arts 956, 958 – 963 CC; (Scotland) Reid *Property* 462 – 463, para 577.

<sup>133</sup> See also (Guernsey): 1852 Ordinance, item 7, item 12; Carey, 69.

<sup>134</sup> Bérault, Godefroy, & d'Aviron *Commentaires* vol 2, 438.

<sup>135</sup> See: ch 4 F(1).

<sup>136</sup> Compare (Guernsey) 1852 Ordinance, item 6.

<sup>137</sup> Art 516 RC: “Pepinieres [tree nurseries], chênôtieres [oak nurseries], haîtrieres [beech nurseries], oulmieres [elm nurseries], & autre jeunes arbres provenus de plant, ou de semence, & tenus en reservoir pour être transplantez, suivent le fonds; néanmoins les veuves, usufruitiers, & autres heritiers prennent part aux pepinieres comme aux meubles, avenant la dissolution du mariage en l'année qu'elles doivent être levées”. Art 517 RC: “Pareillement les fermiers aiant planté lesdites pepinieres, chênôtieres, oulmieres, & autres nouritures de semblable qualité, les peuvent enlever après leur bail expire, en laissant la moitié aux propriétaires, pourvû qu'elles aient été faites du consentement du propriétaire, ou six ans avant la fin du bail.”

<sup>138</sup> See: Poingdestre *Remarques* on art 516.

<sup>139</sup> See also: Houard *Dictionnaire* vol 3, 467. Compare: (Guernsey) Carey, 70. The tenant's right under art 517 has echoes of the *ius tollendi* of Roman law, common to many modern systems: van Vliet “Accession I”, van Vliet “Accession II”.

<sup>140</sup> See: Poingdestre *Remarques* on art 517.

“[...] les Pepinieres & les autres jeunes Arbres provenant de plantes ou semences, & tenus en reservoir pour estre transplantés, suivent le fonds, sauf ce qui est propre pour estre transplanté.”<sup>141</sup>

According to this, the only exception to the rule that trees are immovable when in the ground concerns those which are capable of being transplanted. This rule is attractively simple. Le Geyt provides no further commentary on the subject of trees in his *Manuscripts*, which is suggestive that the matter had generated no significant litigation.

## F. CLASSIFICATION BY ANTICIPATION

Sometimes the law considers it expedient to deem a thing moveable which would otherwise be immovable, and *vice versa*.<sup>142</sup> A functional connection can be made between these two situations. In both cases, a thing of one class is deemed by the law to be of the other class, in anticipation of an actual attachment or detachment.

### (1) Moveables by Anticipation<sup>143</sup>

Article 505<sup>144</sup> of the Reformed Custom states that fruit, grains, and hay still rooted in the ground after the day presumed to be the birthday of John the Baptist (24 June)<sup>145</sup> are considered to be moveable, excepting apples and grapes, which retain their immovable status until 1 September.<sup>146</sup> Commenting on article 488 (a shortened version of 505), Poingdestre<sup>147</sup> notes that this is a new rule, developed and observed

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<sup>141</sup> *Code Le Geyt* 3.6.5.

<sup>142</sup> See: ch 4 E(1)(d). Also: Le Geyt *Manuscripts* vol 1, 68.

<sup>143</sup> On the history of this phrase in French law, see: Carbonnier, vol 2, 1615, para 720. For discussion: Jossierand *Actes* 375 – 392, paras 298 – 312. Also: (Louisiana) Yiannopoulos *Property* 292 – 297, paras 126, 128, and art 474 CC; (Quebec) Lamontagne, 53 – 55, paras 88 – 89 (arts 900, 2698 CC); Dawes *Laws* 170.

<sup>144</sup> “Les fruits, grains & foins étans sur la terre après le jour de la Nativité S. Jean-Bâtiste, encore qu’ils tiennent par les racines, & ne soient coupez ne size, sont néanmoins censez & réputez meubles, fors & reserve les pommes & les raisons qui sont réputez immeubles jusques au premier jour de Septembre; & quant au bois, il n’est repute meuble s’il n’est coupé.”

<sup>145</sup> This is a Jersey quarterday: 1771 Code, “Maisons”. The others are 25 March, 29 September, and 25 December. The old English quarterdays fall on the same dates. Compare: (Guernsey) 1852 Ordinance, item 8.

<sup>146</sup> Compare (Guernsey): 1852 Ordinance, item 9, item 10; Carey, 69. Carey says that the Guernsey dates used to be 24 June and 1 September, but the new dates were established when the calendar changed from Julian to Gregorian.

<sup>147</sup> Poingdestre *Remarques*.



in practice, which is contrary to Roman law, which considered nothing still in the ground to be moveable.<sup>148</sup>

Are apples and grapes exhaustive of the exceptions, or are other similar fruits, such as pears, are to be included? Le Geyt admits pears to fruits immovable until 1 September,<sup>149</sup> but considers the relevant date for all other fruit to be the feast of John the Baptist.<sup>150</sup> Le Geyt also observes that, although the Reformed Custom says “after” the birthday of John the Baptist but “until” 1 September, the position is that 1 September must also have passed before apples, grapes, and pears become moveable.<sup>151</sup> Therefore, the real operative dates for the rules are 25 June and 2 September. These rules are designed to render natural commodities moveable once they are ripe.<sup>152</sup> Pesnelle comments that Norman customary law has eschewed the rule of Roman law – that all in the ground is immovable until cut –<sup>153</sup> in favour of a rule certain and “indépendante du caprice du cultivateur”.<sup>154</sup> The Roman rule has not been ousted completely for living things:<sup>155</sup> it applies to plant-life such as trees, which do not reach a specific, annual window of maturity beyond which they spoil.

Some things made moveable by anticipation may never be severed, such as if a few stalks of crop are missed in the harvest. Presumably, these regain their immovable status once they are intermingled with the soil because they have degraded beyond the point of use.

## **(2) Immoveables by Anticipation**

The concept of immoveables by anticipation is described in the sources as “destination”. A common example concerns the bricks or stones of a house demolished but to be rebuilt: they remain immovable even during the period before

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<sup>148</sup> D.6.1.44.

<sup>149</sup> Also: Pesnelle, 499. Compare: Bérault, Godefroy, & d’Aviron *Commentaires* vol 2, 439 (Godefroy).

<sup>150</sup> *Code Le Geyt* 6.3.2. Also, Le Geyt *Manuscripts* vol 1, 68 – 69.

<sup>151</sup> Le Geyt *Manuscripts* vol 1, 69.

<sup>152</sup> *Ibid* 68 – 69.

<sup>153</sup> Pesnelle gives a reference to D.6.1.24, which appears to be an error. D.6.1.44 is more relevant: “Fructus pendentes pars fundi uidentur”.

<sup>154</sup> Pesnelle, 499, n1. The third paragraph of that note (on when diligence can be done against the crops) should be read in conjunction with Le Geyt *Manuscripts* vol 1, 69, final paragraph.

<sup>155</sup> See: ch 4 F(1).

their re-employment. Interestingly, this example is found in writing on the laws of Normandy,<sup>156</sup> Jersey,<sup>157</sup> Guernsey,<sup>158</sup> and also Scotland.<sup>159</sup> Like accession, this doctrine can be traced back to the *Digest*.<sup>160</sup>

As well as building materials destined for re-employment, Le Geyt appears to favour Basnage's view that materials set aside for use in a particular construction project but not yet employed can be immovable. They must, however, have been prepared in some way, such as by polishing.<sup>161</sup> Referring to a case from 1596, Le Geyt suggests that there is a second criterion: the edifice must be more than half-made.<sup>162</sup> This seems sensible: bricks or stones waiting to be used in reconstruction may provide publicity of their final destination to some degree if they are in plain view. If they are not, while some familiarity with the land (or a conversation with a person so familiar), or a planning application advertised in the Jersey Evening Post,<sup>163</sup> would expose the true position, the requirement for a half-built edifice gives greater publicity of the change in classification of what is apparently moveable property. This is to the benefit of creditors, for it affects the value of hypothecated land, and also heirs and legatees, for whom the distinction between moveable and immovable is all-important. In view of the publicity aspect, another criterion is likely to be that the materials must be on-site. It may, however, be preferable to modify the requirement for a half-finished building to a more flexible standard.

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<sup>156</sup> See, for example: Basnage *Oeuvres* vol 2, 343; Bérault, Godefroy, & d'Aviron *Commentaires* vol 2, 440 (Bérault) 441 (Godefroy). Examples relating to the classification of money given to a woman at the time of her marriage, or to minors, are found in articles 511 and 512 RC, respectively, on which see: Terrien, 5.1; Carey, 71.

<sup>157</sup> Le Geyt *Manuscripts* vol 1, 71.

<sup>158</sup> Carey, 70.

<sup>159</sup> Reid *Property* 21 – 22, para 15 (where, however, things can only be made immovable by destination for the purposes of the law of succession).

<sup>160</sup> D.19.1.17.10.

<sup>161</sup> Le Geyt *Manuscripts* vol 1, 72 (compare (Scotland) *Johnstone v Dobie* (1783) Mor 5443). On the same page, Le Geyt states categorically that heaps of manure, fertiliser or piles of straw are always moveable (compare: (Guernsey) 1852 Ordinance, item 15; (France) art 524 CC, re “engrais”; (Scotland) *Reid's Executors v Reid* (1890) 17 R 519, 522 – 523, per Lord President Inglis). This question exercised commentators elsewhere, for example: Basnage *Oeuvres* vol 2, 343.

<sup>162</sup> Le Geyt *ibid* 72.

<sup>163</sup> States of Jersey Planning and Building Services, Supplementary Planning Guidance, Practice Note 16, section 3. See also: Planning and Building (Jersey) Law 2002, art 6. The records at the Public Registry will, at least, reveal what buildings were on the land the last time it was transferred.

Is exercise of the will an essential element in destination? Intention is probably required, albeit objectively assessed. In the example of building materials, the mental element is that the stones are to be used for rebuilding. If stones are not to be so used, an act of the will alone cannot make them immovable, for this change can only be effected by accession, which occurs by operation of law, not by consent.<sup>164</sup>

Is there some connection between this doctrine and *destination du père de famille*?<sup>165</sup> Although there seems to be no authority on the point, it may be that both are linked not only by the word “destination”, but also by the idea of the *bon père de famille*. The *bon père (ou bonne mère) de famille* would have wished that the building materials would go to the immovable heir, should he die whilst (re)construction work is still ongoing, just as he would ensure that an heir can use a path or road to access the inherited property which was so used during his lifetime.<sup>166</sup>

Destination, as extracted from the Jersey sources, differs from *immeubles par destination* in the French Civil Code.<sup>167</sup> In the latter, the purpose of the thing is the reason for its recognition as immovable. Thus, various things used for economic exploitation of the land (for example, agricultural machinery and beasts, pigeons in dovecots, rabbits in warrens, presses, stills, vats, and manure) all take the nature of an immovable.<sup>168</sup> Unlike the prepared building materials in Jersey law, these things are not in a temporary state of mobilisation while they await transformation into immovables in fact. *Immeubles par destination* in modern French law are thus the functional equivalent of *dépendances* (or constructive fixtures)<sup>169</sup> in Jersey law, although the lists of moveables considered to be immovable by each of those legal fictions are not the same.<sup>170</sup>

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<sup>164</sup> Thus, when accession results in a change of ownership, that is original (not derivative) acquisition. See: ch 5 A.

<sup>165</sup> See: ch 6.

<sup>166</sup> *Ibid.*

<sup>167</sup> See: art 517.

<sup>168</sup> (France) art 524 CC.

<sup>169</sup> See: ch 4 E(1)(d).

<sup>170</sup> Compare, for example: (France) art 524 CC; Le Geyt *Manuscripts* vol 1, 72.

### (3) Comparison

Although a functional comparison is possible between the two types of classification by anticipation, the rules applicable in each case are different. Things become moveable by anticipation mechanically, whereas an element of intention is required for things to be immoveable by anticipation. The policy reasons also differ. Things are made moveable by anticipation in order to render certain the time at which the change in classification will occur. This benefits creditors, who can seek to seize these moveable assets on a certain date, and while they are at peak value. The policy behind making things immoveable by anticipation relates to the transfer of land, and has its origins in a time when most transfers were *mortis causa*. Generally, “destination” seeks to put in place what the deceased would have (or should have) done. Inheriting a partially-built edifice, but not the materials to complete it – though they are on-site and ready – is onerous and an inefficient distribution of the estate.

## G. FISH AND OTHER ANIMALS

In the treatments of the classification of property in the Jersey sources, one matter remains which is given particular prominence:<sup>171</sup> the status of fish, bees, rabbits, pigeons, and suchlike.<sup>172</sup> The only animal expressly mentioned in this respect in the Reformed Custom is the fish. Under article 520,<sup>173</sup> fish in a pond or pool<sup>174</sup> are immoveable, but when they are in a reservoir they are moveable.<sup>175</sup> Poingdestre agrees with this article, extending the application to rabbits in a warren, and pigeons in a dovecot.<sup>176</sup> Le Geyt agrees with Poingdestre.<sup>177</sup> Domestic animals are relieved of earthy bondage: pets are moveable.<sup>178</sup>

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<sup>171</sup> The RC also contains articles on the classification of boats in insolvency (art 519. See: Poingdestre *Remarques* on art 519; Le Geyt *Manuscrits* vol 1, 74; *Re Intersub Ltd* 1985-86 JLR 202, 207, per Crill, Deputy Bailiff; (Guernsey) Carey, 70), and monetary office (art 514. See: Poingdestre *Remarques* on art 514).

<sup>172</sup> Compare: (France) arts 564, 522 CC.

<sup>173</sup> “Les poissons qui sont en estang ou fosse sont reputez immeuble: mais quand ils sont en reservoir ils sont reputez meuble.” Also: (Guernsey) Carey, 72.

<sup>174</sup> Or a stank (see: (Scotland) *Valentine v Kennedy* 1985 SCCR 89).

<sup>175</sup> On keeping fish: de Gruchy, 129.

<sup>176</sup> Poingdestre *Remarques* on art 520.

<sup>177</sup> *Code Le Geyt* 3.6.5. Le Geyt *Manuscrits* vol 1, 70 – 71. Also: Pesnelle, 511; Basnage *Oeuvres* vol 2, 358.

<sup>178</sup> Basnage *Oeuvres* vol 2, 358. Also: Le Geyt *Manuscrits* vol 1, 71.

Article 520 is not easily explained.<sup>179</sup> Pesnelle suggests that the animals deemed immovable have a reciprocal relationship with the land, providing a perpetual succession in exchange for nourishment.<sup>180</sup> However, could this not be said of all animals? Are they not all supported by the land in some respect? One reason for the rule may be a concern to maintain numbers of particular species and, related to that, the protection of the legitimate expectation of an acquirer that a certain number of, for example, fish will remain in the pool when he takes possession.<sup>181</sup>

Basnage asserts that article 520 is consonant with D.19.1.15, (“But fish which are in a pool are not part of a building or farm”)<sup>182</sup> saying that *piscina* (“pool”) signifies a place in which fish would be enclosed in order to be sold, or for commodiousness.<sup>183</sup> (He must, therefore, equate *piscina* with reservoir.) Article 520 is an example of the influence of Roman law,<sup>184</sup> in light of which it is unsurprising that an explanation of the provision is found in Pothier: one does not have ownership of wild animals which is distinct from ownership of the land itself.<sup>185</sup> Therefore, they are immovable.

Is this a form of accession? This is likely. In introducing the subject, Le Geyt uses the word “incorporation”,<sup>186</sup> a word which he also uses in relation to what is clearly accession.<sup>187</sup> The policy of the French Civil Code is to treat particular animals involved in the economic exploitation of land as immovable, with the explanation that they have acceded.<sup>188</sup> The same justification could be applied to article 520 of the Reformed Custom.

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<sup>179</sup> There is some overlap with art 520 RC and art 524 FCC, but the *travaux préparatoires* for the latter reveal nothing: Fenet, vol 11, 4, 14 – 15. Of related interest: Maine *Early* 297; Patault, 98; G McLeod “Wild and Tame Animals and Bird in Roman Law” in Birks *Perspectives*.

<sup>180</sup> Pesnelle, 511.

<sup>181</sup> Le Geyt *Manuscripts* vol 1, 70.

<sup>182</sup> Watson’s translation: Mommsen & Krueger, vol 2, 550.

<sup>183</sup> Basnage *Oeuvres* vol 2, 358.

<sup>184</sup> Also: (Scotland) Hume *Lectures* vol 4, 566.

<sup>185</sup> Pothier *Traité des Personnes et des Choses* para 238.

<sup>186</sup> Le Geyt *Manuscripts* vol 1, 70.

<sup>187</sup> *Ibid* 71.

<sup>188</sup> See: arts 524, 564. Also: ch 4 F(2).

## H. CLASSIFICATION OF RIGHTS

Rights can be classified as either moveable or immovable.<sup>189</sup>

### (1) Real Rights

Article 508 of the Reformed Custom provides that “L’usufruit des choses immeubles, est réputé immeuble.”<sup>190</sup> Poingdestre endorses this article, stating that it is derived from Terrien and thus “de l’ancienne pratique”.<sup>191</sup> Le Geyt is also approving.<sup>192</sup> From this it may be postulated that real rights assume the nature of the physical object to which they relate. A backwards look at Terrien confirms this position: “sont [immeubles] tous droicts dependans de fons, comme usufruit d’heritage, rentes foncieres,<sup>193</sup> & servitudes réelles.”<sup>194</sup> Thus, a real right takes its nature from its object,<sup>195</sup> and a usufruct of moveables, for example, would be moveable.

### (2) Personal Rights

Article 504 of the Reformed Custom – the text of which is taken from Terrien – provides that obligations made in respect of moveable things are moveable and, conversely, obligations made in respect of immovable things are immovable.<sup>196</sup> The article mentions only obligations, but for every obligation in private law there is a correlative right: a personal right.<sup>197</sup> Consequently, article 504 can be applied to determine whether a personal right is moveable or immovable.

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<sup>189</sup> For example: Terrien, 5.1; TJL 1984, art 10(10).

<sup>190</sup> Also: Le Gros, 458; (Guernsey) 1852 Ordinance, item 16; (Guernsey) Carey, 71.

<sup>191</sup> Poingdestre *Remarques* on art 508. Terrien, 5.1.

<sup>192</sup> Le Geyt *Manuscrits* vol 1, 75: “on ne le peut guère aliéner que devant le Magistrat.”

<sup>193</sup> See also (Guernsey): Le Marchant, vol 1, 131; Carey, 71.

<sup>194</sup> Terrien, 5.1. Compare (Guernsey) 1852 Ordinance, item 16.

<sup>195</sup> Also (Guernsey): Le Marchant, vol 1, 131; Carey, 70. *Cave*: Carey errs in his distinction between corporeals and incorporeals on this page.

<sup>196</sup> “Obligations & cédules faites pour choses mobilières, sont réputées meubles; comme en pareil, les obligations qui sont faites pour choses immeubles sont réputées immeubles.” See: Terrien, 5.1. (“Cédule” may be translated as “schedule” (see: *Petit Robert* 376), but has been given the specific meaning of “promissory note” in Guernsey: *Jubilee Scheme 3 Limited Partnership v Capita Symonds Ltd* Guernsey CA Civil Division, Appeal no 425, 14 & 15 December 2010, judgment given 4 Jan 2011, 8, para 23, per Birt JA.) See also: Poingdestre *Remarques* on art 504.

<sup>197</sup> See: ch 3 B.

Le Geyt criticises article 504 for its ambiguity,<sup>198</sup> observing that it is unclear whether the nature of the obligation is fixed by the cause of it, or by its effect.<sup>199</sup> He considers that it would have been clearer to say “pour parvenir à choses mobilières. &c”,<sup>200</sup> which demonstrates that, in his view, classification is to be made by reference to the effect of the obligation. Therefore, for example, a personal right to payment is moveable because it is a right to moveables (money), and a personal right to transfer of an immovable (such as a house) is immovable.

### (3) Real Obligation: *Rente*

A number of the provisions in the Reformed Custom deal with the classification of *rente* as immovable or moveable.<sup>201</sup> The basic position – in Norman customary law and in Jersey law – is that *rente* is immovable, but that what is due to the creditor is moveable, once it has fallen due.<sup>202</sup> “A *rente* is an annual payment charged on land”<sup>203</sup> which may be created on sale as all or part of the price or by a stand-alone transaction.<sup>204</sup> The system of *rentes* functioning as (part-) payment in sales of land, once common in Jersey, was also common in pre-Revolutionary France.<sup>205</sup> The law relating to *rentes* in Jersey was substantially reformed by the *Loi (1880) sur la Propriété Foncière*.<sup>206</sup> One innovation was to make all *rentes* capable of extinction by reimbursement,<sup>207</sup> subject to minor exceptions.<sup>208</sup> To this end, a price was fixed, if none was stipulated in the contract of creation.<sup>209</sup> The price determined by the legislation was not index-linked (and neither were the prices provided for

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<sup>198</sup> Le Geyt *Manuscripts* vol 1, 75 – 76.

<sup>199</sup> *Ibid* 75.

<sup>200</sup> *Ibid* 76.

<sup>201</sup> Arts 507, 509, 510, 513.

<sup>202</sup> Terrien, 5.1, from: “Quant aux rentes hypothèques & achetées par prix d’argent” to “Car tels arriérages & pensions tiennent le lieu de fruits.” Poingdestre *Remarques* on arts 507, 509, 510, 513. *Code Le Geyt* 3.6.6. 1880 Law, arts 27, 36. Matthews & Nicolle, 23, para 2.1. On *Rentes Publiques: Loi (1881) sur la Conversion et l’amortissement de la dette publique*, art 9. Also (Guernsey): Le Marchant, vol 1, 131; Carey, 71.

<sup>203</sup> Matthews & Nicolle, 2, para 1.6. Also: JLC CP8, 10, para 4.2; Nicolle *Immovable* 185.

<sup>204</sup> See: ch 3 I(5).

<sup>205</sup> Planiol *Treatise* vol 1, 768 - 772, paras 2996 – 3004.

<sup>206</sup> For background, see: RP Marett, *Lettre Explicative du Projet de Loi Amendé sur la Propriété Foncière* (logé au greffe le 23 Janvier 1878) (available in 3 (1999) JLRev 41); 1861 Report, xvi – xviii, xxi – xxiv.

<sup>207</sup> Art 37, 1880 Law (for *rentes* created before the 1880 Law); arts 30, 31, 1880 Law (for *rentes* created after the 1880 Law). Also: *Loi (1915) sur la Propriété Foncière (Garanties)* art 12; *Loi (1970) touchant le remboursement des rentes anciennes* art 1.

<sup>208</sup> Arts 41, 42, 1880 Law. The *rente viagère* is also a partial exception: art 32, 1880 Law.

<sup>209</sup> Arts 30, 31, 1880 Law.

contractually). In consequence, the commercial significance of *rentes* has been greatly diminished by inflation. Additionally, many old *rentes* have been extinguished by reimbursement, and now very few new *rentes* are created.<sup>210</sup> The Jersey Law Commission has proposed the abolition of *rentes*.<sup>211</sup>

#### **(4) Leases**

A division is made between “paper leases” (“short leases”) and “contract leases” (“bail à longues années” or “long leases”).<sup>212</sup> Paper leases, or short leases, are leases for nine years or fewer; contract leases, or long leases, are leases for a term in excess of nine years.<sup>213</sup> As it is unclear whether a contract lease is a real right or personal right,<sup>214</sup> it is convenient to consider leases separately.

Contract leases are immovable,<sup>215</sup> paper leases are moveable.<sup>216</sup> Both types of lease pertain to land – an immovable – so, on one view, both should be immovable. The approach of article 504 appears to have been rejected in this instance. According to article 504, a paper lease would be immovable (as would a contract lease) because the right or obligation relates to possession and use of an immovable.

#### **(5) Deeds**

Commenting on article 504 of the Reformed Custom,<sup>217</sup> Poingdestre discusses the status of deeds, arguing that a deed relating to an immovable is itself immovable, and a deed relating to a moveable is moveable.<sup>218</sup> It may be questioned whether this was the burden of the rule intended to be conveyed in article 504. Poingdestre has remarked on the influence of Terrien on these articles of the Reformed Custom.

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<sup>210</sup> JLC CP6, H, “*Rentes*”. See also: JLC CP8, 23, para 7.17.

<sup>211</sup> JLC CP6, *ibid*.

<sup>212</sup> Le Gros, 319.

<sup>213</sup> *Code Le Geyt* 3.6.15; 1861 Report Evidence, 317, questions 7105, 7106; Matthews & Nicolle, 17, para 1.69; Nicolle *Immovable* 136. The nine-year division is also present in (France) art 595 CC. See: ch 3 I(4).

<sup>214</sup> See: ch 3 I(4).

<sup>215</sup> *York Street Pharmacy v Rault* (1974) 2 JJ 65, 69, per Le Masurier, Bailiff.

<sup>216</sup> *Daisy v Clémentine* (1888) 212 Ex 482 (“le droit d’un fermier à la terre qu’il exploite en vertu de son Bail est un droit mobilier”. The lease in question was for seven years). Compare: (Guernsey) 1852 Ordinance, 234, item 21; Carey, 71. Also: *Code Le Geyt* 3.6.15.

<sup>217</sup> “Obligations & cédules faites pour choses mobilières, sont réputées meubles; comme en pareil, les obligations qui sont faites pour choses immeubles sont réputées immeubles.”

<sup>218</sup> Poingdestre *Remarques*.



When Terrien addresses himself to the like point, it is in relation to (incorporeal) rights and obligations, not to the (corporeal) evidence of them, if there be such. It may be, therefore, that Poingdestre is conflating the obligation with the physical document.

## I. CONCLUSION

Answering the question of what is moveable and what is immoveable begins with the simple proposition that all that can be taken from one place to another is moveable, and all that cannot be so taken is immoveable. This is the starting point for classification of corporeal property for all systems in the European tradition.

Corporeal things can change their status; the primary example of this is moveable-to-immoveable accession. The criteria applied to determine when accession – and thus a change in classification – has occurred may differ slightly from one system to the next, but the results achieved are, for the most part, the same, for the underlying policy of the law is preservation of unity where detachment would result in diminution of economic value. Of the matters discussed relating to the classification of property, moveable-to-immoveable accession gives rise to the most litigation.<sup>219</sup> Nevertheless, the cases are few in number. *Moser* provides sufficient material for the exposition of a quadripartite test, but it also demonstrates the utility of comparative reference on this particular point of property law (for which Roman law is a common source). The doctrinal proximity of English law on this type of accession (or on “fixtures”) makes it a legitimate source of inspiration for future questions. However, equally proximate are the laws of other jurisdictions – in particular other mixed jurisdictions – and if Jersey law is to remain true to its own sources and development to date these ought also to be considered.

Under certain circumstances, the normal rules of classification are bent or modified. The extent and instances of this modification may be a point of difference between legal systems, but the general practice is not unusual. It is interesting to note that the

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<sup>219</sup> See, for example: *Moser v Waldon* (1971) 1 JJ 1927; *Keenan and Keenan v Timber Tech* 1999 JLR N6c.

reason for modification of the normal rule appears to be wholly economic. In this way, both the rule and the exceptions to it share a common policy.

Taking the position that rights are things and capable of being owned, rights can themselves be classified as moveable or immoveable. Following the principle given by article 504 of the Reformed Custom of Normandy, this classification of incorporeal property is linked to some aspect of the physical world.

Consideration of the classification of property as moveable or immoveable has been done with matters *inter vivos* in mind. However, it appears that the law set out is equally applicable where these issues must be resolved in the context of succession, for there is nothing to indicate to the contrary. Therefore, the law may be said to be unitary in this respect.

“Et voila ce qui est de ce titre par lequel on voit que plusieurs choses sont réputées meubles ou immeubles non de leur propre nature mais par appropriation, destination ou en faveur des mineurs ou des créditeurs ou pour autres causes; lesquelles en tous autres regards demeurent comme elles sont de leur nature.”<sup>220</sup>

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<sup>220</sup> Poingdestre *Remarques* on art 520.



## **CHAPTER 5 – VOLUNTARY TRANSFER OF IMMOVEABLE PROPERTY**

### **A. THE PROCESS OF TRANSFER**

- (1) Initial Stages: Before the Contract Court
- (2) The Contract Court
- (3) The Nature of the Contract Passed Before the Court
- (4) Registration of Hereditary Contracts

### **B. WHEN DOES TRANSFER OCCUR?**

- (1) Before 1602
- (2) 1602 Act
- (3) Subsequent Legislation
- (4) Analysis: Passing Contract
- (5) Analysis: Registration
- (6) The Nature of the Hereditary Contract

### **C. REQUIREMENTS OF FORM**

- (1) Agreements Concluded Prior to the Contract Court
  - (a) Does the agreement need to be in writing?
  - (b) Requirement of a stipulated penalty clause in order to be able to claim damages?
  - (c) Reform
- (2) The Hereditary Contract

### **D. ENFORCEMENT**

- (1) Enforcement of an Agreement Concluded Prior to the Contract Court
  - (a) No specific performance: *nulle promesse à héritage ne vaut*
  - (b) The reason for the rule: first justification
  - (c) The reason for the rule: second justification
- (2) Acquisition of Possession

### **E. CONCLUSION**

## **A. THE PROCESS OF TRANSFER**

For anyone looking for the first time at the way in which transfer of immovable property is carried out in Jersey, some features are especially striking. Firstly, in general, the court will not order specific performance of an agreement to sell. Secondly, contracts regarding immovable property must be registered, but only after they have been read aloud in open court with the parties to them swearing an oath to uphold their contract.<sup>1</sup> The parties do not sign these contracts. Thirdly, transfers of

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<sup>1</sup> But see: ch 5 n9.

immoveable property must be approved in advance by the Housing Minister,<sup>2</sup> a system which was set up in response to the rise in population following the end of the Occupation, and consequent rise in house prices.<sup>3</sup> If a transaction is carried out without the consent of the Minister, not only may it be declared to be void by the court,<sup>4</sup> but it also constitutes an offence, punishable by fine.<sup>5</sup> The effect of the housing legislation is evident in some of the case-law, but it is not examined here in any detail.

Voluntary transfer followed by registration is not the only way of acquiring immoveable property. Transfer can also be involuntary, as for example with compulsory purchase, or transfer in the course of insolvency proceedings. Original (as opposed to derivative) acquisition<sup>6</sup> is also possible, for example, acquisition by prescription.<sup>7</sup> These matters are not examined in any detail. Nor is the customary law exception to the normal requirement that voluntary transactions transferring immoveable property must be passed before the court and registered. This was considered by the Judicial Committee of the Privy Council in *Nicolle v Wigram*.<sup>8</sup> Precisely, the issue was whether a private road could be transferred to a parish by *acte* of the parish assembly, followed by the parish taking possession. Affirming the judgment of the Superior Number of the Royal Court, the Judicial Committee held that transfer by this method – for this particular type of transaction only – was valid.<sup>9</sup>

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<sup>2</sup> Housing Law 1949, Part 4, and Housing (General Provisions) (Jersey) Regulations 1970. Article 10 of the Housing Law 1949 details the transactions which require consent. The equivalent Guernsey provisions: Housing (Control of Occupation) (Guernsey) Law, 1994, as amended.

<sup>3</sup> Population Office information sheet “Dwelling Accommodation in Jersey” (not dated).

<sup>4</sup> Housing (Jersey) Law 1949, art 12(1).

<sup>5</sup> *Ibid* art 20.

<sup>6</sup> In original acquisition the owner’s title is entirely new, unlike derivative acquisition where the title of the previous owner is acquired, together with any defects or burdens. Apart from acquisitive prescription, examples of original acquisition (concerning all types of property) are accession, commixtion, confusion, occupancy, and specification: (France) arts 546, 573 *et seq*, 712 CC; (Louisiana) arts 482 *et seq*, 3412 CC; (Quebec) arts 914, 916, 935, 954 *et seq* CC; (Scotland) Reid *Property* 30, para 22, n1, and 435 – 455, paras 539 – 566; (South Africa) Badenhorst & Pienaar, ch 8. Also: (England) Smith *Property* ch 7.

<sup>7</sup> The prescriptive period for ownership is 40 years: *Manning v Parish of St Helier* (1982) JJ 215. See also: Poingdestre *Remarques* on art 60; Poingdestre *Lois* 59 – 63; 1771 Code, “A la Cour du Samedi”; Le Gros, 230 *et seq*. Before the introduction of the register in Jersey, concluded contracts which had not been passed *en ouïe de paroisse* were made good by ten years’ possession: Poingdestre *Lois* 65 – 66; Poingdestre *Commentaires* 3. Le Geyt suggests this applies also in the time of the register, in relation to contracts passed before the court, but not registered: *Manuscripts* vol 4, 142.

<sup>8</sup> [1954] AC 301.

<sup>9</sup> *Ibid*. See also: Matthews & Nicolle, 7, para 1.26; Nicolle *Immovable* 98.

The area examined here is *inter vivos* voluntary transfer of immovable property in Jersey, with some reference also to Guernsey. This can arise due to sale, gift, or exchange. The emphasis is on sale, as it is the most important in practice, but it may be noted that the process is substantially the same in all three cases, albeit the *cause* differs. The law now comes principally from legislation and cases, but some customary law also remains relevant.

### **(1) Initial Stages: Before the Contract Court**

In Jersey, all transfers of immovable property,<sup>10</sup> whether that property is corporeal or incorporeal (such as a hypothec),<sup>11</sup> must be passed before the Royal Court and registered.<sup>12</sup> In a typical house sale the period between the seller finding a buyer and the parties appearing at the Contract Court is often quite short: around three weeks.<sup>13</sup> Normally there is no legally enforceable agreement between the parties prior to appearance at the Contract Court. By contrast, a prior contract (conditions of sale) is common in Guernsey.<sup>14</sup> The contract that is presented to the court is drawn up by the transferor's legal representative, and approved by that of the transferee. In Guernsey, it is usually the transferee's advocate who drafts the contract.<sup>15</sup> The contract, once in French, is now written in English; this change occurred in Jersey in 2006,<sup>16</sup> and rather earlier in Guernsey, in 1969.<sup>17</sup> Unless the property has been subdivided or the object is a new building, the terms of the contract will be largely identical to those in the contract for the previous transfer. Obviously, elements such as the names of the parties, the date of possession, and the purchase price (in the case of a sale) will be

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<sup>10</sup> Leases for a period in excess of nine years are immovable and so must be passed before the Royal Court in order to be effective: *Brown v Alexandre* (1891) 214 Ex 349, 351; *Le Gros*, 320. It may be that a contractual right to transfer of immovable property under a (preliminary) agreement of sale is incorporeal and immovable (an immovable personal right), but – despite being immovable – is not transferred by passing contract and registration. See: art 504 RC; ch 4 H(2).

<sup>11</sup> 1880 Law, arts 17, 23. Also: *Ahier v Arm* (1909) 77 Exs 331, 332.

<sup>12</sup> For example: *Nicolle v Starck* (1858) 46 H 251; *Du Tertre v Hornby* (1892) 215 Ex 426, 428 (the transfer of rights created by passing contract before the Royal Court can only be effected by passing contract). Also: 1861 Report Evidence, 311, questions 6973, 6974 (all “real property” passes by contract, and delivery of *saisine* is not required).

<sup>13</sup> Information gathered from anonymous questionnaires completed by Jersey conveyancers.

<sup>14</sup> *Dawes Laws* 629 – 630.

<sup>15</sup> *Ibid* 627. The transferor's agent draws up the conditions of sale (*Dawes Laws* 630). There are exceptions to this (for example, schemes of development: *Dawes Laws* 637).

<sup>16</sup> See Royal Court Rules 2004, rule 20/9 (2), as amended by the Royal Court (Amendment No 2) Rules 2006.

<sup>17</sup> See: Conveyancing (Guernsey) Law, 1969; Conveyancing Order, 1969.

different. Between finalising the terms of the contract and appearance at the Contract Court, the parties are made aware of the contents of the deed by their advocates who also ensure these terms are understood.

The contract that is passed before the Contract Court is known as a “hereditary contract” or *contrat héréditaire*.<sup>18</sup> The qualification “hereditary” is useful in order to distinguish between the agreement that is passed before the court and any other contractual agreement, concerned only with personal rights and obligations.

To provide some security against the possibility that the purchaser may fail to turn up at the Contract Court, a deposit is occasionally paid in advance of settlement (typically around ten per cent of the purchase price).<sup>19</sup> The deposit is paid under written agreement that it will act as liquidate damages if the transaction fails to complete. In such cases, it may be agreed that the purchaser who fails to appear must pay in total twenty-five or thirty per cent of the purchase price. The ten per cent deposit will be retained in part-satisfaction of the debt under the agreement, and the remainder will be sought. This is a high penalty. Conversely, if it is the seller who fails to complete, the disappointed purchaser will wish either to fix another date for completion, or to have the deposit money returned. The return of the money in these circumstances will be provided for in the deposit agreement which normally states that the seller is liable to pay a stipulated penalty in addition.<sup>20</sup>

In Guernsey, the payment of a ten per cent deposit is common and typically provided for in the conditions of sale. The money is held by the purchaser’s agent, which simplifies its return, should the seller fail to complete. In that case, the seller is often bound to pay ten per cent of the purchase price to the purchaser, by way of damages.<sup>21</sup>

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<sup>18</sup> See, for example: Falle, 156, para 1.

<sup>19</sup> Information gathered from anonymous questionnaires completed by Jersey conveyancers.

<sup>20</sup> For examples of penalties on the seller see: *Dolbel v Aubin et uxor* (1796) 3 CR 69; *Guiton v de Gruchy* (1870) 9 CR 70, 72; *Arthur v Procureur Général des Desreaux* (1882) 208 Ex 95, 96.

<sup>21</sup> Dawes *Laws* 631.

## (2) The Contract Court

On the chosen Friday, from 2pm onwards, lawyers, parties, and representatives of parties begin to arrive in the Royal Court.<sup>22</sup> The Contract Court commences at 2.30pm. Anything from a handful to many transactions may be dealt with at the weekly sitting. The precise number for one week is not known until all the parties wishing to pass contract have congregated in the court. The average number of transactions is typically in the thirties or forties.<sup>23</sup> All transactions are dealt with that day; none is postponed. In recent history, the greatest number for one sitting was 113, in 2002. The Contract Court takes place within the sitting of the *Samedi* division<sup>24</sup> of the Royal Court.

The role of the court is administrative, not judicial: the court makes no finding as to the validity of the contracts passed before it.<sup>25</sup> Arguably, this is not the view expressed in a comment in the evidence pertaining to the Report of the Royal Commissioners of 1861:

“7009. (*Mr. Jebb to Mr Dupré.*) When a contract is passed, it has the effect of a judgment of the court?—It has.”

However, the point is not elaborated upon and, as such, is ambiguous. For example: has the content of the contract the effect of a judgment of the court, or is it only the court’s role in solemnising the agreement between the parties that has the effect of a judgment? It is difficult to construct from Mr Dupré’s answer any credible opposition to the orthodox view: passing contracts before the court is an administrative procedure.

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<sup>22</sup> For details of the passing process in the mid-nineteenth century: 1861 Report Evidence, 311 – 312, questions 6975 – 6982, 312 – 313, questions 7001 – 7009, 314, questions 7022 – 7031.

<sup>23</sup> Average number per week: 49 in 2007; 41 in 2008; 38 in 2009; 34 in 2010, up to mid-July. (Figures acquired from the Jersey Judicial Greffe.) The average number passed every three weeks in the mid-nineteenth century was 80 – 90: 1861 Report, 313 – 314, question 7021.

<sup>24</sup> The extraordinary division of the Royal Court, which formerly sat on Saturdays, whence its name: Le Quesne, 30.

<sup>25</sup> See, for example: Falle, 158 – 159, para 6.



The contract is passed to the Judicial Greffier (who is the clerk of court and also the keeper of the register),<sup>26</sup> or Greffier-substitute, by an advocate. It is a contravention of the *Loi (1961) sur l'exercice de la profession de droit à Jersey* for a lay-person to present a contract to the court.<sup>27</sup> Conveyancing without legal representation is thus impossible. The Greffier checks the contract to make sure that the “coding” (the front-page summary of the transaction) is structurally correct and contains all the required information. The contents of the contract are not checked by anyone from the Judicial Greffe<sup>28</sup> until the following Monday. At 2.30pm, everyone stands and the Bailiff (or Deputy Bailiff, Lieutenant-Bailiff, or Commissioner) enters with two Jurats. The Greffier reads the coding of the first contract aloud. If, at this point, the parties have not yet arrived, the lawyer for one side will shout *de côté*, and the contract will be put to the bottom of the pile and called again at the end of the sitting. The whole contract is not read out in court, only the coding, which includes the names of the parties and the type of transaction (for example, “sale of land and appurtenances”). Presumably, the rest of the agreement is included by implication. The parties to the contract stand. If the parties are lay-people, the Bailiff asks:

“Do you know the contents of this deed?”

The parties nod to indicate that they do. The Bailiff then asks the parties to raise their right hands, if they have not already done so, and asks:

“Do you swear that you will neither act nor cause anyone to act against this contract of [type of contract]<sup>29</sup> in perpetuity, on pain of perjury?”<sup>30</sup>

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<sup>26</sup> The role of Judicial Greffier and of Registrar, once separate (see: *Le Geyt Manuscripts* vol 4, 137), became vested in the same person in 1931, by virtue of the *Loi (1931) constituant Le Département du Greffe Judiciaire*. See also: *Departments of the Judiciary and Legislature (Jersey) Law 1965*; Hume & Lambert *Registration*; *Le Geyt Manuscripts* vol 4, 130; *Ogier Government* 73 – 74; Terrien, 12.4, 14.3, 14.4, and 15.6.

<sup>27</sup> Art 2(2).

<sup>28</sup> The department of the Judicial Greffier. Its functions were reformed by the *Loi (1931) constituant Le Département du Greffe Judiciaire* (see: ch 5 n26).

<sup>29</sup> For example: “sale of land and appurtenances”.

<sup>30</sup> The formula given 1861 Report Evidence (312, question 7002) was slightly different: “You swear that you will neither act nor offer to act against the contents of this deed under pain of perjury?” It is submitted that the present formula is preferable, for it is broader. See also: 1771 Code, “Serment des Contractans”.

Again the parties nod to answer in the affirmative. The Bailiff signs or initials the contract at the top of the first page<sup>31</sup> or at the end, and passes it to the Jurats who do the same.<sup>32</sup> These three persons alone sign the contract: the contracting parties do not. Once all the contracts in the Greffier's possession have been passed before the court and signed, the Greffier gathers them together and transports them to the Judicial Greffe, which is located in the basement of the court building.

Once the contract has been passed before the court its contents are in the public domain.<sup>33</sup> Consequently, the Greffier, if asked, will now show the contract to any third party, even before he has reached the Judicial Greffe,<sup>34</sup> where the details of the contract are put on to the register.<sup>35</sup>

By the Powers of Attorney (Jersey) Law 1995, it is possible for a mandatory to take oath on behalf of a contracting party, and a mandatory is involved in the passing of approximately half of the contracts passed before the court.<sup>36</sup> A power of attorney should have been executed<sup>37</sup> and registered in the Public Registry before the contract is passed in court.<sup>38</sup> If registration of the power of attorney post-dates the Contract Court at which the mandatory acted, it is possible to pass a deed of rectification at the next sitting of the Contract Court. The deed sets out the parties to, and nature of, the transaction it seeks to rectify, and the relevant dates (which illustrate the problem addressed, because the date of registration of one party's power of attorney will post-date the passing of contract). The contract which is the subject of the deed of rectification is referred to by date and by the book number and page number where it

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<sup>31</sup> That is, near the first line of the full contract, not on the coding page.

<sup>32</sup> The Code of 1771 requires only that the Bailiff and Jurats *signent*, not that they subscribe. Further detail is given by rule 18/8 of the Royal Court Rules 2004: “[a]n hereditary contract is duly authenticated if signed or initialled on either the first or the last page thereof by the persons before whom it has been passed.”

<sup>33</sup> True in Jersey and in Guernsey: Jeremie, 132; Carey, 181.

<sup>34</sup> Which may be defined as follows: “The Judicial Greffe provides administrative and secretarial support to ensure the effective operation of Jersey's courts.” <http://www.gov.je/Government/NonexecLegal/JudicialGreffe/Pages/WhoWeAre.aspx> (accessed on 4 August 2011). See also: Bois, 44, para 5/85.

<sup>35</sup> Compare with Royal Court Rules 2004, rule 18/3(2). For a comparative view see: F Roumy “Histoire du noriat et du droit notarial en France” in Schmoeckel & Schubert.

<sup>36</sup> Information obtained from the Jersey Judicial Greffe.

<sup>37</sup> Powers of Attorney (Jersey) Law 1995, arts 3(2), 3(5).

<sup>38</sup> *Ibid* art 3(4).

can be found in the Public Registry. The manner in which the deed is set out resembles that of any other contract passed before the court.

The deed of rectification declares itself to have retrospective effect.<sup>39</sup> There are obvious difficulties with retrospectivity in property law as third parties can be affected. For example, what would happen if a hypothec were granted by the transferor over the object of transfer (such as a field) during the period between passing contract for alienation of the field and passing the deed of rectification? Were the deed of rectification to be passed at the very next sitting of the Contract Court, there may be no problem (assuming that the deed of rectification takes effect before the grant of hypothec).<sup>40</sup>

Bodies corporate are empowered by the 1995 Law to execute powers of attorney “in the manner permitted by [...] articles of association or other internal regulations”.<sup>41</sup> It is not clear whether certain persons may automatically act for a body corporate, such as a director in the case of a company. According to the “realist” theory of corporate personality,<sup>42</sup> the board of directors of a company, when acting together, is the company (an organ of the company) and not just an agent of it. If this approach pertains in Jersey, the board of directors could pass contracts for (or as) the company with no need for a mandate. Article 20 of the Companies (Jersey) Law 1991 is about contracting on behalf of the company, but the language used is that of the law of agency,<sup>43</sup> and so it does not resolve the question.

The Guernsey Contract Court takes place on Tuesday and Thursday mornings from 9.30am. The procedure differs slightly from that of Jersey.<sup>44</sup> The composition of the Court is usually a Lieutenant-Bailiff and four Jurats, but, as in Jersey, the contract

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<sup>39</sup> For example, by virtue of a clause such as this one: “Now today [first party to the original contract] and [second party to the original contract] have agreed to ratify and confirm the said contract which passed before Court on [date] and furthermore to confirm that the said contract remains valid and in full force from the date of its passing before Court on [date], notwithstanding that [relevant party’s] power of attorney was not registered on or before that date.”

<sup>40</sup> Compare information on ranking of contracts passed on the same day in Guernsey: Dawes *Laws* 640.

<sup>41</sup> Powers of Attorney (Jersey) 1995 Law, arts 2(4), 3(3).

<sup>42</sup> See: FW Maitland “Introduction” in Gierke, particularly xxv, xxvi, xl, but the whole repays reading.

<sup>43</sup> Art 20(1). See also: Dunlop *Company*.

<sup>44</sup> See further: Dawes *Laws* 626 – 627.

will usually be signed by the Lieutenant-Bailiff and two Jurats. As in Jersey, the parties do not sign the contract.

In Guernsey, in addition to the possibility of appointing a mandatory, a party may give consent “in advance of completion at an earlier Contract Court”.<sup>45</sup> The consent is noted by the court. Presumably, this consent is revocable, but having been given in a public forum it would seem logical that it should also have to be revoked in that same forum.

The process of passing contracts before the court is a public act. In contrast to personal rights (*droits personnels*) which affect only certain, specified persons, real rights (*droits réels*) affect third parties.<sup>46</sup> Consequently, the process of creation, variation, transfer, or extinction of real rights is attended by some sort of publicity, and this is particularly true of immovable property, which is typically of high value.<sup>47</sup> The use of publicity to inform third parties, to promote certainty, to facilitate proof of rights,<sup>48</sup> and to reduce the opportunity for fraud,<sup>49</sup> is sometimes known as the “publicity principle”.<sup>50</sup> The outworking of this principle is in evidence both in the requirement that contracts relating to land are passed in open court and in the requirement that contracts so passed are registered in a public register.<sup>51</sup> In relation to the latter, Le Geyt records that the function of the Register of 1602 – which register is still in use – was publicity of rights and preservation of deeds; earlier, in 1562, the

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<sup>45</sup> *Ibid* 627.

<sup>46</sup> See: ch 3.

<sup>47</sup> *C & G Developments Ltd v Duquemin* (1965) Guernsey Court of Appeal, October 15, per Le Masurier, Bailiff of Jersey: “For my part I am quite unable to accept that invitation. It was of the very essence of the feudal system that a sale of land should be public and notorious and the faculty given to members of a family in the line of succession to reclaim land sold out of the family upon tendering to the purchaser the purchase price could have been of little avail had not some machinery been devised for making the fact of sale widely known.”

<sup>48</sup> Hume & Lambert *Registration* para 1.

<sup>49</sup> *Ibid* para 2. 1861 Report Evidence, 316, questions 7073, 7074.

<sup>50</sup> In Scotland and South Africa by this name, but the principle is clearly discernable elsewhere also: SLC DP 121, 1, para 1, 2, paras 1.4 – 1.5. Also: (Scotland) Reid *Property* 482, para 602; (South Africa) van der Merwe *Things* 38, para 44, Badenhorst & Pienaar 65; (France) Simler & Delebecque, 613 *et seq*, Malaurie & Aynès, 29; (Quebec) art 2938 *et seq* CC, Lamontagne *Biens* 77 – 78, para 128, Lamontagne *Publicité*; (Louisiana) art 1839 CC, Mazeau “Registration”, Redmann “Recordation”, Yiannopoulos *Servitudes* para 125, (particularly 359 – 360). See also: Vinding Kruse, ch 2 (on publicity and – *inter alia* – a Scandinavian right similar to the *retrait lignager*).

<sup>51</sup> The publicity function of registration is mentioned in the evidence to the 1861 Report: 164, question 3753.

establishment of a register had been proposed by Royal Commissioners, but that project did not have publicity at its heart (the register was to be kept locked) and sought only to achieve the preservation of deeds.<sup>52</sup> Appearance at the Contract Court provides publicity of the act itself, and registration supplies ongoing publicity. The formalities involved in transfer of immovable property also provide a safeguard against rash decisions to alienate or burden property. This is sometimes described as the cautionary principle: “parties are not to be caught by rash expressions”.<sup>53</sup>

An essential part of the Jersey system of immovable transfer is the involvement of public officials. In this respect the Jersey system is similar to those of continental Europe where a public official – the notary –<sup>54</sup> is involved in transfer of immovable property.<sup>55</sup> Jersey does not have notaries in the continental sense, but instead has recourse to (functionally) the original notary: the court.<sup>56</sup> The ceremony of passing contract is a public act of transfer. This may be contrasted with a private system of transfer, such as in Scotland and England, where there is no equivalent involvement of a public official prior to registration.

Going further, Vinding Kruse has identified two forms of publication in relation to private transactions in civil law systems. The first is publication “immediately *at the very moment*—or directly after—the legal fact has come into existence”; the other he describes as permanent publication, which term is used because this is the method of making known a “legal fact [which] will continue to exist in relation to third persons”.<sup>57</sup> Both are seen in Jersey: passing a contract before the court provides immediate publication (publicity of the transaction);<sup>58</sup> registration provides permanent publication (publicity of the right).

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<sup>52</sup> Le Geyt *Manuscripts* vol 4, 139.

<sup>53</sup> Erskine *Institute* 684, 3.2.2.

<sup>54</sup> A modern study is Schmoeckel & Schubert, in which see: F Roumy “Histoire du notariat et du droit notarial en France”; N Ramsay “The History of the Notary in England”; J Finlay “The History of the Notary in Scotland”. See also: Brooks & Helmholz.

<sup>55</sup> For example: F Roumy, “Histoire du notariat et du droit notarial en France” in Schmoeckel & Schubert, 125, 155 *et seq.*

<sup>56</sup> A point recognised, in part, by Carey, 181: “un instrument public lorsqu’il est fait par un notaire public, ou, en ce pays, lorsqu’il est signé par deux Justiciers.”

<sup>57</sup> Vinding Kruse, 71.

<sup>58</sup> *Ibid* 118 (also: 117 on reading in court and publicity).

### (3) The Nature of the Contract Passed Before the Court

A typical hereditary contract for the sale and transfer of land includes the following clauses: salutation;<sup>59</sup> designation of parties; conveyance, detail of what is conveyed, and derivation of neighbouring titles; title conditions, such as servitudes; statement that all is in perpetuity; inclusion of any rights not expressly detailed, of any defects, and a statement of the parish in which the property is situated; statement that the purchaser is subject to all burdens which were on the seller, and derivation of the seller's title; stipulation of the price and when it is payable; warranty that there are no rights in security over the property; statement that immediate vacant possession is given; apportionment of rates; narration of the oath; and attestation of due execution by the court.<sup>60</sup> Modern contracts are typically longer than earlier examples, but this is largely due to an increase in the number of servitudes and title conditions; the basic structure has persisted for centuries.<sup>61</sup>

A notable feature of the hereditary contract is that its essential parts as to transfer are drafted in the past tense (which is not true of the equivalent Guernsey deed).<sup>62</sup> For example, the contract states that the parties “appeared”<sup>63</sup> in court, the words of conveyance are in the past tense (*bailla, donna, quitta, céda, transporta, vendit, vendirent*, sold, gifted, ceded, transferred, given, etc), in the case of transfer by reason of sale the contract states that the sale “was made”<sup>64</sup> for a stated sum which will be paid by a stated date, the contract states that the parties “took oath”<sup>65</sup> to uphold the contract, and the final clause states that the contract was sealed with the Seal of the Royal Court (“we have sealed”).<sup>66</sup> (Sealing is no longer done in practice.)<sup>67</sup> According to the contract, the transfer has already taken place. This is

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<sup>59</sup> The opening salutation addressing all who may come to see or hear the document was in common use. See, for example: Kaye, 28; Mollet “Interesting” (an Act of the Royal Court granting a divorce in 1580).

<sup>60</sup> Commentary on the clauses in the hereditary contract is given by Falle: 158 – 171, paras 4 – 45. For the equivalent information in relation to Guernsey: Dawes *Laws* 637, appendix 7.

<sup>61</sup> For example: Le Quesne, 565 – 566, note xxvi; 1861 Report, xviii. Also: Le Gros, 434 – 436; Trotter.

<sup>62</sup> Dawes *Laws* appendix 7.

<sup>63</sup> Or *comparurent*.

<sup>64</sup> Or [*Ladite vente héréditaire*] faite.

<sup>65</sup> Or [*Et*] jurerent [*lesdites parties*].

<sup>66</sup> Or *nous avons scellé*.

<sup>67</sup> See: ch 5 A(4).

odd. When the deed is drawn up, it purports to record a future event. Nonetheless, the predictable nature of the event makes this possible.

As the document itself records that which has already happened, this suggests that it is not constitutive of transfer. This is the view of Advocate Richard Falle, who also provides some useful contextual information:

“The earliest surviving written contracts indicate that they were first sworn before the Bailiff and Jurats and later read publicly before the congregation *à l’issue du service divin*, literally *en ouïe de Paroisse* or ‘in the hearing of the Parish’. There is some evidence that before transactions were reduced to writing the parties to a transfer of title would make a simple and solemn verbal declaration *en ouïe de paroisse* and it was this declaration which bound the parties. It may also be for this reason that the whole transaction is recorded historically. The written document minutes and announces an event which has already occurred.”<sup>68</sup>

This comports with the view of John Le Patourel, the Channel Islands historian, who notes that the Jersey hereditary contract appears to have fulfilled a function secondary to the act taking place.<sup>69</sup>

The hereditary contract is essentially a notarial deed (the executing notary being the court). Notarial deeds of this style were once commonplace in immovable transfer in a large part of France<sup>70</sup> (and elsewhere),<sup>71</sup> but this is no longer so: the present notarial function is execution of a deed, rather than the recording of a passed act. Although the use of the past tense in Jersey contracts is explicable, it may be that, in modern times, it would be appropriate to draft the Jersey contract in the present tense. This point is considered below.<sup>72</sup>

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<sup>68</sup> Falle, 159, para 7. See also: Le Couteur, 16.

<sup>69</sup> Le Patourel, 100.

<sup>70</sup> Brissaud, 392 – 401, paras 312 – 316; Falle 157 – 158, para 3.

<sup>71</sup> For example, on the Scottish instrument of sasine: JW Cairns “Historical Introduction” in Reid & Zimmermann, vol 1, 74; GL Gretton “The Feudal System” in Reid *Property* 86 – 87, para 91 (note that the Land Register has since become operational for the whole of Scotland); Ockrent, 46.

<sup>72</sup> See: ch 5 B(6).

#### (4) Registration of Hereditary Contracts

On Friday afternoons, the codings of the hereditary contracts passed that day are photocopied and put into a ring-binder which is available in the public reading room.<sup>73</sup> This acts as an index to the contracts until they are given a permanent entry in the register. Anyone may request to see the full hereditary contract to which one of the photocopies pertains. The details of each transaction are entered onto the PRIDE<sup>74</sup> system: an electronic database which can be accessed by the public without charge at the Judicial Greffe or at the Jersey Archive. Many legal firms have remote access to the online register. The final destination of the physical documents, which are vacuum-packed, is the Jersey Archive. The costs associated with immovable transfer are stamp duty,<sup>75</sup> a £50 registration fee, and a £20 Jurats' stamp.

Until 1963, contracts were sealed with green wax. On the obverse was the seal of the Bailiwick; on the reverse was the Bailiff's personal arms or monogram. Sealing was done twice a year "on a day appointed by the Bailiff" which was, in practice, "the same day as the *exposition des contrats*, held each term on the Wednesday before the last day on which summonses could be served for the *Assise d'Héritage*." In this way, "all contracts passed in the preceding six months could be inspected without charge by the public" should anyone wish to raise an action in the *Cour d'Héritage* on the basis of a contract thus inspected.<sup>76</sup>

Royal Court rules of 1963 abolished the *exposition des contrats* and amended how sealing was done. Instead of wax, a press seal on a paper wafer was introduced. "At that stage, the seal used was still that of the Bailiwick". Royal Court Rules of 1968 introduced a seal for use on, *inter alia*, contracts passed before the Royal Court, which change carried the practical advantage that law firms no longer needed to take

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<sup>73</sup> Registration practice has changed over the years since 1602. This may be seen by comparing the terms of the 1602 Act, or the relevant provisions of the Code of 1771, with modern practice. Some insight into the practice of the mid-nineteenth century can be obtained from the 1861 Report, "Registration" xxvi, and 1861 Report Evidence, 328, question 7343 *et seq.* See also: Le Geyt *Manuscrits* vol 4, 140 – 142; Le Quesne, 186 (summary of early registration practice).

<sup>74</sup> Public Registry Index and Document Enrolment.

<sup>75</sup> Stamp Duties and Fees (Jersey) Law 1998, art 2(1), schedule, part 1, item 13.

<sup>76</sup> Information gathered from correspondence with Mr Peter Bisson (with thanks), October 2010. Quotations in this paragraph are from that correspondence.



contracts to the Bailiff's office for the purpose of sealing.<sup>77</sup> According to Royal Court Rules 2004, rule 20/10(3), sealing of contracts is still required, "but it is no longer done because [the contracts] are no longer released back to the law firms". Instead, as detailed above, contracts are sent by the Judicial Greffe to the Archive, for storage.<sup>78</sup>

The Jersey Public Registry was set up by an Act of the States of 1602.<sup>79</sup> The 1602 Act established that "registration must be made of all hereditary contracts which are passed before justice in time to come".<sup>80</sup> As an incentive to use the new register, if the parties failed to have their rights registered within three months (presumably three months of the appearance before the court), the rights were rendered null.<sup>81</sup> (Present practice means that the court delivers the contract up for registration immediately after it has been passed.)<sup>82</sup> Today, in addition to hereditary contracts (including transfers of ownership, hypothecs, contract leases,<sup>83</sup> servitudes, and usufructs), some other deeds are also registered.<sup>84</sup>

The register is a register of deeds (RoD), not a register of title (RoT): title flows from the deed, or contract, and not from the register itself.<sup>85</sup> Not all RoD systems are alike, and this is equally true of RoT systems.<sup>86</sup> Broadly, a register of deeds:

"is evidence that a particular transaction took place, but is in principle not itself proof of the legal rights of the involved parties and, consequently, it is

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<sup>77</sup> Royal Court Rules 1968 (R&O 5107), rule 15.

<sup>78</sup> See also: Royal Court (General) (Jersey) Rules 1963 (R&O 4450), rules 31, 32.

<sup>79</sup> It is not clear whether the 1602 Act was ever the subject of an Order in Council. The Jersey Archive only holds Orders in Council going back to 1603, and the Privy Council registers for the period 1 January 1602 to 1 May 1613 were destroyed by fire in 1619.

<sup>80</sup> "un enregistrement soit fait de tous contrats heritaux qui se passeront en temps d'avenir par devant justice" 1602 Act.

<sup>81</sup> "Et en cas que aucun seroit refusant et que par sa faute déliberée ses droits ne seroient enregistrés dedans Trois mois au susdits livres tels droits recelés seront tenus de nul effet ni valeur." 1602 Act.

<sup>82</sup> Royal Court Rules 2004, rule 18/3(2).

<sup>83</sup> A lease for more than nine years: see ch 5 n10.

<sup>84</sup> For example: *partages* (dividing up the estate of a deceased person between the heirs), wills of immovables, powers of attorney, tutelles, curatelles, deeds poll relating persons who already have a register entry, and electricity, waterworks, and drainage notices. It was not possible to make a will of immovable property until 1851 (*Loi (1851) sur les Testaments d'Immeubles*). Testation was not completely free until 1926 (*Loi (1926) sur les héritages propres*).

<sup>85</sup> See, for example: SLC DP 125, 1 – 4, paras 1.5 – 1.12.

<sup>86</sup> This point is demonstrated for RoT systems by O'Connor: "Deferred". See also: Mapp, 3, para 1.7.

not evidence of its quality. Thus before any dealing can be safely effected, the ostensible owner must trace his ownership back to a good root of title”,<sup>87</sup>

while a register of title is a register of:

“the legal consequence of [the] transaction [...]. So the right itself together with the name of the rightful claimant and the object of that right with its restrictions and charges [is] registered. With this registration the title or right is created.”<sup>88</sup>

Thus, where land is being transferred in Jersey, it is necessary to trace title back at least forty years, after which time any problems with title may have been “cured” by the operation of acquisitive prescription.<sup>89</sup> Of course, prescription does not operate through passage of time alone: it is necessary to show the requisite possession also.

The register is composed of verbatim copies of deeds, the manner of recording of which has kept pace with technological advance. Today, deeds are scanned into an electronic register, whereas they were previously photocopied (from the early 1960s), and before that scribes made copies by hand. The electronic register contains deeds from 1753 onwards; earlier deeds – which have not been scanned – are available in books. The entire register is indexed by name but not by property. The difficulties associated with extracting information from a register indexed in this way are complained of in the evidence given the Royal Commissioners which led to the Report of 1861.<sup>90</sup> However, some remedial steps have been taken. Indexing by address began for all new registrations in 1984 and, following the introduction of conveyancing in English on 1 November 2006, it has been the practice to include a reference to the Jersey Digital Map within the body of the hereditary contract, where applicable, and to attach a copy of part of the map as an appendix to the contract, indicating the location of the property.<sup>91</sup> The Digital Map has no effect on title; it is for illustrative purposes only. If the Map contains a mistake, this has no effect on the

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<sup>87</sup> Stoter, 17. Also: Hogg, 1 – 2.

<sup>88</sup> Stoter, 17.

<sup>89</sup> See: ch 5 n7.

<sup>90</sup> 1861 Report Evidence, 329, question 7369 *et seq.*, 331, question 7399.

<sup>91</sup> See Practice Direction RC06/01 “Use of English in contracts passed before the Royal Court and in other documents registered in the Public Registry”, schedule B, n15.

rights to which it relates. Property is defined by a written description of the boundaries in the body of the hereditary contract. This can be problematic. Descriptions are sometimes vague. Modern deeds typically refer to a Unique Property Reference Number (UPRN), which relates to the Digital Map and at least assists in locating the object of transfer in the island,<sup>92</sup> even if the Map itself carries no authority.

In Guernsey, registration is made at the Greffe and also – where ownership, usufruct, or *droit d'habitation* is transferred – at the Cadastre.<sup>93</sup> (There is no Cadastre in Jersey.) The effect of registration at the Greffe is considered below.<sup>94</sup> Registration must be made at the Cadastre within twenty-eight days of registration at the Greffe,<sup>95</sup> failure to do so is punishable by fine,<sup>96</sup> but has no effect on property rights. The Cadastre contains details of all “real property in the Islands”, including a property reference and the applicable rate of tax, the owner’s name and address, and the dimensions of the property “plan area”.<sup>97</sup> The cadastral register is public.<sup>98</sup> Changes or additions to a plan area which may affect its taxation must be notified to the Cadastre by 30 September immediately following the change; failure to do so is punishable by fine.<sup>99</sup> There are also penalties for submission of false information to the Cadastre.<sup>100</sup> The purpose of the Guernsey Cadastre is to facilitate rating and the levying of taxes. However, as the Cadastre can be searched by property (rather than

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<sup>92</sup> See Practice Direction RC 06/01 (pursuant to rule 20/9 of the Royal Court Rules 2004), schedule B, n15.

<sup>93</sup> See: Taxation of Real Property (Enabling Provisions) (Guernsey and Alderney) Law, 2005; Taxation of Real Property (Guernsey and Alderney) Ordinance, 2007, ss12, 16, 54.

<sup>94</sup> See: ch 5 B(2).

<sup>95</sup> Taxation of Real Property (Guernsey and Alderney) Ordinance, 2007, s16(1)(a). Also: Dawes *Laws* 627 – 628, 641. In view of the conclusions drawn below about when ownership is transferred, art 16(1) is ambiguous: the twenty-eight days could be calculated from either registration at the Greffe, or when contract is passed before the court (if registration follows within two months). It is suggested that art 16(1)(b) was intended to apply to acquisition by prescription and other forms of original acquisition.

<sup>96</sup> The owner is fined: Taxation of Real Property (Guernsey and Alderney) Ordinance, 2007, s16(5).

<sup>97</sup> *Ibid* arts 12(3)(a), 12(3)(b), 12(3)(c), 12(3)(e) 12(5).

<sup>98</sup> *Ibid* art 12(4).

<sup>99</sup> *Ibid* art 15(1), 15(4).

<sup>100</sup> *Ibid* art 50.

the name of the owner) and has an associated map,<sup>101</sup> it assists with location of the information in the register at the Greffe.<sup>102</sup>

As with the Jersey register, the register at the Guernsey Greffe is a register of deeds.<sup>103</sup> The Greffe makes copies of deeds and these copies make up the register.<sup>104</sup> The information at the Cadastre is not determinative of title; it is the information on the register at the Greffe which is important for this purpose.

## **B. WHEN DOES TRANSFER OCCUR?**

In Jersey, transfer does not take place before the parties appear at the Contract Court.<sup>105</sup> There are two distinct phases after that. The first is the passing process itself; the second is registration of the deed passed before the court. At which of these points does transfer occur?

There are at least two main models of transfer found in legal systems. In what may be called the “constitutive” model, registration achieves the actual transfer. That is the case in both England and Scotland.<sup>106</sup> In the “defeasibility” model, transfer occurs by other means, before registration, but the owner is vulnerable to subsequent grants by the transferor, and also to claims of the transferor’s creditors, until registration is made. The acquirer thus has ownership, but not priority in a question with third parties. Voluntary transfer of immoveable property in France operates on the defeasibility model.<sup>107</sup> Can the Jersey system of transfer be described in either of these ways?

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<sup>101</sup> *Ibid* art 13.

<sup>102</sup> Dawes *Laws* 628, 634; information gathered from the Cadastre.

<sup>103</sup> *Ibid* 627.

<sup>104</sup> Original deeds are returned by the Greffe. The exception is bonds, where the Greffe retains the original: *Ibid* 640.

<sup>105</sup> *Le Geyt Manuscripts* vol 1, 119; *Poingdestre Remarques* on art 527. Also (Guernsey): Carey, 181–182; *C & G Developments Ltd v Duquemin* (1965) Guernsey Court of Appeal, October 15, per Le Masurier, Bailiff of Jersey.

<sup>106</sup> (England) Land Registration Act 2002, s58(1) (for commentary see Cooke, ch 4); (Scotland) Land Registration (Scotland) Act 1979, s3(1)(a), *Burnett’s Trustee v Grainger* 2004 SC (HL) 19, 46–47, para 88, per Lord Rodger of Earlsferry (for example), but note that the feudal system has now been abolished (Abolition of Feudal Tenure etc (Scotland) Act, s1). See also Germany: § 873(1) BGB.

<sup>107</sup> See: art 1138 (also 1583) CC, *Décret no 55-22* of 4 January 1955, arts 28(1), 30(1). Quebec, for example, has a similar system: *Lamontagne Publicité* 31 *et seq.*

## (1) Before 1602

From at least as early as the fourteenth century,<sup>108</sup> transfers were solemnised by public announcement of the details of the transaction “within the hearing of the Parish”, *en ouye de Paroisse*.<sup>109</sup> An identical, or closely analogous, procedure was also used for some time in Normandy and some other parts of France.<sup>110</sup> A shift in the formalities for transfer of land from taking place on the land itself to taking place in a public forum such as a churchyard, assembly, or court, is observable in the histories of many jurisdictions.<sup>111</sup> In Jersey, rights were probably transferred when publicity of the act was made, that is, the declaring of the transaction to the parish, for without such declaration the contract was void.<sup>112</sup> Such a system made sense in a largely illiterate society. Clearly, however, the collective memory of the parish was unreliable and capable of corruption.

The practice developed of declaring the transfer to the Royal Court in order that the details of the transaction would be entered on to the Rolls of Court, providing some written record of the parties’ rights. Like declaration to the parish, appearance before the court for this purpose was not unique to Jersey.<sup>113</sup> In 1562, Royal Commissioners instructed that a register should be set up in Jersey. Initially the project did not thrive, and it seems that many transactions were not registered.<sup>114</sup> On 24 July 1602, the States passed the Act which formed the basis of the present register. The process of passing a contract before the court, with the addition of registration, was the chosen

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<sup>108</sup> See further the short history in Le Couteur. For a modern study of eleventh century transfers, see: Tabuteau.

<sup>109</sup> Poingdestre *Commentaires* 3 (8 for further comment); Le Quesne, 185 – 187; 1861 Report, 312, question 6984; 314 – 315, questions 7034 – 7040; Messervys “Notes”; Rybot “Deeds”; Mollet “Ouye”; Mollet “Contrats”; Le Gros, 434 – 435. Also: Vinding Kruse, 83–84, on the transition to involvement of written deeds in transfer in France generally.

<sup>110</sup> Art 455 RC: “La lecture se doit faire publiquement & à haute voix, à jour de Dimanche, issue de la Messe Paroissiale du lieu où les héritages sont assis en la presence de quatre témoins pour le moins, qui seront à ce appellez, & signeront l’acte de la publication sur le dos du contrat, dont le Curé ou Vicaire, Sergent ou Tabellion du lieu qui aura fait ladite lecture est tenu faire registre: & n’est receu aucun à faire prevue de ladite lecture par témoins. Pourront néanmoins les contractans leur seureté faire enregistrer ladite lecture au Greffe de la Jurisdiction ordinaire.” The witnesses did not sign in Jersey, except perhaps between 1562 and 1602: Le Geyt *Manuscripts* vol 4, 137 (also: Poingdestre *Remarques* on art 455). See also: Denisart, vol 3, 389, “Nantissement”; Le Conte, 218 – 219.

<sup>111</sup> Vinding Kruse, 76, 77.

<sup>112</sup> Poingdestre *Lois* 30, para 5.

<sup>113</sup> Vinding Kruse, 83–86, 89–90, on England, Northern France, and Germany. Of related interest: Brissaud, 381 – 392, para 304 – 311.

<sup>114</sup> Falle, 157 –158, paras 2, 3; Le Geyt *Manuscripts* vol 4, 137. Also: Le Quesne, 122 – 123, 184 – 186.

model,<sup>115</sup> replacing public declaration to the parish.<sup>116</sup> Compulsory registration provided ongoing publicity, which task was previously vested in the imperfect collective memory of the parish.<sup>117</sup>

The Jersey register applies to the whole island. Even in 1602, this achievement was not novel. Some of the Hanseatic city-states had registers dating from the fourteenth century.<sup>118</sup> Neither England nor France had, however, created a comparable system. Broadly speaking, registers of rights in land in Europe seem first to have flourished in the Germanic countries and in Scotland. In France, there was an unsuccessful attempt to establish a comprehensive register of rights in 1553,<sup>119</sup> which itself was preceded by the successful establishment of a register of donations in 1539.<sup>120</sup> In England too an unsuccessful attempt was made to establish a register of immoveable property,<sup>121</sup> by the statute For Inrollments of Bargains and Sales in 1536.<sup>122</sup> The establishment of the General Register of Sasines in Scotland was broadly contemporaneous with the Jersey project; its foundational statute, an Act of 1617, bears some similarity to the Jersey 1602 Act.<sup>123</sup> In Scotland, as in Jersey, attempts

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<sup>115</sup> Falle, 157, para 3. See also Falle “Poem” 226 – 227.

<sup>116</sup> Poingdestre *Lois* 30, para 5. See also *Loi (1842) sur les Publications dans les Eglises*.

<sup>117</sup> See, for example: Hume & Lambert, para 2.

<sup>118</sup> Ockrent, 8.

<sup>119</sup> 4 May (Henry II), available in Rebuffi, vol 2, 18 – 22. The scope of the Edict was to cover contracts of “vendition, eschange, donations, cessions, & transportz, constitutions de rentes, garenties, contrelettres licites, & declarations, & toute autre obligation excédant pour une fois, la somme de cinquante livres tournoys, & generalement toute autre disposition, soit entre vizf ou derniere volonté [...]” art 1, 19. Also: Cooper, part 1, 23 and 31; Brissaud, 401 “the Edict of May 3, 1553, decided that neither ownership nor rights in land could be acquired without registration of the sale and of the deed relating to it; but this edict was not carried out”; *Ordonnance de Villiers-Cotterets* of 1539.

<sup>120</sup> *Ordonnance sur le fait de la Justice* which “is generally cited as the earliest [French] ordinance on the subject of Registration”, and “was confirmed by the *Ordonnance de Moulins* [...] February, 1566; and by D’Aguesseau’s Ordinance of 1731”: Cooper, part 1, 20. (On D’Aguesseau’s Ordinance, see Regnault, vol 1 “Les Donations et l’ordonnance de 1731”.) See also: Terrien, 7.15; Ockrent, 13.

<sup>121</sup> “Manors, Lands, Tenements or other Hereditaments, shall pass, alter or change from one to another, whereby any Estate of Inheritance or Freehold shall be made or take Effect in any Person or Persons, or any Use thereof to be made, by reason only of any Bargain and Sale thereof, except the same Bargain and Sale be made by Writing indented sealed, and inrolled” 27 Henry VIII c 16.

<sup>122</sup> (1535) 27 Henry VIII c 16 (available in *Statutes At Large* vol 2, 234 – 235). This statute required sealed writing, and registration within six months. See also: Vinding Kruse, 86; Cooke, 17 – 18.

<sup>123</sup> For example, both enforce the compulsory nature of registration by making it a requirement for the continuing effectiveness of the deed against third parties: 1602 Act “Et en cas que aucun seroit refusant et que par sa faute délibérée ses droits ne seroient enregistrés dedans Trois mois au susdits livres tels droits recelés seront tenus de nul effet ni valeur”; 1617 Act “And if it shall happen any of the saids Writs, which are appointed to be Registered, as said is, not to be duely Registered within the said space of three-score dayes: then, and in that case, his Majesty, with advice and consent

had been made in the mid- to late-sixteenth century to set up a register.<sup>124</sup> The register kept by the Guernsey Greffe is first mentioned in an Ordinance of the Guernsey Royal Court in 1563 (4 October),<sup>125</sup> but was not established until around three years later.<sup>126</sup> (The register is “extant though fragmentarily in its early pages, from 1567.”)<sup>127</sup> Precisely what influence, if any, these projects had on one another is not examined here, but it may be seen that the Jersey register (and that of Guernsey) was established at a time when the northwest corner of Europe was very much concerned with such endeavours.<sup>128</sup>

Has the point at which transfer takes place changed between 1602 and the present day? If transfer still takes place when the contract is passed before open court, at what point in the passing process does transfer occur? And what is the role of registration?

## **(2) 1602 Act**

The starting point for the modern law is the Act of the States of 24 July 1602, which set up the register of contracts.<sup>129</sup> On priority against subsequent grants of the transferor, the Act states that:

“Auquel enregistrement seront sujettes les obligations reconnues en justice, les engaiges et hypothèques, sur peine d’être réputées privées et ne porter aucun pied en date, au devant des autres.”

Thus registration is necessary for priority.

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foresaid, decernes the same to make no faith in Judgement by way of action or exception in prejudice of a third party, who hath acquired a perfect and lawful Right to the saids Lands and Heritages”.

<sup>124</sup> Ockrent, 65 – 72. See: ch 5 n114; 1861 Report Evidence, 314 – 315, question 7039.

<sup>125</sup> Available in R MacCulloch (ed) *Recueil d’Ordonnances de la Cour Royale de l’isle de Guernesey* (1852) vol 1 (covering 1533–1800) 17.

<sup>126</sup> 1566 (20 Jan) (available in R MacCulloch (ed) *ibid* 20). Further ordinances were made in 1570 (*ibid* 27), 1581 (*ibid* 44), and 1631 (*ibid* 163).

<sup>127</sup> Ogier *Government* 55, n14.

<sup>128</sup> See: Vinding Kruse, 95, on similar sixteenth- and early seventeenth-century developments in Denmark and Norway.

<sup>129</sup> “Il a été trouvé expedient par Monsieur Le Gouverneur bailly Justice et États que un enregistrement soit fait de tous contrats heritaux qui se passeront en temps d’avenir par devant justice”. For an account of the different sections of the Act: Le Geyt *Manuscripts* vol 4, 137 – 139.

In the previous section it was concluded that, prior to 1602, ownership transferred on the passing of contract. There is no suggestion in the 1602 Act that the point at which ownership transferred was changed. Falle notes that the provisions of the 1602 Act were, at least in some matters, regulatory only,<sup>130</sup> that is, they did not change the existing practice. It seems likely that the 1602 Act was regulatory only in this respect also. If that is the correct view, ownership passed when the contract was passed before the court.<sup>131</sup> The final provision of the 1602 Act may support this conclusion because it states that “rights” must be registered within three months of passing contract. However, it is not clear whether by “rights” are meant personal rights, real rights, or perhaps the physical document itself. The final provision is also notable because it declares to be null any contract not registered within the stipulated time. Thus, the ownership acquired by passing contract may be described as precarious.<sup>132</sup>

On this view, therefore, ownership transfers between the parties when the contract is passed before the court, while priority against subsequent acts of the granter is acquired on registration. If registration is not made within three months of passing contract, not only is priority not acquired, but the entire contract is stripped of any effect, ownership reverts to the transferor.

Is another reading possible? Article 58 of the French *Ordonnance de Moulins* of 1566 provided that, if a donation was registered within the stipulated period (four months), it took effect from the date of the deed.<sup>133</sup> Therefore, not only was

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<sup>130</sup> Falle, 157, para 3.

<sup>131</sup> Poingdestre *Remarques* on art 527: “Un contrat hereditaire ne seroit valable en nos isles n’étant passé devant justice”.

<sup>132</sup> “Et en cas que aucun seroit refusant et que par sa faute délibérée ses droits ne seroient enregistrés dedans Trois mois au susdits livres tells droits recelés seront tenus de nul effet ni valeur.”

<sup>133</sup> “Et pour oster à l’avenir toutes occasions de frauds & de doutes qui pourroient estre mûës entre nos sujets pour l’insinuation des donations qui seront ci-après faites, avons ordonné que d’oresnavant toutes donations faites entre-vifs, mutuelles, réciproques, onereuses, en faveur de mariage & autres, de quelque forme & qualité qu’elles soient faites entre-vifs, comme dit est, seront insinuées ès Greffe de nos sieges ordinaires de l’assiette des choses données & de la demeure des parties dans quatre mois, à compter du jour & date d’icelles donations, pour le regard des biens & personnes, & dans six mois, pour ceux qui seront hors de nostre Royaume. Autrement & à faute de ladite insinuation, seront & demeureront lesdites donations nulles & de nul effet & valeur, tant en faveur du créancier, que de l’heritier du donant. Et si dedans ledit temps ledit donant ou donataire decedoit, pourra néanmoins ladite insinuation estre faite dans ledit temps, à compter du jour dudit contrat comme dessus, sans que cette présente Ordonnance fasse aucun prejudice aux donations ci-devant faites, & droits acquis à nos sujets à cause d’icelles, ni aux instances mûës & à mouvoir pour ce regard.” Available in *Recueil*



ownership transferred on the date of the deed (provided registration followed), but a precarious priority was acquired at that same time. Could this be the effect of the 1602 Act? It would seem not. The contract is brought into existence when it is passed before the court (except, according to Poingdestre, hypothecs, which are valid between the parties even without being passed before the court).<sup>134</sup> The contract ceases to have any legal existence if it is not registered within three months. The priority provision envisages the possibility of a period where the contract has no priority against subsequent grants of the transferor (“sur peine d’être réputées privées”). The only time at which a contract (other than a hypothec) could exist and carry no priority must be within those three months. Registration is the only event given which will affect priority within the three-month period. Therefore, in order to meet the description of events given in the Act, registration must be constitutive of priority, and is not merely a means of preserving it.

The device employed by the 1602 Act – a punitive sanction for failure to register within a certain period – was used in other legislation of the same period,<sup>135</sup> notably, the Guernsey Ordinance of 1631 on registration (superseded by an Ordinance of 1724):<sup>136</sup>

“[...] faits enregistrer au Greffe de la Cour dans deux mois après le passément d’iceux, à peine de perdre la preference qu’aultrement ils pouroent avoir eu sur les acquiseurs et creantiers posterieurs qui se seroent faits enregistrer”<sup>137</sup>

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*d’Edits et d’Ordonnances Royaux sur le fait de la justice, et autres matieres* (1720) vol 1, 477. See also: Cooper, part 1, 20; Argou, vol 1, 266 – 269.

<sup>134</sup> Poingdestre *Remarques* on art 527.

<sup>135</sup> Scottish Act of 1617 setting up the General Register of Sasines (see: ch 5 n123, for text).

<sup>136</sup> “à l’avenir toutes obligations et transactions ne prendront date de priorité que du jour qu’ils seront mis au Greffe.” Available in R MacCulloch (ed) *Recueil d’Ordonnances de la Cour Royale de l’isle de Guernesey* (1852) vol 1 (covering 1533–1800) 248. Of related interest: Howitt; *Jubilee Scheme 3 Limited Partnership v Capita Symonds Ltd* Guernsey Court of Appeal, Civil Division, Appeal no 425, 14 & 15 December 2010, judgment given 4 January 2011.

<sup>137</sup> Available in R MacCulloch (ed) *ibid* 163. Also: Carey, 183.

This provision appears to say that a precarious priority is acquired when the contract is passed because priority is “lost” (rather than never acquired) if registration is not made within the stipulated period.<sup>138</sup>

It is noteworthy that the 1631 Guernsey Ordinance did not provide for the eventual invalidity of the deed itself. Priority (or alternatively the opportunity to acquire it) was removed by failure to register within two months, but ownership remained with the transferee. There is nothing to suggest that a subsequent registration could not have been made in Guernsey, although, presumably, the deed would only have ranked according to the date of registration, rather than the date on which it had been passed before the court. Therefore, what was lost following failure to register within two months of passing contract was priority from the date of the contract. Ownership was transferred when the contract was passed before the court.<sup>139</sup>

Thus, when registration came to be introduced in Jersey (and in Guernsey) the model of transfer was the defeasibility model. Registration was not constitutive of transfer, which occurred when the contract was passed before the court. Rather, registration removed the transferee’s vulnerability to subsequent grants by the transferor and to the transferor’s creditors. If the transferor is honest and registration is made within the stipulated period, the main practical difference between the defeasibility model and the constitutive model is the transferee’s period of vulnerability to the claims of the transferor’s creditors.

### **(3) Subsequent Legislation**

The Code of 1771 (a compilation of laws, rather than a systematised codification) contains a section on the law of the register, which amounts broadly to a restatement of the 1602 Act. The Code of 1771 can be taken as superseding the 1602 Act on

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<sup>138</sup> An alternative reading is that it is the opportunity to acquire priority (by the act of registration) which is lost, and not priority itself. The result of either reading is the same in that, as long as registration is made within two months of passing contract, priority takes effect from the date that the contract was passed. The difference is that priority is conferred contemporaneously with ownership (when the contract is passed) on the first reading, whereas on the second reading priority is conferred on registration although backdated to the date on which the contract was passed.

<sup>139</sup> See also: Dawes *Laws* 640.

those matters covered by both.<sup>140</sup> Notably absent from the Code of 1771 is the final paragraph of the 1602 Act, which states that contracts not registered within three months have no effect.<sup>141</sup>

It is not clear why this provision was omitted from the 1771 restatement. Both the 1602 Act and the 1771 Code mention that the contract, once passed, will be “dans deux ou trois jours après”<sup>142</sup> delivered up for registration (a provision which has now been repealed).<sup>143</sup> This provision seems to give guidance only, for there is nothing to suggest that failure to meet its terms carries any consequences. However, it appears to demonstrate that in 1771 the practice was still to hand the passed contracts back to the parties, who thus bore the responsibility of taking them to be registered. The only sanction for failure to register is the three-month rule of the 1602 Act. Why was the rule omitted? Possible explanations are that registration always took place on time (and so the rule was superfluous), or that registration never took place on time and so the rule ceased to be operative (*la coutume abat le droit*).<sup>144</sup>

Le Geyt (writing broadly equidistant from 1602 and 1771) provides some guidance to the practice of his day.<sup>145</sup> He describes the provision of the 1602 Act containing the three-month rule as “nothing but menacing”,<sup>146</sup> and considers that it no longer renders a contract completely without effect. Rather, “La non-insertion dans le temps requis rend le contrat un fait privé.”<sup>147</sup> On this view, failure to register in time has consequences only for priority: passing contract transfers ownership, even if registration is not made. Le Geyt appears to report that registration within three

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<sup>140</sup> That registration must be made of all hereditary contracts passed before the court composed of the Bailiff, or his Lieutenant, and two Jurats; that the contract is to be formal in nature and signed by the Bailiff and Jurats; various stipulations regarding how registration is to be made by the official in charge of the register; that *engages* (or *engaiges*) and hypothecs are to be registered; and, that the register is to be public. *Engages* appear to be alienations of land or rights by the Crown, with the facility to repurchase what was sold at any time: Houard *Dictionnaire* vol 2, 132 – 133, “Engagement”, “Engagistes”; de Ferriere *Dictionnaire* vol 1, 578 – 579, “Engagement”, “Engagistes”.

<sup>141</sup> “Et en cas que aucun seroit refusant et que par sa faute délibérée ses droits ne seroient enregistrés dedans Trois mois au susdits livres tells droits recelés seront tenus de nul effet ni valeur.” 1602 Act.

<sup>142</sup> 1771 Code “Regîtres”. The formula in the 1602 Act is identical, save that “dans” is rendered “dedans”.

<sup>143</sup> *Loi(1840) sur le registre public des contrats*, art 6.

<sup>144</sup> Le Gros, 456, citing 1861 Report Evidence, 278 – 279, questions 6286, 6287.

<sup>145</sup> Le Geyt *Manuscrits* vol 4, 137, *et seq.*

<sup>146</sup> “cette clause n’est que comminatoire” *ibid* 139.

<sup>147</sup> *Ibid* 142.

months of passing contract meant that priority was acquired from the date of the deed.<sup>148</sup> Thus registration within three months preserved priority, rather than constituted it. Furthermore, later registration was possible, although a contract registered more than three months after the date that it was passed before the court took priority from the date of registration.<sup>149</sup>

Against this position, Le Geyt refers obliquely to “quelques sentences” in which contracts not registered within three months were nonetheless ranked by the date on which they were passed before the court.<sup>150</sup> He recognises that these decisions are “directly contrary” to the 1602 Act.<sup>151</sup> Perhaps in order to sideline these decisions, he provides no dates or other references for them (contrary to his usual practice). This suggests that they are to be considered as aberrations, rather than representative of the law.

The omission of the final provision of the 1602 Act from the Code of 1771, taken together with Le Geyt’s description of the practice of his day, indicate that the law was in the course of development. Subsequent enactments do not appear to have modified the moment of transfer, or the moment at which priority is acquired. It may be seen, therefore, that the position in Jersey today is similar to the position in Guernsey under the Ordinance of 1631.<sup>152</sup>

Legislative reform of the law on registration was made in 1840<sup>153</sup> and again in 1862.<sup>154</sup> The 1840 law introduced registration of the division of immoveable property of a deceased person by the heirs.<sup>155</sup> Article 6 (since repealed)<sup>156</sup> is of

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<sup>148</sup> *Ibid* 139. This passage is not easy to interpret. Some assistance may be obtained from: JLC CP8, 10 *et seq*; Kelleher “Effect”; Poingdestre *Lois* 101 – 104, generally. The 1880 Law (arts 44 – 46) has modified the law since Le Geyt’s day.

<sup>149</sup> Interestingly, a similar fate seems to have befallen art 58 of the French *Ordonnance de Moulins*: Argou, vol 1, 267 – 269.

<sup>150</sup> Le Geyt *Manuscrits* vol 4, 139.

<sup>151</sup> *Ibid*.

<sup>152</sup> No longer in force: ch 5 n136.

<sup>153</sup> *Loi (1840) sur le registre public des contrats*.

<sup>154</sup> *Loi (1862) sur le tenue du Registre Public*, now known as the *Loi (1862) sur le registre public des contrats* (see: Statute Law Revision (No 3) (Jersey) 1966, art 2, schedule 2). The four articles of the 1862 Law made administrative changes to facilitate searches, in pursuance of the aim that the register should be “aussi parfait que possible” (preamble to the Law).

<sup>155</sup> Art 2.

interest: all contracts passed before the court are to remain in the hands of the Chief Magistrate, who will deliver them for registration within three days.<sup>157</sup> It is unclear whether this altered the practice of the day, or whether it stated in legislative form what was already taking place. Either way, since at least 1840 it has been almost impossible to conceive of circumstances in which the three-month rule of the 1602 Act could be applied. Even in the unlikely event that a contract was lost for a period in excess of three months following it being passed in court, this would not fall foul of the three-month rule, which requires that the failure to register is due to the refusal and deliberate fault of a contracting party.<sup>158</sup> Thus, although the three-month rule may remain in force, in practice it lies dormant. (This is not so in Guernsey, where the parties take their contracts away and have responsibility for registering them, and priority is only acquired on registration.)<sup>159</sup>

Part 18 of the Royal Court Rules 2004 contains provisions on “Registration of Title, Hypothecs etc [...]”. Rule 18/3, “Registration of instruments relating to the title of immoveable property”, states:

“(1) No instrument relating to the title of immoveable property is valid unless registered in the Public Registry.

“(2) Any such instrument shall be deemed to be so registered if it is in the custody of the Greffier for the purposes of registration, and its effective date shall be deemed to be, if a contract, the date on which it was passed before Court or, if another instrument, the date on which its registration in the Public Registry was ordered by the Court.”<sup>160</sup>

“Instrument” is not defined by the Royal Court Rules. Given the terms of 18/3(2), it clearly includes hereditary contracts, but is intended to be broader than these alone.

According to rule 18/3(1), registration is required for a contract to have any validity at all. This suggests that the point at which transfer occurs is on registration, which,

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<sup>156</sup> By the Statute Law Revision (No 3) (Jersey) Law 1996, art 1, schedule 1.

<sup>157</sup> “Tout contrat après sa passation devant Justice restera entre les mains du Chef-Magistrat, qui le remettra dans trois jours à l’Enregistreur.”

<sup>158</sup> “Et en cas que aucun seroit refusant et que par sa faute délibérée ses droits ne seroient enregistrés dedans Trois mois [...]” 1602 Act.

<sup>159</sup> See: ch 5 n136.

<sup>160</sup> An earlier incarnation of this rule is rule 14/3 of the Royal Court Rules 1968 (R&O 5107).

according to rule 18/3(2), takes place when the hereditary contract is passed to the Greffier. The Royal Court Rules 2004 are, however, secondary legislation, deriving their authority from article 13(1) of the Royal Court (Jersey) Law 1948. The power conferred by article 13(1) is for the creation of administrative regulations only. Therefore, if previously transfer occurred when the contract was passed before the court, this has not changed.

#### **(4) Analysis: Passing Contract**

Assuming transfer of ownership to occur at the time that the contract is passed before the court, when is the crucial moment before which the transferee has no right and after which the transferor is divested of his or her right?

The Bailiff (or Lieutenant-Bailiff) and two Jurats are the only persons to sign<sup>161</sup> a hereditary contract. In doing so, they are not assenting to the contract on behalf of the parties, for the parties themselves have just assented by taking the oath before all present. The signatories are no more than witnesses.<sup>162</sup>

Normally, when a witness signs, the juridical act has already been performed (as with, for example, witnesses to a paper lease, or a will). The hereditary contract was historically a record of an act – the juridical act of transfer – that had already taken place.<sup>163</sup> Thus, the Bailiff and the Jurats’ role as witnesses suggests that transfer takes place when the parties take the oath. Yet that would be to overlook the particular identity of these witnesses: the Bailiff and Jurats are public officials, and it is in their capacity as public officials that they act in the Contract Court. Further, the juridical act is not taking place privately (as it would with a paper lease or a will), but publicly, in the court. The signatures of the Bailiff and Jurats are, in effect, a notarisation of the contract (the court being the original notary). Unlike ordinary

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<sup>161</sup> “An hereditary contract is duly authenticated if signed or initialled on either the first or the last page thereof by the persons before whom it has been passed.” Royal Court Rules 2004, rule 18/8. For historical interest, see Royal Court Rules 1968 (R&O 5107), rule 14/6.

<sup>162</sup> The final clause of the contract: “In witness whereof we have sealed these present letters with the Seal of the Royal Court; present hereto” or “En temoin de quoi nous avons Scellé ces Lettres du Sceau de la Court Royale. Présents à ce”. These words are followed by the names of the two Jurats present. The name of the Bailiff is given in the first, salutation, clause of the contract. If another is sitting in the place of the Bailiff, his name is recorded next to this clause, at the top of the contract.

<sup>163</sup> See: ch 5 A(3).

witnessing, the signing by the three public officials is an inherent part of the passing process. That process, therefore, is not complete until the second Jurat has signed, at which point transfer is effected. Thus, there are two distinct phases to the juridical act of transfer of immoveable property: the parties swearing the oath, and the contract being signed (or notarised). Transfer of ownership occurs, wholly and instantaneously, at the moment at which both phases have been completed:<sup>164</sup> validity and (precarious) priority is conferred upon the transaction at this point.

## (5) Analysis: Registration

Registration has the effect of conserving, or making permanent, the priority and validity acquired when a contract is passed.<sup>165</sup> Registration also provides publicity. Furthermore, Matthews and Nicolle consider, under reference to Le Gros and Le Geyt, that “there is [...] undoubtedly a principle that instruments once enrolled in the public records acquire a *prima facie* validity only displaced by a judicial decision or *inter partes* agreement”.<sup>166</sup> The passage from Le Gros is:

“De la nullité *ab initio* des contrats héréditaires.

“Pour qu’une partie puisse invoquer la nullité, il faut qu’elle y ait intérêt. En principe, ce qui est nul ne produit aucun effet legal. Mais, à Jersey, cette règle ne reçoit pas son application en matière des contrats passés en forme authentique sous le sceau du bailliage. Le Registre Public fait foi des contrats y enregistrés, et tout contrat nul *ab initio* qui n’a pas été annulé par acte judiciaire ou par contrat entre partie et partie subsiste en toute sa force et vigueur.”<sup>167</sup>

It is unremarkable to say that a party should have interest before he or she may bring an action in court, and it is logical that a nullity should be without legal effect. Le

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<sup>164</sup> Consistent with *C & G Developments Ltd v Duquemin* Guernsey Court of Appeal (1965) October 15 and 16, per Le Masurier, Bailiff of Jersey: “Counsel for both parties were agreed, but for reasons unexplained, that by the law of Guernsey, land could be lawfully conveyed in only one way. The conveyance does not depend on the act or consent of the parties themselves, but the sanction of the Royal Court is required to substantiate the transfer.” The final sentence is unfortunately worded: of course, transfer requires the consent of the parties as much as any prior agreement to transfer does. Perhaps the purpose of the sentence was to distinguish the Guernsey (and Jersey) process of immoveable transfer from those jurisdictions where transfer is made by consent of the parties alone. See also: Carey, 181, 183; Dawes *Laws* 640.

<sup>165</sup> See also: Vinding Kruse, 109, 116.

<sup>166</sup> Matthews & Nicolle, 8, para 1.33. Also: Nicolle *Immovable* 113 and *Deacon v Bower* (1978) JJ 39 at 49 *et seq*, per Crill, Deputy Bailiff.

<sup>167</sup> Le Gros, 430.

Gros' next assertion is interesting. Presumably, the "règle" (note the singular) to which he refers is that a nullity has no legal effect. So, a contract passed before the court (and registered) constitutes an exception to the general principle that that which is null has no legal effect. What Le Gros tells us is that the register "makes faith"<sup>168</sup> in relation to the contracts registered therein, and this he expands upon, stating that any contract which is actually a nullity but has not been formally annulled "subsists with all its force and vigour". That is its legal effect. Presumably, this means that the contract has the effect it would have had, were it not for its vice. Le Gros does not say that the vitiated contract is unassailable. Thus, on his view, on registration, a void contract would be made good but challengeable by registration. This seems a stronger statement of the effect of registration than that made by Matthews and Nicolle. On one reading, a hereditary contract which was completely ineffective is given effect to by registration, whereas Matthews and Nicolle seem to say merely that registration confers a presumption of validity.

Le Gros' passage proceeds to discuss what he describes as a statutory exception to the exception<sup>169</sup> that he has just given: article 42 of the *Loi (1880) sur la Propriété Foncière*.<sup>170</sup> He concludes with a reference to Le Geyt,<sup>171</sup> which, however, is silent on the effect of registration apart from making the related observation that hereditary contracts only become valid when certain formalities are performed.<sup>172</sup>

In addition to the reference to Le Gros, Matthews and Nicolle also cite the following article in Le Geyt's *Code*:

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<sup>168</sup> Curiously, the Scottish Registration Act of 1617 uses the same language: "mak faith", and later "mak no faithe".

<sup>169</sup> The rule is that a nullity has no legal effect. The exception to this (according to Le Gros) is that a registered contract which is void *ab initio* does have effect until it is annulled. The exception to this exception is found in art 42 of the 1880 Law.

<sup>170</sup> "La femme alliée de mari, qui n'est point séparée de lui quant aux biens, ne pourra être contrainte d'accepter le remboursement d'une rente ancienne, ou d'une rente ou autre hypothèque conventionnelle nouvelle, à elle appartenant ; et le remboursement desdites rentes et hypothèques fait au mari sans le consentement libre et exprès de la femme, exprimé au moyen d'un contrat passé devant Justice, sera nul *ab initio*, sans qu'il soit nécessaire pour la femme d'en faire prononcer la nullité après le décès du mari."

<sup>171</sup> It is assumed that Le Gros's reference is to Le Geyt's *Manuscripts*. The passage referred to concerns validity of contracts and court judgments: vol 1, 118 *et seq.*

<sup>172</sup> Le Geyt *Manuscripts* vol 1, 119.



“Les Escritures publiques sont de la main de personnes autorisées pour cela par des charge qu’elles portent dans l’Etat, & ces Escritures ne peuvent guere estre contredites sans la formalité d’une inscription en faux.”<sup>173</sup>

This is found in the context of formalities under the heading “Des Escritures”. “Escritures publiques” appear to be writings made by a public official in his or her capacity as such.<sup>174</sup> Consequently, hereditary contracts may be described as “Escritures publiques”.<sup>175</sup> The *inscription de faux* is an action in French private law by which a notarised document may be challenged.<sup>176</sup> Notarial deeds are probative as to all the matters which it is possible for the notary to know, such as the identity of the parties, and the date on which the deed was signed.<sup>177</sup> It seems that Le Geyt, in the quotation above, refers to a similar action in Jersey law.<sup>178</sup> Le Gros too states that hereditary contracts must be challenged by formal process:<sup>179</sup> just as creation of a hereditary contract can only be done by formal process, so too is there a formal process for attacking the contract.

Is Le Geyt to be read as saying that registration confers a right where there would otherwise be none (at least until a successful *inscription de faux* is made)? The article from his *Code* is consistent with both Le Gros and Matthews and Nicolle, but there is nothing to suggest that his view goes as far as Le Gros’s. If Le Gros is put aside for a moment, Le Geyt’s article (and article 42 of the 1880 law) could mean merely that registration shifts the burden of proof.<sup>180</sup> This is a more convincing reading, for it does not lead to the result that a fraudster’s contract, once registered, would acquire a validity which it surely does not deserve. Further, Le Geyt’s article on “Escritures publiques” is found in a section of his *Code* concerned with the different ways in which proof can be established, not the way in which rights are constituted. In

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<sup>173</sup> *Code Le Geyt* 2.7.7.

<sup>174</sup> See: Houard *Dictionnaire* vol 2, 87 “Escritures”.

<sup>175</sup> See also *Le Nouveau Petit Robert* (1995 edn) 716, “Écrivain public”: “personne qui rédige des lettres, des actes, pour ceux qui ne savent pas écrire ou qui maîtrisent mal l’écrit”.

<sup>176</sup> *Code de procédure civile*, arts 306, 314. The related *Crime de faux* is mentioned in Poingdestre *Lois* 254.

<sup>177</sup> Art 1319 CC. See: Herzog, 327.

<sup>178</sup> See also: Carey, 230; Le Geyt *Manuscripts* vol 4, 131; Houard, *Dictionnaire*, vol 3, 42 – 44; Hemery & Dumaresq, 25; Pipon & Durell, 28.

<sup>179</sup> Le Gros, 430.

<sup>180</sup> For moveables, where the burden of proof lies in relation to ownership is dependent on possession.

modern French law “fait foi” may be translated as “probative”,<sup>181</sup> if that word is taken to mean a presumption that some aspect, or aspects, concerning the deed is valid. Thus, on the basis of Le Geyt and Matthews and Nicolle, it is suggested that the effect of registration is to render the contract probative.<sup>182</sup>

Of what does this probativity consist? As already seen, one approach is to separate the matters which can be known by the notarising body from those which cannot be so known. For example, the probativity conferred by registration could extend to the date on which the contract was passed before the court, the identity of the parties (imputing the advocates’ knowledge of the parties to the court), the date of registration (given that this effectively now takes place in the court room),<sup>183</sup> and that the formalities required to be performed by the court have been validly executed. Were the presumption of validity to go beyond the matters within the immediate knowledge of the court, probativity could also extend to the content of the contract: for example, that the immoveable transferred was owned by the putative transferor immediately prior to the transfer. Perhaps it was this that Le Gros had in mind when he penned his passage. It seems certain that the first type of probativity applies to registered deeds (that is, probativity as to those matters within the immediate, and usual, knowledge of the court). Although probativity as to the contents of the deed is not at odds with the sources, it seems unlikely that it extends so far, in the absence of express authority to that effect.

Returning to the Royal Court Rules in light of the above discussion, rule 18/3(1) could be read to mean that no contract can be used as evidence unless it has been registered, because rule 18/3(1) does not say that registration is constitutive of validity, but that registration is a necessary, even if not a sufficient, condition for validity:<sup>184</sup>

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<sup>181</sup> Compare, for example, the French and English texts of art 1319(1) CC on [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr). See also: *Le Nouveau Petit Robert* (1995 edn) 939 “FOI [...] FAIRE FOI: démontrer la véracité, porter témoignage, donner force probante.”

<sup>182</sup> See also: Le Geyt *Manuscrits* vol 4, 141, 131.

<sup>183</sup> Royal Court Rules 2004, r18/3(2).

<sup>184</sup> This is true of instruments of sasine in Scotland.

“(1) No instrument relating to the title of immovable property is valid unless registered in the Public Registry.”

On this view, “valid” ought to be preceded by “presumed to be”, or followed by “proof”, if the rule were to be unambiguous.

When taken as a whole, what has been written, legislatively or otherwise, about the effect of registration does not provide clear guidance. One possibility is that apparently suggested by Le Gros: registration turns an invalid deed into a valid one, at least for a time. This is not at odds with rule 18/3(1), Matthews and Nicolle, or article 42 of the 1880 Law. However, this interpretation does not seem wholly to fit with Le Geyt’s view. There is a specific procedure for challenging registered deeds, but this does not mean that those deeds are valid until shown to be otherwise. Neither – significantly – does Le Gros’s interpretation fit with the function of registration as reducing the opportunity for fraud for, as already observed, a fraudster’s void contract would acquire undeserved validity on registration.

The other possibility considered is that registration confers a presumption of, *inter alia*, valid execution upon a deed. This view is consistent with the article from Le Geyt’s *Code*, article 42 of the 1880 Law, and Matthews and Nicolle. As suggested above, rule 18/3(1) can be read to fit with this position. Clearly, Le Gros is at odds with this conclusion. It may be that he is simply wrong. This seems likely: none of the sources on registration since 1602 suggests that registration confers validity on a nullity.

In practice, the window between the hereditary contract being passed before the court and its registration is now very small, for, under rule 18/3(2) of the Royal Court Rules 2004, registration of a contract affecting title to land is deemed to have taken place once the contract is “in the custody of the Greffier for the purposes of registration”. The contract is in the hands of Greffier for this purpose when it is given back to him after the Bailiff and Jurats have signed or initialled it.

## **(6) The Nature of the Hereditary Contract**

Through the development of the process of immovable transfer, a new role for the hereditary contract has crystallised. The contract is still a record of a transaction that has already taken place, and this aspect of its character facilitates the important business of registration for posterity and publicity. But the contract is itself an inherent and indispensable part of the transaction of which it is a record. Therefore, it would be wholly appropriate to formulate hereditary contracts in the present tense.

## **C. REQUIREMENTS OF FORM**

### **(1) Agreements Concluded Prior to the Contract Court**

Sometimes there is a preliminary agreement between the parties, created prior to passing contract and distinct from the hereditary contract. For example, parties to a transaction for the sale and transfer of high-value property may decide that a deposit will be paid by the purchaser to the vendor, to be forfeited if, through the fault of the purchaser, the transaction does not complete.

#### *(a) Does the agreement need to be in writing?*

In Guernsey, a preliminary agreement must be in writing and signed.<sup>185</sup> In Jersey, the position is less clear.<sup>186</sup> Le Geyt states in his *Code* that, in order to constitute proof of the arrangement, a private agreement must be in written form, signed by the obligated party and two witnesses.<sup>187</sup> However, this relates to proof and not to validity, on which the article is silent.

In *Guiton v de Gruchy* in 1870 the full court refused to make an award of damages for failure to pass a hereditary contract to transfer land because there was no prior written agreement between the parties containing a stipulated penalty clause.<sup>188</sup> That decision was later considered in the 1968 case of *Basden Hotels v Dormy Hotels*, which referred to Le Geyt's *Code*, 2.9.5:

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<sup>185</sup> Conveyancing (Guernsey) Law, 1996, ss1(1), 1(3), respectively. Previously, writing was not required: *Gauson v Harris* (1995) 20.GLJ.42.

<sup>186</sup> See, for example: JLC CP6, D.

<sup>187</sup> 2.7.1.

<sup>188</sup> (1870) 9 CR 68, 72.

“Le Titre d’un heritage ne se peut prouver par Tesmoins de vive voix, tous Contracts hereditaux devant estre passez par Serment devant le Magistrat, & n’est celuy qui se retracte d’un accord heredital non passé dans cette forme sujet qu’à payer le dedit, s’il y en a, & les despens & dommages encourus par sa faute. On tolere que des assignations de rente & des eschanges qui, d’accord de partie, se presentent & se lisent publiquement en Cour, passent sans Serment & soient insinuez sur les Rolles des Cours Ordinaires pour valoir à perpetuité.”

In this passage, Le Geyt presents the requirement for writing as a rule of evidence only.

Based on this passage, the court in *Basden* concluded that, although *Guiton* could be read as requiring both a written agreement and a stipulated penalty clause before any remedy can be given, it is only a written agreement that is actually necessary.<sup>189</sup> It should be noted, however, that Le Geyt does not say whether the broken “accord hérédital” must be in writing. On the basis of Le Geyt alone, it seems that it is possible to conclude an agreement without the intervention of writing, but this was not the approach taken by the courts in *Guiton* and in *Basden*. Although these cases concerned the availability of a remedy, it is unsatisfactory to say that it is possible to have a right but no remedy. Assuming the court not to have intended such a result, two things may be observed: first, that writing was considered by the courts to be a requirement for the validity (as opposed to proof) of a contract relating to the transfer of land; second, that this represents a divergence from Le Geyt’s *Code*. A transition has been made from the requirement of writing as a rule of evidence, to the requirement of writing for validity.<sup>190</sup>

The view of the court in *Basden* (that a written agreement is required before the court will award a remedy, but a stipulated penalty is not) was upheld in the 1974 case of *York Street Pharmacy v Rault*,<sup>191</sup> and also in 1977 in *Romeril v Davis*.<sup>192</sup> Although in

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<sup>189</sup> (1968) 1 JJ 911, 915, per Bois, Deputy Bailiff (also: 916 “The situation therefore is that the courts of this Island can penalise a faithless promisor ‘à héritage’ where he has given his promise in writing. Where there is nothing in writing, he can shield himself behind the maxim ‘promesse à héritage ne vaut’.”).

<sup>190</sup> Also: *Symes v Couch* (1978) JJ 119, 147, per Crill, Deputy Bailiff.

<sup>191</sup> (1974) 2 JJ 65, 69, per Le Masurier, Bailiff.

*Romeril* the court determined that concluded intention to contract was absent, there is some discussion of the requirements for an “accord hérédital”,<sup>193</sup> including the assertion (not made in other cases) that both parties must sign a single written agreement.<sup>194</sup>

The following year, in 1978, the decision in *Symes v Couch*<sup>195</sup> seemed to step back from a rigid requirement for writing. There was an oral agreement that the defendant company would transfer a house to the plaintiff once Housing Committee consent had been obtained. Consent had not been granted, but when the defendant company instructed the third-party tenant to pay rent to it, instead of to the plaintiff who had been collecting the rent until that time, the plaintiff sought clarification of the position from the court. The defendant company argued that the lack of writing and lack of a penalty clause made the agreement unenforceable.<sup>196</sup> The court held that there was an oral agreement between the parties,<sup>197</sup> and that, in principle,<sup>198</sup> the plaintiff could have a remedy in damages based on that oral agreement.<sup>199</sup> The reasons for this decision merit some examination.

Having determined that there was “an oral agreement, evidenced in writing” (that is, by an exchange of correspondence) between the parties, the court considered the remedies available to the plaintiff. Was writing necessary in order to obtain a remedy for non-performance? It was observed that specific performance of an “accord hérédital” (whether written or not) has been consistently rejected by the court.<sup>200</sup> The court summarised the previous case-law thus:

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<sup>192</sup> (1977) JJ 135.

<sup>193</sup> *Ibid* 138 – 140, per Crill, Deputy Bailiff.

<sup>194</sup> *Ibid* 139.

<sup>195</sup> (1978) JJ 119.

<sup>196</sup> *Ibid* 122, per Crill, Deputy Bailiff.

<sup>197</sup> *Ibid* 140, 148.

<sup>198</sup> Should the plaintiff obtain housing consent and the defendant company refuse to transfer the house to him, the plaintiff would be able to obtain damages: *ibid* 149.

<sup>199</sup> *Ibid* 149 (see: 121 – 122 for details of the Order of Justice).

<sup>200</sup> *Ibid* 140 – 149.

“[...] it appears from most of the cases that what was sought to be enforced was a simple promise, sometimes oral, occasionally without the mention of a penalty in default, and unsupported by any act by the party relying on it.”<sup>201</sup>

Of these characteristics, weight was placed particularly on the element of reliance (or its absence).

The court proceeded to consider the position in England where “the Statute of Frauds,<sup>[202]</sup> now replaced by Section 40<sup>[203]</sup> of the Law of Property Act, 1925, produced almost the same effect as the customary law of Jersey”: an agreement for the transfer of land must be in written, executed form. However, in England, where writing was absent but there had been some performance of the agreement, specific performance could be obtained by bringing a suit in equity.<sup>204</sup> Could a parallel result be achieved in Jersey? There seems to have been some doubt over whether specific performance was available as a remedy at all in Jersey law, but the court pointed to its earlier judgment in *York Street Pharmacy v Rault*<sup>205</sup> where it was concluded that, generally, the remedy does exist in the jurisdiction.<sup>206</sup>

Reference was made to the English case of *Steadman v Steadman* (which in turn refers to Fry’s *Specific Performance*)<sup>207</sup> and the criteria set out therein to be satisfied in order to demonstrate part performance.<sup>208</sup> The court was clear that without either writing or part performance, it would be unable to provide any remedy because this would be directly contrary to an established line of Jersey case-law.<sup>209</sup> Although

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<sup>201</sup> *Ibid* 140.

<sup>202</sup> Of 1677.

<sup>203</sup> Section 40(1).

<sup>204</sup> *Symes v Couch* (1978) JJ 119, 140 – 141, per Crill, Deputy Bailiff.

<sup>205</sup> (1974) 2 JJ 65, 69, per Le Masurier, Bailiff.

<sup>206</sup> *Symes v Couch* (1978) JJ 119, 141 – 142, per Crill, Deputy Bailiff.

<sup>207</sup> This is reached by a circuitous route: “In ‘*Steadman v. Steadman*’, at page 991, letter e., Lord Dilhorne cited a passage from ‘*Chapronière v. Lambert*’ in which Warrington L.J. referred to Fry on *Specific Performance*.” *Ibid* 142.

<sup>208</sup> “(1) the acts of part performance must be such as not only to be referable to a contract such as alleged but to be referable to no other title: (2) they must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing: (3) the contract to which they refer must be such as in its own nature is enforceable by the Court; and (4) there must be proper parol evidence of the contract which is let in by the acts of part performance.” *Ibid* 142.

<sup>209</sup> *Ibid* 144.

there could be doubt as to whether all of the *Steadman* criteria were satisfied,<sup>210</sup> the court was clearly leaning towards finding some remedy for the plaintiff; it declared that a refusal to pass contract (were the Housing Committee to consent) would be fraudulent “by taking advantage of the lack of a written memorandum”.<sup>211</sup> Specific performance was rejected because the court considered it had “no power” to grant it.<sup>212</sup> Instead, damages were awarded, for “to leave the plaintiff without a remedy would be to set at naught the equitable jurisdiction of the Royal Court.”<sup>213</sup>

It has been suggested that the effect of *Symes v Couch* is to relax the requirement for a written agreement only where the agreement is evidenced in writing (as it was in *Symes*).<sup>214</sup> This seems doubtful. As the judgment of the court develops, it is made clear that the reason for the relaxation is that there had been some performance of the agreement between the parties.<sup>215</sup> In broad terms, it seems that the plaintiff in *Symes* relied upon an assertion made on behalf of the defendant company, to the company’s knowledge, and to the plaintiff’s detriment. Therefore, the basis of the decision appears to be based on the English Equitable doctrine of part performance.<sup>216</sup> Consequently, the decision in *Symes* does not affect the rule established in the earlier cases (that preliminary contracts relating to the transfer of immoveables must be in writing), but it does illustrate a way around it in certain circumstances.

In summary, the position now seems to be that writing is a requirement for the constitution of contracts relating to the transfer of land (what may be called an “agreement of sale”). This does not appear to be true of deposit agreements, but, following *Le Geyt*,<sup>217</sup> witnessed writing would constitute proof of the arrangement. In any case, it is clearly best practice to reduce a deposit agreement to writing. Given the requirement of writing for agreements of sale, it may be observed that, where

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<sup>210</sup> The doubt was over the third: *ibid* 143.

<sup>211</sup> *Ibid* 143.

<sup>212</sup> *Ibid* 148.

<sup>213</sup> *Ibid* 149.

<sup>214</sup> Matthews & Nicolle, 8, para 1.32.

<sup>215</sup> Noted also in: Nicolle *Immovable* 102.

<sup>216</sup> Abolished by the Law of Property (Miscellaneous Provisions) Act 1989, s2(8).

<sup>217</sup> *Code Le Geyt* 2.7.1.



there is no such agreement, there are no legally binding obligations between the parties prior to appearance at the Contract Court.

*(b) Requirement of a stipulated penalty clause in order to be able to claim damages?*

If there is a concluded agreement prior to the parties' appearance at the Contract Court and that agreement is broken, the court may award damages for the breach. In the case of *Guiton v de Gruchy*,<sup>218</sup> the court appears to take the view that damages could not be awarded in the absence of a stipulated penalty for breach contained within the contract.<sup>219</sup> It is hard to see why, but in any event Le Geyt's view<sup>220</sup> contradicts this and more recent judgments have expressly rejected that aspect of the 1870 decision.<sup>221</sup> It is submitted that this latter position is the correct one. Thus, damages may be awarded whether or not there is a stipulated pecuniary penalty for non-performance. Additionally, it was held by the court in *Basden Hotels v Dormy Hotels* (referring to Le Geyt's *Code* and to Pothier) that where a penalty clause is included in the agreement the court has the power to reduce it.<sup>222</sup>

*(c) Reform*

The Jersey Law Commission is unhappy with the uncertainty of the law in this area and has recommended legislating for a rule that all agreements relating to transactions "in immovable property [...] should contain prescribed essential terms in writing [...] and be signed by both parties in the presence of independent witnesses".<sup>223</sup> *Symes* would be overruled. The Commission believes that constructive trusts, estoppel, and rectification – all of which exist in Jersey law – would provide

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<sup>218</sup> (1870) 9 CR 68.

<sup>219</sup> *Ibid* 72.

<sup>220</sup> *Code Le Geyt* 2.9.5.

<sup>221</sup> *Basden Hotels Limited v Dormy Hotels Limited* (1968) 1 JJ 911, 915, per Bois, Deputy Bailiff; *Symes v Couch* (1978) JJ 119, 147, per Crill, Deputy Bailiff (referring to *Basden*). *Cf.* JLC CP6, D, 2.1.

<sup>222</sup> (1968) 1 JJ 911, 915, per Bois, Deputy Bailiff. See also: *Arthur v Procr Gen de Desreaux* (1882) 208 Ex 95, 101.

<sup>223</sup> JLC CP6, D, 1.5.

the flexibility in the new rule that justice may require.<sup>224</sup> As the Commission notes, this “would not be radically different from existing Jersey law”.<sup>225</sup>

## **(2) The Hereditary Contract**

Hereditary contracts in both Jersey and Guernsey must be in writing.<sup>226</sup> A requirement of writing is usual in other countries too,<sup>227</sup> and facilitates ongoing publicity by providing something which can form the basis of a land register entry. The hereditary contract is, however, unusual in that the parties to it do not sign it.

The Royal Commissioners in their report on the laws of Jersey in 1861 suggested that hereditary contracts should be signed by the parties.<sup>228</sup> There is some discussion of the point in the evidence appended to the report; the opinion in favour of signing was not unanimous.<sup>229</sup> In spite of the Commissioners’ suggestion, signing of hereditary contracts was never introduced. One of the objections given in the evidence was on grounds of the additional cost because the Greffier would need to retain the original contracts, which was not the practice at the time.<sup>230</sup> This particular objection no longer pertains. Mr Godfray (a Jersey advocate) saw no pressing need for signing because the system had worked well for many years and, while signing may have made a difference in a case referred to (but not named) in the evidence, it would not eliminate fraud.<sup>231</sup> Even if signing were to be introduced, it was not suggested that it should replace passing contract.<sup>232</sup>

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<sup>224</sup> *Ibid* 1.4.

<sup>225</sup> *Ibid* 1.5.

<sup>226</sup> Jersey: “tous passements qui seront fait par devant le Bailly ou son lieutenant et deux ou trois de Justice, seront écrits en une lettre formelle” 1602 Act; “Tous Contrats ou Passemens qui seront faits par devant le Bailly ou son Lieutenant, et deux Jurés-Justiciers, seront écrits en Lettres formelles” 1771 Code. Guernsey: Conveyancing (Guernsey) Law, 1996, ss1(1), 1(6).

<sup>227</sup> For example, in Scotland, the common law requirement (see Stair: 335 – 338, 2.3.11, 2.3.13, 2.3.14) was made statutory by the Requirements of Writing (Scotland) Act 1995, s1(2)(b). See also: s16 of the Deeds Registries Act 1937 (South Africa).

<sup>228</sup> 1861 Report, xviii.

<sup>229</sup> *Ibid* Evidence, 312 – 314. Passing reference is also made at 215, question 5056.

<sup>230</sup> *Ibid* 313, question 7017.

<sup>231</sup> *Ibid* questions 7013, 7014.

<sup>232</sup> *Ibid* questions 7016, 7017. Signing the register instead of the deed is also suggested: 314, question 7025.

In 2002, the Jersey Law Commission proposed that the passing process be abolished in favour of a system where all the parties sign the contract before a Jersey advocate or solicitor acting as witness. The witness would bear the responsibility of delivering the contract for registration.<sup>233</sup> In the same Consultation Paper, the Commission also proposed that hereditary contracts should be drafted in English. To date, the latter proposal has been implemented,<sup>234</sup> but the former has not.

It may be noted that, in practical terms, signing has already been introduced as an alternative to a party appearing in court in order to pass contract. Under the Powers of Attorney (Jersey) Law 1995, article 3(2), it is possible for a party to appoint another to pass contract in his or her stead. Of course, this does not avoid the necessity for someone to pass contract, but it removes the need for a particular person to appear in court and so serves to limit the inconvenience to the parties, if they consider passing contract as such.

## D. ENFORCEMENT

### (1) Enforcement of an Agreement Concluded Prior to the Contract Court

In many cases, there is no agreement prior to that made in the Contract Court and thus nothing to enforce. Where there is a preliminary agreement, in what way will this be enforced by the court?

#### (a) *No specific performance*: *nulle promesse à héritage ne vaut*

It is a rule of some antiquity that contracts relating to land that have not been passed in due form before the Contract Court cannot be enforced by specific performance. This rule has become connected with the formula *nulle promesse à héritage ne vaut*, which was included by Le Gros in his collection of maxims.<sup>235</sup> Although the rule is given by Le Geyt in his Code (so was presumably well established by the time Le Geyt was writing), the actual maxim *nulle promesse à héritage ne vaut* – or any of its

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<sup>233</sup> JLC CP6, B.

<sup>234</sup> Royal Court Rules 2004, r20/9(2).

<sup>235</sup> Le Gros, 459 (“Promesse à Héritage ne vaut”). See also discussion: Matthews & Nicolle, 8, para 1.30; Nicolle *Immovable* 100.

variations –<sup>236</sup> does not appear until the twentieth century. It is found, for example, in the court record for the case *Neame, veuve Palmer et au v Sinatt* (1925),<sup>237</sup> and is also recorded by Le Gros<sup>238</sup> (with no supporting references). Nonetheless, the rule itself is clearly long-established: specific performance is in principle unavailable where the contract relates to land.

It is important to note that the maxim is of application only in those cases where there is some contractual agreement prior to the failure to pass contract in the Contract Court. It seems that such an agreement is common only in Guernsey.<sup>239</sup> In Jersey, the number of cases where the rule applies must be few in number (albeit that the scope of the rule is, obviously, wider than merely transfer of ownership).<sup>240</sup>

In *Basden Hotels v Dormy Hotels* the court states that the reason for its inability to compel someone to pass contract is that “the obligation is one ‘*quae non est in dando, sed in faciendo*’ (see Pothier, *Traité du Contrat de Vente*, Partie VI, Chap. I, Nos. 480 et seq.).”<sup>241</sup> In fact, Pothier sets out both the proposition made, and an opposing view,<sup>242</sup> before concluding that the law of France has followed the latter. The following part of the passage bears reproduction:

“D’un autre côté on dira que la règle, *Nemo potest cogi ad factum*, et celle que les obligations *quae in faciendo consistunt*, se résolvent nécessairement en dommages et interest, ne reçoivent d’application qu’à l’égard des obligations de faits extérieurs et corporels, telle qu’est l’obligations de celui qui se seroit obligé de copier mes cahiers, lesquels faits ne peuvent se suppléer que par une condamnation de dommages et interest. Mais le fait qui est l’objet d’une promesse de vendre n’est pas un fait extérieur et corporel de la personne du débiteur: il peut le suppléer par un jugement, comme nous l’avons rapporté, qui ordonnera que, faute par le débiteur de vouloir passer un contrat de vente, le jugement vaudra pour contrat. Cette opinion paroît suivie dans la pratique,

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<sup>236</sup> For example: *Promesse à héritage ne vaut (rien)*, or *À héritage (nulle) promesse ne vaut*.

<sup>237</sup> 233 Ex 479, 484.

<sup>238</sup> Le Gros, 459.

<sup>239</sup> Although an “Agreement of Sale” is referred to in *Romeril v Davis* (1977) JJ 135, 137, per Crill, Deputy Bailiff.

<sup>240</sup> For example, leases, which are moveable if for a term of nine years or fewer and immovable (and therefore must be passed before the court) if for a longer period: *Code Le Geyt* 1.1.17.

<sup>241</sup> *Basden Hotels v Dormy Hotels* (1968) 1 JJ 911, 914, per Bois, Deputy Bailiff.

<sup>242</sup> Pothier *Traité du contrat de vente* para 479.

comme étant la plus conforme à la fidélité qui doit régner entre les hommes pour l'accomplissement de leurs promesses.”

Although Pothier sets the two views out as alternatives, rather than definitively concluding that there is some fatal logical flaw with the one which was rejected by practice, the passage as a whole has the effect of an argument against the proposition that the court in *Basden* seems to assert it supports.

In England, the primary remedy for breach of contract is damages.<sup>243</sup> Many jurisdictions do not adopt this approach, but neither do they recognise an absolute right to specific performance.<sup>244</sup> For example, if an order of specific performance will be unduly burdensome on the defaulting party the courts will decline to grant it. Specific performance as the primary remedy for breach of non-monetary obligations is the model adopted by the Draft Common Frame of Reference,<sup>245</sup> subject to a handful of exceptions.<sup>246</sup> The Jersey law on remedies in the general contractual sphere is not wholly clear.<sup>247</sup>

*(b) The reason for the rule: first justification*

In Jersey, two justifications for the rule have been advanced: the principle of *conservation du bien dans la famille*, and that a man cannot be compelled to take an oath against his will. Their nature differs. *Conservation du bien dans la famille* expresses a policy preference which underlies more than one legal rule. The inability to compel a person to take an oath is a statement of fact and thus expresses a practical problem rather than a legal principle. This can be seen from the order the

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<sup>243</sup> Beale *Chitty* 1719, para 27-005.

<sup>244</sup> For example, in Scotland, where specific implement (performance) is the primary remedy, although it is discretionary: McBryde, para 23.10 – 23.27; Walker *Remedies* 276. In sales of land, there is a special variant for implement of the sale obligation, “adjudication in implement”: Rules of the Court of Session, Form 13.2-B(21); Sheriff Courts (Scotland) Act 1907, s5A. The position in French law is well summarised in von Bar & Clive *DCFR (Full)* vol 1, 834 – 835. For South Africa: G Lubbe “Contractual Derogation and the Discretion to Refuse an Order for Specific Performance in South African Law” in Smits *Specific*. See also: H Dondorp “Precise Cogi: Enforcing Specific Performance in Medieval Legal Scholarship” in Hallebeek & Dondorp, 32 – 41.

<sup>245</sup> Von Bar & Clive *DCFR (Full)*.

<sup>246</sup> III. 3:302. The exceptions, in III. 3:302(3), are that performance is (a) “unlawful or impossible” (b) “unreasonably burdensome or expensive” (c) “of such a personal character that it would be unreasonable to enforce it”.

<sup>247</sup> Related to this, see: Supply of Goods and Services (Jersey) Law 2009, arts 86, 87.

court makes when it is asked to enforce a transfer: the recalcitrant party is to pass the contract or pay damages.<sup>248</sup>

The first of these justifications – the feudal principle *conservation du bien dans la famille* – has been progressively eroded by an increased statutory loosening of the rules on succession to immoveables.<sup>249</sup> The *Loi (1851) sur les testaments d'immeubles* made it possible to make a will of certain immoveable property. Thereafter, the *Loi (1926) sur les héritages propres* enabled a person to leave immoveable property to whomever he wished. Finally, the *Loi (1960) modifiant le droit coutumier* abolished the rights of an heir to have contracts or testaments set aside on certain grounds.<sup>250</sup> A surviving relative no longer has the right to challenge a will of immoveable property simply by virtue of being related to the deceased. The court in *Basden* commented:

“We come therefore to the conclusion that the effect of the Law of 1926 is virtually to set at naught the fundamental principle of Jersey law “de la conservation du bien dans la famille” so far as immoveables are concerned, and consequently that where the only reason why an obligation entered into by and enforceable against a person in relation to immoveables should not be enforceable against his successor in title is that the successor is an heir, the heir no longer has the right to avoid the obligation.”<sup>251</sup>

If the *conservation* principle were the only root of the rule preventing specific performance, the rule has become detached from the idea which gave it life. That aside, it is doubtful whether *conservation du bien dans la famille* can actually be a foundation for the rule, for the rule neither prevents transfer nor the creation of limited real rights.

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<sup>248</sup> See: *Symes v Couch* (1978) JJ 119, 141, per Crill, Deputy Bailiff.

<sup>249</sup> Le Gros “Préface” IV.

<sup>250</sup> Art 1.

<sup>251</sup> *Basden Hotels Limited v Dormy Hotels Limited* (1968) 1 JJ 911, 917, per Bois, Deputy Bailiff.

(c) *The reason for the rule: second justification*

Another reason for the rule is given by Mr Dupré<sup>252</sup> in his answers to the Royal Commission in 1859:<sup>253</sup> a man cannot be compelled to take an oath against his will.<sup>254</sup> Nevertheless, the law departs from this position in three instances.

Article 36 of the Matrimonial Causes (Jersey) Law 1949 provides that a person nominated by the court can convey property on behalf of a recalcitrant party, at that party's cost, to give effect to an order of the court pursuant to the 1949 Law. *Ritson v Slous* from 1973<sup>255</sup> and *Lane v Lane* from 1985<sup>256</sup> apply this model to other circumstances.

In *Ritson*, a bungalow and land were left by will to seven children in equal shares.<sup>257</sup> The Ritsons bought six of these shares. The Slouses held the remaining one seventh share. Under Jersey law, as in Roman law,<sup>258</sup> co-owners are not normally required to remain in co-ownership and may raise a court action to bring the co-ownership to an end.<sup>259</sup> The reason for this rule is that co-ownership is an unstable relationship, from which one should always be able to escape.<sup>260</sup> The Slouses refused to sell their share to the Ritsons, but when the latter threatened to raise a court action the Slouses agreed to a sale by auction.<sup>261</sup> The Ritsons' £21,500 bid was the highest at auction.<sup>262</sup> However, housing law and regulations meant that the whole property could be sold for a maximum of £3,388 only,<sup>263</sup> because the land was intended for development.<sup>264</sup>

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<sup>252</sup> The then Attorney General.

<sup>253</sup> 1861 Report Evidence, 527, question 10,801. See also: *Gallichan v Gallichan* (1954) 1 JJ 57, 60, 65, per Le Quesne, Lieutenant Bailiff; *Symes v Couch* (1978) JJ 119, 140, per Crill, Deputy Bailiff.

<sup>254</sup> The Jersey Law Commission describes this as the "reason most often stated for non-availability of specific performance in relation to immovables." JLC CP6, D, 2.1.

<sup>255</sup> 1 JJ 2341.

<sup>256</sup> 1985-86 JLR 48.

<sup>257</sup> *Ritson v Slous* (1973) 1 JJ 2341, 2342, per Le Masurier, Bailiff.

<sup>258</sup> The *actio communi dividundo*. See: Justinian *Codex* 3.37.5 (*In communionem vel societatem nemo compellitur invitus detineri*); D.10.3; Justinian *Institutes* 4.6.20, 4.17.5.

<sup>259</sup> (1973) 1 JJ 2341, 2346, per Le Masurier, Bailiff. It is a maxim of customary law that *nul n'est tenu de rester dans l'indivision*. But see also comments against this being an absolute right: *Haas v Duquemin* 2002 JLR 27, 39, para 39, per Hodge, JA.

<sup>260</sup> See: D Kleyn & S Wortley "Co-ownership" in Zimmermann & Visser *Mixed* 703, 713: "It has often been noted that *communio est mater rixarum*—co-ownership is the mother of disputes."

<sup>261</sup> (1973) 1 JJ 2341, 2342, per Le Masurier, Bailiff.

<sup>262</sup> *Ibid* 2342.

<sup>263</sup> This was done under the Housing (Extension of Powers) (Jersey) Law 1969, art 10, and the Housing (General Provisions) (Jersey) Regulations 1970, regulation 4(a). Imposing a maximum price

On account of the low price, the Slouses refused to pass contract. An action of *licitation* was raised and the court granted an order to sell. Nonetheless, the Slouses continued to refuse to pass contract and the Ritsons returned to the court, seeking relief.<sup>265</sup> The Slouses were ordered to convey the property within six weeks or the Deputy Viscount<sup>266</sup> was empowered to convey the property in their stead.<sup>267</sup> The court was:

“satisfied that it is the incontestable right of the owner of an undivided share of any real estate to enforce the sale of such real estate, and *we know of no rule of law* which prevents this Court from divesting a person of his property when the justice of a case dictates that that be done.”<sup>268</sup>

The judgment refers neither to the maxim *nulle promesse à héritage ne vaut* nor to the rule it is said to express. The court record is equally silent.<sup>269</sup> Given this, the judgment could be seen to be *per incuriam*, not formally affecting the authority of the line of cases applying the rule.

Nevertheless, something can be said regarding the interaction of the rule and common ownership. Common ownership is a special regime with features that differ from the normal rules of ownership, such as the capacity of one co-owner to bring the co-ownership to an end, which forces the other co-owner(s) to enter into a sale or alienation. The court in *Ritson* is protective of this capacity (“the incontestable right [...] to enforce the sale”)<sup>270</sup> and this protectiveness (understandably, if it is to count for anything) also extends to the transfer by reason of sale. Although some aspects of the approach taken by the court are suggestive of an inappropriate application of English law,<sup>271</sup> the result is eminently sound: if a co-owner has the right to force a

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at which land can be sold (or leased) is still within the power of the Housing Minister (Housing (Jersey) Law 1949, art 14(3)(c)), but can only be done if regulations provide how the price will be determined. It appears that there are currently no such regulations.

<sup>264</sup> (1973) 1 JJ 2341, 2343 – 2344, per Le Masurier, Bailiff.

<sup>265</sup> *Ibid* 2344 – 2345.

<sup>266</sup> “The Viscount is the Chief executive officer of the Courts and the States. He also acts as Coroner.” Bois, 5, para 2/4.

<sup>267</sup> (1973) 1 JJ 2341, 2346 – 2347, per Le Masurier, Bailiff.

<sup>268</sup> [emphasis added] *Ibid* 2346.

<sup>269</sup> (1973) 260 Ex 447.

<sup>270</sup> (1973) 1 JJ 2341, 2346, per Le Masurier, Bailiff.

<sup>271</sup> *Ibid* 2345.



sale of the co-owned property, the ability to force transfer must also exist. Therefore, the rule expressed by the *nulle promesse* maxim ought not to be applied to cases where a co-owner seeks exit from common ownership.

Twelve years later, in *Lane v Lane*,<sup>272</sup> a similar result was handed down by the Royal Court. The defendant was divorced from her husband in the English High Court. An agreement between the parties regarding various properties was made the subject of a court order. The ex-spouses jointly owned a house in Jersey, and the defendant had agreed to transfer her share of that house to her ex-husband. To this end, she signed a power of attorney allowing a Jersey advocate to pass the necessary contract on her behalf. The ex-husband died in an accident. Following this, and on learning that the transfer had not yet been made, the defendant travelled to Jersey, revoked the power of attorney, and moved into the house, of which she was now the sole owner.<sup>273</sup>

The plaintiff was an heir of the deceased. Further proceedings in England concluded that the order remained valid even after the death of the ex-husband, and could be enforced by the plaintiff.<sup>274</sup> The plaintiff sought transfer or damages. If an order to transfer were granted, the plaintiff also requested that the Viscount be given the power to do this if the plaintiff did not do so within a certain period.<sup>275</sup> The court recognised the comity “between the courts of the United Kingdom and Jersey”,<sup>276</sup> and held that the defendant had consented to transfer “all her interest”,<sup>277</sup> in the house, which was construed broadly to include “interests both present and contingent”.<sup>278</sup> The house was to be valued and either transferred to the plaintiff or its value paid to the plaintiff by the defendant. It is not unusual for the court to make such an order: transfer or the payment of damages. What is remarkable is that if neither were done within six weeks, the Viscount was “authorised to pass the contract on behalf of the defendant and thereafter to put the plaintiff into possession.”<sup>279</sup> Thus, the court was

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<sup>272</sup> 1985-86 JLR 48.

<sup>273</sup> *Ibid* 52, per Crill, Deputy Bailiff.

<sup>274</sup> *Ibid* 54. (See also: *Re Lane (Deceased)* [1986] 1 FLR 283, [1986] Fam Law 74.)

<sup>275</sup> *Ibid* 53.

<sup>276</sup> *Ibid* 57.

<sup>277</sup> *Ibid* 60.

<sup>278</sup> *Ibid* 61.

<sup>279</sup> *Ibid* 63.

willing to put the mechanism of the Viscount as substitute for the recalcitrant party into practice once again (albeit that the defendant could avoid this by paying the value promptly).<sup>280</sup>

Although the maxim *nulle promesse* is not mentioned, there is some discussion of the court's ability to grant specific performance.<sup>281</sup> The defendant is likened to a "faithless promisor under an agreement of sale", and reference is made to the earlier case of *Symes v Couch*<sup>282</sup> in which specific performance of transfer of land was requested, but denied.<sup>283</sup> It may thus be argued that, like *Ritson*, this case too is *per incuriam* regarding the rule under consideration. Additionally, the effect of *Lane* on the court's power to enforce transfer of immovable property was considered to be limited in a subsequent case, on the grounds of the cross-jurisdictional element involved.<sup>284</sup> Nevertheless, *Lane*, like *Ritson*, demonstrates that inability to force a person to take an oath does not remove the court's power to force transfer. Given that a route around this problem has been found it is difficult to justify refusal to implement the same procedure on this ground in other cases.

In conclusion, *conservation du bien dans la famille* no longer justifies the rule, if it ever did. Neither does the inability to force a person to take an oath. Of course, the court cannot force someone to take an oath, but no doubt this is true of any juridical act, in any jurisdiction. There is no logical impediment to the court granting specific performance of the transfer of land more widely, where it appears that it would best serve the ends of justice to do so. Although there is a legal impediment, in the form of judicial precedent, both of the justifications that have been advanced for the rule can be demonstrated to be either obsolete or not good. The Jersey Law Commission has recommended the introduction of legislation enabling the court to grant specific performance in immovable property transactions generally.<sup>285</sup>

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<sup>280</sup> Consider also the court's ability to appoint a factor or *curateur loco absentis* to pass contract on behalf of an absent: *Falle*, 160 – 161, para 11.

<sup>281</sup> 1985-86 JLR 48, 62, per Crill, Deputy Bailiff.

<sup>282</sup> (1978) JJ 119.

<sup>283</sup> 1985-86 JLR 48, 62, per Crill, Deputy Bailiff.

<sup>284</sup> *Pirouet v Pirouet* 1985-86 JLR 151, 162, per Dorey, Commissioner.

<sup>285</sup> CP6, J.

## **(2) Acquisition of Possession**

Transfer of ownership does not automatically entail transfer of possession. However, assuming the vendor or other possessor has no real right in the immovable, the matter is straightforward: the owner may apply to the court for removal of the unwanted person from his or her premises. As real rights, the right of usufruct or the right of a tenant to possess under a contract lease would be unaffected by the transfer of ownership of the immovable in which the right is held.

## **E. CONCLUSION**

Writing is required for what may be called an “agreement of sale” in Guernsey and in Jersey. However, there is some indication that the court in Jersey will provide a remedy in respect of an oral agreement if there has been part performance.

Where an agreement of sale is in writing, the absence of a stipulated penalty clause for breach will not preclude a court award of damages. Where a penalty is stipulated, the court may reduce it if it is considered to be too great, notwithstanding the normal rule that *la convention fait la loi des parties*. In general, the court has set its face against granting specific performance of an obligation to transfer land. In justification of this at least two reasons have been advanced, but neither seems sufficient to continue to support the refusal.

The hereditary contract must be in writing. While the Guernsey hereditary contract has been modernised to some extent, the Jersey contract has changed little for centuries. However, while it was once but a written record of a transaction which had already taken place, the legislation on registration has attributed to it an essential and central role in the transfer process: transfer cannot be made without a hereditary contract.

Transfer of ownership is effected by passing contract before the Royal Court. The continuance of the practice of concluding immovable transfers in public may seem somewhat quaint, but provides the benefit of signalling the gravity or importance of

the transaction in which the parties are engaged.<sup>286</sup> This process is complete when the last person to sign the contract has done so. It seems that in Jersey a precarious priority is also conferred at this point. Registration must follow within three months in order for the contract to rank from the date on which it was passed before the court. Later registration is possible, but priority in that case is taken from the date of registration. Current practice means that registration follows almost immediately on passing contract. In Guernsey, following the Ordinance of 1724, priority is conferred on registration; deeds rank according to the date of registration.

The registers in both Jersey and Guernsey are registers of deeds, which have no effect on the validity or otherwise of the deeds of which they are composed. Registration in Jersey renders a contract probative, but it is suggested that this extends only to the matters that may be known by the court, for example that the formalities of execution were validly performed, and that the contract was passed on a particular date. As to other matters, the burden of proof is on anyone seeking to rely on the deed.

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<sup>286</sup> See also, Falle, 159, para 6.



## **CHAPTER 6 – INTRODUCTION TO, AND CREATION OF, SERVITUDES**

### **A. INTRODUCTION**

- (1) Reception of Servitudes
- (2) Definitions
  - (a) Servitude
  - (b) Positive (or affirmative), and negative (or passive)
  - (c) Real (or praedial), mixed, and personal
  - (d) Rustic (rural), or urban
- (3) Balancing Rights
- (4) Publicity Principle

### **B. EXPRESS CREATION**

#### **C. *DESTINATION DU PERE DE FAMILLE***

- (1) History
- (2) Jersey Sources
- (3) A Qualification to the Application of Destination?
- (4) Which Servitudes are Capable of Creation by Destination?
  - (a) Continuous
  - (b) Apparent
  - (c) Conclusion on continuous and apparent
  - (d) Urban
- (5) Basis of Destination

### **D. ACQUISITIVE PRESCRIPTION**

- (1) No Acquisitive Prescription
- (2) *Nulle Servitude Sans Titre*
- (3) Le Geyt on Acquisitive Prescription
- (4) Quasi-Prescription: *Baudains v Simon*
- (5) Conclusion

### **A. INTRODUCTION**

A real servitude is a limited real right.<sup>1</sup> Creation, exercise, and extinction of servitudes created by agreement (conventional servitudes), by *destination du père de famille*, and by carrying out particular activity for a specified time (acquisitive prescription) are examined in this and the following two chapters. For reasons of space, the related subject of restrictive covenants is not considered.

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<sup>1</sup> See: ch 3 I(2), K.

## (1) Reception of Servitudes

Servitudes<sup>2</sup> have been received from Roman law into many legal systems.<sup>3</sup> It appears that Jersey is no exception. Servitudes are found neither in the *Très-Ancien Coutumier* nor in the *Grand Coutumier*, only in the Reformed Custom,<sup>4</sup> suggesting that servitudes were received into Norman law between the mid-thirteenth century and sometime before 1583.

The section on servitudes in the Reformed Custom was not a complete picture of the law. For example, rustic servitudes are not mentioned at all, save for one article, which addresses only the size of servitudes of way.<sup>5</sup> In view of such gaps, and of the provenance of the law of servitudes, it is unsurprising that commentators on the Reformed Custom, Poingdestre and Le Geyt, commonly took cognisance of the civil law in writing on servitudes.<sup>6</sup>

## (2) Definitions

### (a) Servitude

The French Civil Code provides a definition of a servitude which can be equally well applied in Jersey. A servitude is a burden “imposed on one piece of land for the use and utility of a piece of land which belongs to another”.<sup>7</sup> It is passive in respect of the person whose land is burdened: the servient proprietor.<sup>8</sup> It gives the person whose land benefits from the servitude – the dominant proprietor – a property right in the land of the servient proprietor.

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<sup>2</sup> Known in English law as easements and *profits à prendre*.

<sup>3</sup> A short comment on the Roman law ancestry of the Scots servitude and the English easement can be found in: Mackintosh *Roman* 141 – 144. See also: (Roman Law) Buckland, 259 – 268; Watson *Roman* 49 – 50; Schulz *Classical* 381 – 386, 392 – 397; (Scotland) Reid *Property* para 440; (France) Larroumet, 475 *et seq*; (Louisiana) Yiannopoulos *Servitudes* para 9; (Quebec) Lamontagne *Biens* 367 *et seq*; (South Africa) Badenhorst & Pienaar, ch 14.

<sup>4</sup> Poingdestre notes this in his *Remarques*: “Les servitudes tant urbaines que prediales ont été omises par le coutumier et la Glose ni le style de proceder ni même Terrien qui les a suivis de bien loin n’en ont presque rien dit.”

<sup>5</sup> Art 622.

<sup>6</sup> See: Basnage *Servitudes*; Bérault, Godefroy & d’Aviron *Commentaires* vol 2, 711 – 739 (Godefroy & d’Aviron); Poingdestre *Lois* 193 – 198, 302 – 304; Le Geyt *Manuscrits* vol 1, 193 *et seq*.

<sup>7</sup> Art 637. Also: Basnage *Servitudes* 558.

<sup>8</sup> Matthews & Nicolle, 10, para 1.38; Nicolle *Immovable* 56.

Servitudes may be exercised by another in place of the dominant proprietor. However, generally, for brevity, reference is made throughout to the dominant proprietor alone.

*(b) Positive (or affirmative), and negative (or passive)*

The dominant proprietor in a positive servitude has the right to take something from, or perform some action on, the servient tenement. The dominant proprietor in a negative servitude has the right to prevent some action taking place on the servient tenement.<sup>9</sup>

*(c) Real (or praedial), mixed, and personal*

Servitudes have sometimes been divided into real (praedial), mixed, and personal.<sup>10</sup> A real servitude subordinated one piece of land to another. This chapter is concerned with this class of servitudes. A mixed servitude subordinated a piece of land to a person (for example usufruct). A personal servitude subordinated a person to a person: slavery. It is now common to speak only of real and personal servitudes, with personal in the modern context assuming the meaning originally ascribed to mixed.

*(4) Rustic (rural), or urban*

In Roman law, rustic servitudes were *res mancipi*;<sup>11</sup> urban servitudes were *res nec mancipi*.<sup>12</sup> The former were conveyed by *mancipatio*; the latter were not.<sup>13</sup> *Mancipatio* is not part of Jersey law,<sup>14</sup> and this classification “has been suppressed in all modern civil codes.”<sup>15</sup> Therefore, it appears that these terms have no significance in Jersey law.

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<sup>9</sup> *Ibid.* Also: Poingdestre *Lois* 57.

<sup>10</sup> Bartolus *Commentaria in Digestum Veteris* 183, 183; Basnage *Servitudes* 558. Also: (Scotland) Mackenzie *Institutions* II.9, 166; ch 3 I(2).

<sup>11</sup> G.2.17.

<sup>12</sup> G.2.29.

<sup>13</sup> G.2.22.

<sup>14</sup> Matthews & Nicolle, 10 – 11 para 1.40; Nicolle *Immovable* 57 – 58. Also: Yiannopoulos *Servitudes* para 15.

<sup>15</sup> Yiannopoulos *Code* 169, comments on art 698, para (d).



### **(3) Balancing Rights**

As noted by the court in *Le Feuvre v Mathew*, “every servitude is a burden on the servient tenement.”<sup>16</sup> Where there is a servitude, there are two conflicting property rights in one piece of land: ownership and a servitude.<sup>17</sup> The right of the owner to the enjoyment of the land must be balanced against the right of the servitude-holder, without rendering either sterile. Therefore, the law of servitudes seeks a balance between these competing rights.<sup>18</sup>

### **(4) Publicity Principle**

Real rights, or property rights, are enforceable against the whole world.<sup>19</sup> The publicity principle is the idea that property rights must be subject to some form of publicity before they are constituted: just like contractual rights, their creation, transfer, variation, or extinction must be intimated to those who will be affected. Obviously, in practice it is not possible to intimate these events to the whole world, so some attenuated form is deemed sufficient, such as registration.

## **B. EXPRESS CREATION**

Servitudes are commonly created by express agreement between the parties, either within a hereditary contract for the transfer of land, or in a separate document. The hereditary contract must be passed before the Royal Court, to be constitutive of a real right.<sup>20</sup> Thus, in *Nicolle v Starck*,<sup>21</sup> the plaintiff sought to register a deed, constitutive of a servitude in his favour, on the court roll. It was held that this was insufficient to create a servitude, which could only be done by the passing of a contract before the Royal Court.

A large number of servitudes arise expressly, either created by the would-be servient owner over his land (express grant), or by the would-be dominant owner over land

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<sup>16</sup> *Le Feuvre v Mathew* (1974) 2 JJ 49, 63, per Ereat, Deputy Bailiff.

<sup>17</sup> Carbonnier, vol 2, para 795.

<sup>18</sup> See, for example: *Cusine & Paisley*, 387, para 12.02.

<sup>19</sup> See: ch 3 B.

<sup>20</sup> See: ch 5.

<sup>21</sup> (1858) 46 H 251. Also: *Felard Invs v Trustees of Church of Our Lady* (1978) JJ 1, 8 – 10, per Ereat, Bailiff.

which he is in the process of transferring to another (express reservation). Express creation is probably the most common in practice.

### **C. DESTINATION DU PERE DE FAMILLE<sup>22</sup>**

*Destination du père de famille* (“destination”) is the doctrine that in certain circumstances a servitude can be created other than expressly when land is divided. If an owner has been making use of land which would constitute a servitude were the land divided, a servitude is created upon division. Only certain servitudes can be created in this way, and the scope of the doctrine is discussed below. This basic idea is found in many legal systems,<sup>23</sup> which suggests it is a desirable component. Certainly, it assists where an express grant or reservation of a desirable servitude has, for whatever reason, been omitted upon division. This flexibility is perhaps even more desirable within a system like Jersey which, at least generally,<sup>24</sup> does not allow acquisition of servitudes by prescription.

#### **(1) History**

Godefroy<sup>25</sup> gives Bartolus’<sup>26</sup> commentary on D.32.89.1<sup>27</sup> as the origin of this doctrine. However, it appears that Bartolus’ ideas were influenced by Accursius<sup>28</sup> and Oldradus.<sup>29</sup> Either way, the doctrine was part of the *ius commune* development of Roman law.<sup>30</sup> Destination appeared, *inter alia*, in the Customs of Normandy,

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<sup>22</sup> The comparable doctrine in Louisiana is known as “destination of the owner” (art 741 CC), and as “destination of proprietor” in Quebec (art 1181 CC). This is commensurate with the modern day situation where there is often no *père* and no *famille*.

<sup>23</sup> For example: (France) *destination du père de famille*, art 692 CC; (England) Gray & Gray, 654 – 659 (the rule in *Wheeldon v Burrows*), 679 – 681 (implied reservation); (Louisiana) destination of the owner, art 741 CC; (Scotland) implied grant and implied reservation of servitudes, Cusine & Paisley, chs 7 – 9. It does not appear in South African law: Badenhorst & Pienaar, 332 – 334. In Quebec, “destination of the proprietor” requires, *inter alia*, writing, and so is essentially unilateral express creation: art 1183 CC, Lamontagne *Biens* 406 – 408.

<sup>24</sup> See: ch 6 D.

<sup>25</sup> Godefroy *Coutume* 458. Also: Ourliac & Gazzaniga *Histoire* 229.

<sup>26</sup> Bartolus of Saxoferrato, or Bartolo de Sassoferrato (1313 – 1357).

<sup>27</sup> D.32.91.1 in some versions.

<sup>28</sup> Or Francisco Accorso (c 1182 – c 1260).

<sup>29</sup> Referred to by Bartolus, with approval: Bartolus *Infortiati* on D.32.1.89 (“*Ita dicit Old. & bene.*”).

<sup>30</sup> See: ch 3 C (second para).

Paris, and Orléans. Paris and Orléans differed from Normandy in requiring writing of some form before destination could apply.<sup>31</sup>

## (2) Jersey Sources

The starting point for Jersey law is article 609 of the Reformed Custom:

“En faisant partage & division entre coheritiers ou personniers de chose commune dont l’une partie sert à l’autre, les veuës & esgouts demeurent comme ils sont lors du partage, si par lots & partages il n’est expressément dit du contraire.”<sup>32</sup>

This is accepted by Poingdestre as representative of Jersey law.<sup>33</sup> The doctrine of destination is expounded at greater length by Le Geyt, in his *Code*:

“Quand aucun met hors de ses Mains partie de sa Maison, ou une Maison, qui a veuës & esgouts ou autres Servitudes permanents sur une autre Maison qu’il retient, ou quand la Maison retenuë a de telles Servitudes sur celle qu’on aliene, les choses doivent demeurer en l’estat qu’elles sont lors qu’on contracte, mais, quant aux Servitudes discontinuës, elles demeurent esteintes de part & d’autre s’il n’en est rien dit du contraire. Il en est ainsi des partages d’heritages entre coheritiers ou autres consorts.”<sup>34</sup>

This article goes further than article 609 of the Reformed Custom. The latter seems only to envisage division of the land and transfer of all the pieces, while Le Geyt describes a situation where only a part of the land is alienated. Thus destination in Jersey law appears to have developed by Le Geyt’s time.

The only Jersey case to consider destination fully is *Le Feuvre v Mathew*.<sup>35</sup> It gave rise to two Royal Court judgments (the court was convened for a second time to allow counsel to research the questions raised by the first sitting). The facts concerned an L-shaped plot of land which was divided into three approximately

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<sup>31</sup> *Coutume d’Orléans* art 228. *Coutume de Paris* art 216 (1580) (cf: art 91 (1510)). Precisely what the requirement of writing meant is not clear.

<sup>32</sup> Also, for example: Basnage *Servitudes* 560.

<sup>33</sup> “Cet article est pour les servitudes et Batiments tant urbanes que praediales Et n’a point de difficulté car il est de droit commun confirmé par la pratique.” *Remarques* art 609.

<sup>34</sup> *Code Le Geyt* 3.11.8.

<sup>35</sup> (1973) 1 JJ 2461; (1974) 2 JJ 49.

square-shaped pieces. One of the outer thirds (the walled garden) had a servitude of way over a private road located on the middle section (Lynton). This servitude was extinguished by confusion when both sections came to be owned by the same person. Upon that owner's death the two plots were again separated by testamentary disposition. A servitude of way, as had existed before, was not expressly re-created.

At the first hearing the court concluded that "the laws of England and of Jersey on this matter are basically similar".<sup>36</sup> The court was satisfied that destination, or creation of a servitude "by implication",<sup>37</sup> was part of Jersey law and set out "defined circumstances"<sup>38</sup> in which the doctrine would operate. These were intended as "demonstrative and not exhaustive".<sup>39</sup> Firstly, one person must have held the putative dominant and servient tenements immediately prior to division for the question of destination to arise.<sup>40</sup> This is self-evident. Secondly, immediately prior to division "the properties must have been used in such a way, or have been in such a physical state" as could have constituted a servitude had they been separate.<sup>41</sup> Thirdly, the putative servitude must be continuous, apparent, and permanent.<sup>42</sup> Fourthly, "If the division is effected by the instrument of the former sole owner, there must be no expression of intention which is expressly contrary to the implied continuance of the position existing at the time of division."<sup>43</sup>

In the second judgment it was concluded that a right of way which is visibly manifest can be created by destination.<sup>44</sup> Despite the judicial comment on the similarity of Jersey and English law in this area, it was determined that the doctrine of destination

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<sup>36</sup> *Le Feuvre v Mathew* (1973) 1 JJ 2461, 2478, per Ereat, Deputy Bailiff. This is broadly true where, as in *Le Feuvre*, neither subdivided plot is retained by the transferor (Gray & Gray, 655). This statement is qualified because it is unclear whether the state of knowledge of each transferee is relevant (see: *Aldridge v Wright* [1929] 2 KB 117, 130, per Greer, LJ).

<sup>37</sup> *Le Feuvre v Mathew* (1973) 1 JJ 2461, 2478, per Ereat, Deputy Bailiff.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Le Feuvre v Mathew* (1974) 2 JJ 49, 54, Ereat, Deputy Bailiff.

<sup>40</sup> *Le Feuvre v Mathew* (1973) 1 JJ 2461, 2478, per Ereat, Deputy Bailiff.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid* 2478 – 2479. It is also stated that the servitude need not be one of necessity. Indeed, if it were, it would not be created by destination at all, but would be a legal servitude.

<sup>43</sup> *Ibid.* A fifth and final point concerns matters of evidence.

<sup>44</sup> *Le Feuvre v Mathew* (1974) 2 JJ 49, 53 – 54, per Ereat, Deputy Bailiff.

(not servitudes by implication) exists in Jersey law, and that it had operated to create a servitude in this case.

There is nothing to suggest that the use has to continue after division. Obviously, if the right is not exercised within forty years of its creation, it will be extinguished by prescription.<sup>45</sup> The essential requirement for its creation is that there was some relationship between the putative dominant and servient tenements which would (or could) have been a servitude right up to the time of division. Severance completes the process. “Permanent” is a condition mentioned by Le Geyt,<sup>46</sup> and adopted by the court in *Le Feuvre*,<sup>47</sup> which presumably means use that is well-established and not of a temporary nature. This fits with the nature of a servitude as a real right.

In *Le Feuvre*, the properties in question were simultaneously devolved *mortis causa*, and the court expressly declined to decide whether destination would operate were the division to be effected in a way other than “testamentary disposition” or “partage”.<sup>48</sup> However, it did say that:

“It would seem clear from the reference in Le Geyt, [...] that the principle equally applies to such a case [division by another means], but we leave open the question whether it might be subject to qualification.”<sup>49</sup>

The “reference in Le Geyt” is from his *Code*, in which examples where only part of the land is transferred are given. The retained land is either the dominant tenement (as in express reservation), or the servient tenement (as in express grant). In both cases, where the servitude would be continuous, it is created. Discontinuous servitudes cannot be created in this way.<sup>50</sup>

Two questions arise: what might be the “qualification” adverted to by the court in *Le Feuvre*, and to which servitudes can destination apply?

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<sup>45</sup> See: ch 8 F.

<sup>46</sup> See: *Code Le Geyt* 3.11.8.

<sup>47</sup> See: *Le Feuvre v Mathew* (1973) 1 JJ 2461, 2479, per Ereat, Deputy Bailiff.

<sup>48</sup> *Le Feuvre v Mathew* (1974) 2 JJ 49, 54, per Ereat, Deputy Bailiff.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Code Le Geyt* 3.11.8. The text is above: ch 6 C(2).

### **(3) A Qualification to the Application of Destination?**

No indication of what the “qualification” alluded to by the court in *Le Feuvre*<sup>51</sup> might refer to is given. It is possible that the court had in mind whether or not a distinction should be made between retention of the dominant tenement and retention of the servient tenement. In English law (and in Scots law) it is more difficult to acquire an implied servitude when the putative dominant tenement is retained because “a grantor [should] not derogate from him grant.”<sup>52</sup> Arguably, no distinction should be made because the problem is the same either way: some established use is lost. No distinction is made in France, or Louisiana.<sup>53</sup>

Le Geyt’s *Code* mentions no qualification. Given that he lays out the circumstance of a servitude being created over the retained land, this absence is notable. Were the question to arise, the better view appears to be that Jersey law follows the French position in making no distinction between grant or reservation of a servitude by destination.

### **(4) Which Servitudes are Capable of Creation by Destination?**

It is clear that not all servitudes fall into the ambit of destination. Certain limitations have been suggested. In addition to “permanent” (discussed above)<sup>54</sup> the servitude must be “continuous”<sup>55</sup> and “apparent”.<sup>56</sup> “Urban” may also be a condition.<sup>57</sup>

#### *(a) Continuous*

Le Geyt discusses definitions of “continuous” and “discontinuous” servitudes in his *Manuscripts*. He identifies two views. The Canonists, he says, considered continuous servitudes to be those capable of being used at any time, such as a right of access open at all times. Gathering acorns is given as an example of a discontinuous servitude: owing to the seasons, it cannot be exercised all year round. The Civilians

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<sup>51</sup> *Le Feuvre v Mathew* (1974) 2 JJ 49, 54, per Ereat, Deputy Bailiff.

<sup>52</sup> (England) Gray & Gray, 679 – 681, *Wheeldon v Burrows* (1879) 12 ChD 31, 49, per Thesiger, LJ; (Scotland) Cusine & Paisley, 297.

<sup>53</sup> (France) Larroumet, 524 – 528; (Louisiana) Yiannopoulos *Servitudes* 404 – 409. (Or Quebec: Lamontagne *Biens* 404 – 408. But see: ch 6 n23).

<sup>54</sup> Ch 6 C(2).

<sup>55</sup> *Le Feuvre v Mathew* (1973) 1 JJ 2461, 2478 – 2479, per Ereat, Deputy Bailiff.

<sup>56</sup> *Ibid.*

<sup>57</sup> Poingdestre *Remarques* on art 610.

made the distinction according to whether the servitude is exercised by a person or not. Thus aqueduct and support are given as examples of continuous servitudes. Also view and stillicide<sup>58</sup> are ranked among the continuous because evidence of their existence is visible. A discontinuous servitude is such because it cannot be exercised continuously (such as access).<sup>59</sup> Although these definitions appear in a section on the prescription of servitudes, Le Geyt indicates that these are general terms of classification.<sup>60</sup> Although he does not explicitly endorse either the Canonist or the Civilian position, in a later passage he employs the Civilian approach.<sup>61</sup> However, Le Geyt's failure to choose clearly between the two approaches is typical of the early sources generally. Indeed, the choice was only definitely made in France when the Civilian approach was adopted for the Civil Code.<sup>62</sup>

While considering whether it is possible to possess a servitude,<sup>63</sup> Poingdestre states clearly that access is a discontinuous servitude whereas aqueduct is continuous.<sup>64</sup> This is the Civilian approach. Less clear, however, is the following:

“les autres qui ont cause continüe, comme chemin gardé ouvert continuellement, un conduit ou Aqueduct par la terre d'autrui, &c”<sup>65</sup>

Does this mean that access can be a continuous servitude if it is exercised over a route which is always open? If so, this conflicts with Poingdestre's otherwise Civilian approach. Consistency would be achieved by reading “chemin gardé ouvert continuellement” as a reference to a ditch, or similar, used for a servitude of aqueduct, although this would be an unusual use of “chemin”.

In pre-codification French law it appears that there was some emphasis on whether the servitude could be seen. For example, both Lalaure<sup>66</sup> and Pesnelle conflate

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<sup>58</sup> Eavesdrip or eavesdrop.

<sup>59</sup> Le Geyt *Manuscripts* vol 1, 193. An account of the Civil law position is also given by Basnage: *Servitudes* 558 – 559.

<sup>60</sup> *Manuscripts* vol 1, 193.

<sup>61</sup> *Ibid* 195.

<sup>62</sup> Art 688.

<sup>63</sup> It is not: *Lois* 196.

<sup>64</sup> *Lois* 197.

<sup>65</sup> *Ibid*.

continuous with visible, and discontinuous with latent.<sup>67</sup> This apparent tendency offers an explanation for Poingdestre’s otherwise unclear sentence: it seems that he too has conflated continuous and visible. The continually open path giving access over the servient tenement is a constant advertisement of the existence of the servitude. The court in *Le Feuvre* read Poingdestre in this way, concluding that “a servitude ‘continue’ is one which is clearly visible and permanent”.<sup>68</sup> The same view was read into the passage from *Le Geyt*.<sup>69</sup> While *Le Geyt* is not necessarily inconsistent with this position, it cannot be positively justified from the relevant text.

France and Louisiana have abandoned the “continuous” requirement: the servitude must be “apparent”.<sup>70</sup> Arguably, if limits are placed on the type of servitudes susceptible to creation by destination, the main concern should be whether the servitude is visible as it is this aspect which will give warning to others who might be affected by it. Given the tendency in the sources to conflate “continuous” with “visible”, “continuous” in either the Civilian or Canonist sense seems already to have been abandoned as a condition. If that is so, the servitude of view must no longer be susceptible to creation by destination, for while it is continuous (in the Civilian sense) it is not visible.

### *(b) Apparent*

According to the court in *Le Feuvre*, the prospective servitude must be “apparent”<sup>71</sup> (visible). “Apparent” is a condition common in jurisdictions with destination or a similar doctrine,<sup>72</sup> but it is not given by *Le Geyt*,<sup>73</sup> Poingdestre,<sup>74</sup> or article 609 of the

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<sup>66</sup> One writer describes his work as “the leading treatise in France before the *Code civil*”: White “Acquisitive” 778, n8.

<sup>67</sup> Lalaure *Servitudes* 8: “On divise encore les Servitudes par rapport à leur effet & leur exercice, en visibles ou continues ; en latentes ou discontinues”. Pesnelle, 621, n1: “les servitudes discontinues & latentes”. Merlin notes a problem with conflating continuous and visible: negative servitudes are continuous and invisible (*Repertoire* vol 12, 522).

<sup>68</sup> *Le Feuvre v Mathew* (1974) 2 JJ 49, 51, per Ereat, Deputy Bailiff.

<sup>69</sup> *Ibid.*

<sup>70</sup> (France) art 694 CC applies destination to discontinuous servitudes; (Louisiana) art 741 CC, Yiannopoulos *Servitudes* 405, para 142. Both had employed the Civilian meaning of “continuous” and “discontinuous”. The requirements in Quebec are different: art 1183 CC (compare art 551 CC of Lower Canada). See: ch 6 C(4)(b).

<sup>71</sup> *Le Feuvre v Mathew* (1973) 1 JJ 2461, 2479, per Ereat, Deputy Bailiff.

<sup>72</sup> (France) arts 692, 694 CC; (England) Gray & Gray, 657, Simpson “*Wheeldon*”; (Louisiana) arts 767 – 769 of the 1870 CC. (Art 741 of the present LaCC provides that apparent and non-apparent



Reformed Custom.<sup>75</sup> However, Poingdestre evidences conflation of the “continuous” nature of a servitude with its visibility.<sup>76</sup> When this is taken together with “continuous” as a condition for destination in Le Geyt’s Code, some argument for “apparent” as a condition can be drawn from these Jersey sources. As apparent seems to have supplanted continuous only in the modern codes, it is possible that it had not fully emerged as a condition in the legal milieu of Poingdestre and Le Geyt, and so does not find full expression in their work.

The court in *Le Feuvre* supports “apparent” as a condition for destination in the first judgment.<sup>77</sup> In the second judgment, counsel for the plaintiff argued in favour of “apparent” (or visible) as a condition for destination, essentially on the basis of the publicity principle.<sup>78</sup> The “apparent” condition meets the requirement of publicity for creation of real rights better than the “continuous” condition.

### *(c) Conclusion on continuous and apparent*

From the above, it can be concluded that servitudes which are capable of creation by destination are those which are “apparent”, that is, which present some manifest sign. Access over a cut or marked road or path, view, and stillicide, are all examples of such servitudes. If “continuous” were to be added as a requirement, this would make the scope of destination unjustifiably narrow, for there is no real policy reason for it. As noted above, other jurisdictions have dropped the requirement of continuousness. “Apparent” can be justified on the basis that it provides publicity of the right. Nevertheless, even restricting the operation of destination to visible servitudes may be too much. For example, if a property is divided and no servitudes are created in respect of underground pipes and services, such rights cannot be constituted by destination because of failure to meet the “apparent” requirement.

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servitudes can be created by “destination”, but for the latter a document must first be filed at the registry which is analogous to unilateral express creation. For implied creation, therefore, “apparent” is still a condition.) In Scotland, the test is based around the notion of “necessity”: *Cusine & Paisley*, ch 8.

<sup>73</sup> *Code Le Geyt* 3.11.8.

<sup>74</sup> *Remarques* on art 609.

<sup>75</sup> Art 609 does not refer to “continuous” or “discontinuous” servitudes either.

<sup>76</sup> See: ch 6 C(4)(a).

<sup>77</sup> See: ch 6 n71.

<sup>78</sup> *Le Feuvre v Mathew* (1974) 2 JJ 49, 53, per Ereat, Deputy Bailiff. See: ch 5 A(2) (publicity principle).

One option would be to construe “apparent” broadly. It could be considered that pipes and wires carrying services ought to be expected to exist where, for example, a piece of land has a building on it. Consequently, the circumstances themselves give adequate notice of the servitude-like use already being exercised.<sup>79</sup>

Alternatively, the test could be styled as “continuous” *or* “apparent” (which is consistent with Poingdestre). In this way, access (one of the most important servitudes in practice) would be included, to the extent that it is exercised over a clear path or road, because it would be “apparent”. Pipes and services would also be included because, while perhaps not apparent, they would be “continuous”. The law in this area is not entirely settled, and is thus open to further judicial development.

#### *(d) Urban*

The article on destination in the Reformed Custom names two servitudes: view and stillicide.<sup>80</sup> Both are urban servitudes.<sup>81</sup> According to Bérault and Godefroy, article 609 applies only to the two types of servitude to which it directly refers.<sup>82</sup> Pesnelle favours another reading: the two servitudes mentioned in article 609 are merely examples of the servitudes which are “plus ordinaires & plus connues”.<sup>83</sup> Le Geyt is silent on this, and the article in his Code gives no such restriction. Poingdestre’s view is obscure. He states that article 609 applies to servitudes “tant urbaines que prœdiales”.<sup>84</sup> If “prœdiales” is supposed to be synonymous with “rustic” (which would be unusual), he is with Pesnelle. Alternatively “prœdiales” may signify that the article applies to real servitudes, not personal servitudes.<sup>85</sup> In the latter case,

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<sup>79</sup> See: Basnage *Servitudes* 490 – 491 “Si toutefois les deux heritages de haut & de bas avoient appartenu à une même personne, & que depuis il eût aliéné le fonds superieur, cet aquereur ne pourroit pas le priver de l’usage de l’eau pour le fonds qu’il auroit retenu, quoi qu’il ne se fût pas réservé ce droit, parce qu’il n’est pas vrai-semblable qu’il ait vendu sans cette condition, ce qui est conforme à la loi *binas à dex. de servit. Urb. Præd.* & il faut résoudre en ce cas la même chose que la Coûtume a fait en l’art. DCIX. qu’en faisant partage entre coheritiers & personniers, les vûës & les égouts demeurent comme ils sont lors du partage: ce qu’il faut pareillement observer pour les eaux qu’un coheritier ou un associé seroit tenu de laisser au même état qu’ils étoient lors du partage.”

<sup>80</sup> Art 609. See: ch 6 C(2).

<sup>81</sup> Justinian *Institutes* 2.3.1.

<sup>82</sup> Bérault *Coutume* 694; Godefroy *Coutume* 458.

<sup>83</sup> Pesnelle, 621.

<sup>84</sup> Poingdestre *Remarques*.

<sup>85</sup> On which see: ch 3 I(2).

Poingdestre's view is closer to that of Bérault and Godefroy, but less restrictive, as he would apply the article to all urban servitudes.

Generally, the distinction between rustic and urban servitudes is of no application to Jersey law.<sup>86</sup> Destination is no exception. The court in *Le Feuvre* clearly did not consider "urban" to be a requirement (access is a rustic servitude)<sup>87</sup> and also – in keeping with *Le Geyt* – showed no preference for limiting the servitudes capable of creation by destination to the two given in article 609 of the Reformed Custom.

### **(5) Basis of destination**

According to the court in *Le Feuvre v Mathew*, "the principle we are considering is based on the presumed intention of the parties".<sup>88</sup> Immediately following this comment is a quotation giving the basis for destination as the intention of the seller alone.<sup>89</sup> The name of the doctrine itself also refers to one person only: the owner of the single piece of land before division. It is true that both the intention of the seller alone and the intention of buyer and seller are required, albeit at different stages. The actions of the owner before division demonstrate his intention "that one plot serve the other", and it is at that stage that the intention of the seller alone is required.<sup>90</sup> Common intention of both parties is required (or may be imputed) when the land is divided, for there can be nothing to negate the creation of the servitude in the hereditary contract. Failure by both parties to exercise a power of veto could be described as a "convention tacite".

Nevertheless, the essence of destination is a state of affairs, set in place by the owner of a piece of land, which would amount to a servitude were the land divided<sup>91</sup> (and which is still ongoing at the time of division). The intention of the "père de famille" dates from the time when the servitude-type use is commenced. The will of any other party who will become owner of part of the land only bears on the matter at the time

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<sup>86</sup> See: ch 6 A(2)(d).

<sup>87</sup> Justinian *Institutes* 2.3.

<sup>88</sup> *Le Feuvre v Mathew* (1973) 1 JJ 2461, 2478, per Ereaud, Deputy Bailiff.

<sup>89</sup> Dalloz *Nouveau Répertoire de Droit* (1950) (see: *ibid* 2477).

<sup>90</sup> KGC Reid "Praedial Servitudes" in Palmer & Reid *Mixed* 19.

<sup>91</sup> Subject to some limits. See: ch 6 C(3), (4).

of conveyance to that party, whose only input is the capacity to prevent a servitude being created, by demanding provision in the deed to that effect. Arguably, therefore, the true genesis of a servitude created by destination is the action of the owner before division, together with his intention (whether actual or implied from the circumstances) to make one part serve another.<sup>92</sup>

## D. AQUISITIVE PRESCRIPTION

### (1) No Acquisitive Prescription

In pre-Revolution France, rules varied regarding the possibility of creating servitudes prescriptively. In the *pays de droit écrit*, which followed Roman law, acquisitive prescription was largely allowed in the presence of certain factors.<sup>93</sup> In the *pays du droit coutumier*, the trend was against acquisitive prescription of servitudes.<sup>94</sup> Le Geyt records that the prohibition on acquisitive prescription in respect of servitudes first appeared in Jersey law in 1625,<sup>95</sup> noting that this follows the position of article 607 of the Reformed Custom.<sup>96</sup> In a decision of 28 April 1625, the court held that long use alone was no longer sufficient to create a servitude without title.<sup>97</sup>

It was not the practice in Jersey to adopt all the innovations of the Reformed Custom. However, this rule may have seemed particularly attractive following the successful establishment of a land register for the whole island in 1602. A register will be incomplete if rights can be acquired prescriptively, so the rule supports the publicity aim of the register.<sup>98</sup> Of course, not all rights do appear on the register (for example, ownership can be acquired prescriptively)<sup>99</sup> and in that sense the policy regarding

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<sup>92</sup> Consider also: KGC Reid “Praedial Servitudes” in Palmer & Reid *Mixed* 19 – 20 (on Louisiana).

<sup>93</sup> Merlin *Répertoire* vol 12, 552.

<sup>94</sup> See: Lalaure *Servitudes* 181 *et seq.*

<sup>95</sup> Le Geyt *Manuscrits* vol 1, 194.

<sup>96</sup> “Droiture de servitude de vûës, égoûts de maisons & autres choses semblables, par la Coûtume générale de Normandie, ne peut être acquise par possession & jouissance, fût-elle de cent ans, sans titre; mais la liberté se peut raquerir par la possession de quarante ans continuels, contre le Titre de Servitude.”

<sup>97</sup> Le Geyt *Manuscrits* vol 1, 194. Unregistered servitudes created by prescription prior to 1625 are valid until extinguished. There is some suggestion that this is true of servitudes created before 1771 in *Baudains v Simon*. See: ch 8; ch 6 D(4), respectively.

<sup>98</sup> See: ch 5 A(2). A similar argument was advanced by counsel for the plaintiff in *Le Feuvre v Mathew* (1974) 2 JJ 49, 53, per Ereaut, Deputy Bailiff.

<sup>99</sup> See: ch 5 n7.

acquisitive prescription seems inconsistent, but the new register may have been one factor which led to the adoption of the rule.

The writers of the French Civil Code tended towards the prevailing position in the *pays de droit écrit*: acquisitive prescription of servitudes is thus possible in France, but it is restricted to servitudes which are “continuous” and “apparent”.<sup>100</sup> Many other countries allow acquisitive prescription of servitudes.<sup>101</sup> Jersey, Guernsey, and Quebec – in the minority – retain the prohibition.<sup>102</sup>

## **(2) Nulle Servitude Sans Titre**

The general rule that the acquisitive prescription of servitudes is not possible is often expressed as *nulle servitude sans titre*.<sup>103</sup> *Titre*, or “title”, is a troublesome word, which has different meanings in different contexts. In some contexts, “title” means ownership, as in “having title” to a particular piece of land. It is clear that this is not the meaning to be ascribed to the word here, for, while it is true that there must be ownership before there can be a servitude, this is true of all types of servitude and so would not specifically exclude acquisitive prescription. “Title” may mean a document, but again this meaning would not exclude acquisitive prescription, which could proceed on the basis of a “grant” from a non-owner.<sup>104</sup> Therefore, this meaning seems unlikely. “Title” could also mean a juridical act (that is, a voluntary act

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<sup>100</sup> Art 690 CC.

<sup>101</sup> (Louisiana) art 740 CC, “Apparent servitudes may be acquired by title, by destination of the owner, or by acquisitive prescription”; (Scotland) only positive, or affirmative, servitudes can be created by prescription (Prescription and Limitation (Scotland) Act 1973, ss3(1), 3(2)); (England) acquisitive prescription is possible by common law, the doctrine of lost modern grant, or the Prescription Act 1832; (South Africa) Badenhorst & Pienaar, 303.

<sup>102</sup> Dawes *Laws* 678 – 679; (Quebec) art 1181 CC.

<sup>103</sup> See, for example: *Sarre v Barette* (1914) 228 Ex 508, 511; *Searley v Dawson* (1971) 1 JJ 1687; *Le Feuvre v Mathew* (1973) 1 JJ 2461; *Felard Investments v Church of Our Lady* (1978) JJ 1, (1979) JJ 19; *Colesberg Hotel v Alton Hotel* 2003 JLR 47, 2003 JLR 176; Matthews & Nicolle, para 1.42 *et seq*; Nicolle *Conveyancing* 22; Nicolle *Immovable* 59. (Guernsey) *Kingsway v Bell* (1987) 6.GLJ.141; *Singleton v Le Noury* (1990) 9.GLJ.48; Dawes *Laws* 679. Also: Houard *Dictionnaire* vol 4, 201; Basnage *Servitudes* 561. (Quebec) Lamontagne *Biens* 386, para 565.

<sup>104</sup> As is the case for acquisitive prescription of land in Scotland (Prescription and Limitation (Scotland) Act 1973, s1) and in Germany (Servitudes (Grunddienstbarkeiten, § 1018 BGB) can be constituted by prescription, which functions in the same way as the acquisitive prescription of ownership of land (§§ 1065, 1227, 985, 1004 BGB). Such prescription must be based on an entry in the Land Register).

intended to have, and having, legal consequences).<sup>105</sup> This is the meaning favoured in modern commentary,<sup>106</sup> and can reasonably be imposed on earlier sources. For example, Le Geyt:

“Mais c’est à present l’usage, il faut un titre pour une servitude, comme donation, vente, échange ou partage entre les propriétaires des deux fonds, le servant et le dominant.”<sup>107</sup>

Of course, all of these juridical acts must be carried out before the Royal Court in Jersey, and so will of necessity involve a document. In general, commentators’ use of “title” is ambiguous as to whether “document” or “juridical act” is meant.<sup>108</sup> Possibly the two were conflated, for a document may be constitutive, or at least evidence, of a juridical act.

If the maxim means that without a document evidencing (or constituting) a juridical act there can be no servitude, this would not only exclude prescriptive servitudes but be problematic for legal and natural servitudes. Legal servitudes (such as the way of necessity in favour of landlocked land)<sup>109</sup> and natural servitudes (such as natural drain of rainwater from higher to lower land)<sup>110</sup> arise by operation of law. By definition, therefore, they will have no associated documentation. Le Gros states baldly that they are excluded from the maxim.<sup>111</sup> The reason may be historical. Discussion of the maxim appears to pre-date discussion of legal and natural servitudes in the Jersey (and Norman) sources.<sup>112</sup> Therefore, the maxim is first

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<sup>105</sup> For example, a contract. A useful definition is given in von Bar & Clive *DCFR (Full)* vol 1, 125: “A juridical act is any statement or agreement, whether express or implied from conduct, which is intended to have legal effect as such. It may be universal. It may be unilateral, bilateral, or multilateral.” (II 1:101(2)).

<sup>106</sup> In Quebec, the “titre” of the maxim means an agreement: Lamontagne *Biens* 386, para 566. Also: (France) Larroumet, 521 (“titre” means “acte juridique”); (Louisiana) Yiannopoulos *Servitudes* para 112.

<sup>107</sup> *Manuscrits* vol 1, 195.

<sup>108</sup> For example: Le Geyt *Manuscrits* vol 1, 194; Bérault, Godefroy & d’Aviron *Commentaires* vol 2, 712 (Bérault), 715 (Godefroy) (compare 472 (Bérault)).

<sup>109</sup> For example: *Hawkins v Turner* (1971) 1 JJ 1813.

<sup>110</sup> For example: *Gibaut v Le Rossignol* (1900) 11 CR 188; Le Gros, 199.

<sup>111</sup> 17.

<sup>112</sup> For example, Poingdestre discusses the way of necessity, but never describes it as a legal servitude, instead discussing whether an owner of land next to landlocked land can be compelled to sell a passage: *Lois* 194 – 195. See also: Yiannopoulos *Servitudes* para 12.

discussed when the only kind of servitude for which there would be no documentary evidence was one acquired by prescription.

In fact, the prohibition on acquisitive prescription of servitudes is given in the Code of 1771 without reference to “title”.<sup>113</sup> Therefore, questions concerning the meaning of “title” and the meaning of the maxim can often be ignored. The exception is when considering older sources, of which an example is Le Geyt’s suggestion that prescription without “title” is still possible in certain circumstances.

### **(3) Le Geyt on Acquisitive Prescription**

Le Geyt was unhappy with the judgment of 1625 which followed article 607 of the Reformed Custom in denying creation of servitudes by prescription. He described the judgment as a “grand erreur”,<sup>114</sup> noted in some detail that the practice since the 1625 decision had not been constant, and doubted, in consequence, that custom had changed.<sup>115</sup> This unhappiness is reflected in his *Code*, where he sets out that a servitude can prescribe without title following forty years’ possession:

“La Servitude peut néanmoins se prescrire sans titre s’il paroist qu’elle ait esté 40 ans possédée, non seulement *nec vi nec clam nec precario*, mais par une voye d’exécution de son droit, & par des Actes qui, au veu & au sceu de la partie, ne se puissant faire autrement que par titre, & qu’on ne peut presumer n’avoir esté soufferts que par une pure humanité.”<sup>116</sup>

If “au veu & au sceu” is rendered “au vu & au su”, Le Geyt states prescription operates when exercise of the putative servitude is made as if of right, in the sight and with the knowledge of the putative servient owner. The same idea is presented in his *Manuscrits*.<sup>117</sup> However, in the same title in his *Manuscrits*, Le Geyt strongly conveys the impression that he is swimming against the tide in arguing (in a way

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<sup>113</sup> “servitude, laquelle ne peut s’acquérir par la prescription, fût-elle Centenaire” *À la Cour de Samedi*.

<sup>114</sup> Vol 1, 200.

<sup>115</sup> *Ibid*.

<sup>116</sup> 3.10.6.

<sup>117</sup> Vol 1, 200.

which is not easy to follow) that acquisitive prescription of servitudes is still permissible.<sup>118</sup> At times it seems that even he is not convinced of his stated position.

Elsewhere in his *Code*, Le Geyt says that aqueduct can be acquired by forty-years' possession.<sup>119</sup> He also discusses this in his *Manuscrits*, stating that "La servitude d'aqueduct est la seule qui se prescrit incontestablement par quarante ans."<sup>120</sup> This is taken directly from Roman law.<sup>121</sup> Only two servitudes were expressly mentioned in article 607 of the Reformed Custom (view and stillicide). Bérault refers to debate over whether article 607 applied to all servitudes, or to urban servitudes only.<sup>122</sup> Le Geyt's argument in favour of prescriptive acquisition of aqueduct also draws on this debate, and on the *Digest*.<sup>123</sup> However, given that Le Geyt rejects application of article 607 in Jersey law, it seems odd apparently to argue on the basis that it does apply.

Poingdestre accepts article 607 as Jersey law without demur, and applies it to all servitudes.<sup>124</sup> Whatever the position in the time of Poingdestre and Le Geyt, the Code of 1771 is unequivocal in its exclusion of any form of acquisitive prescription.

#### **(4) Quasi-Prescription: *Baudains v Simon***

*Baudains v Simon*<sup>125</sup> could be seen as supporting the existence of, or introducing, acquisitive prescription of servitudes, contrary to other sources of Jersey law. For this reason, the case merits close examination.

The facts were as follows. Simon raised an action to confirm her right to use a short stretch of road, which the defendants kept obstructing and (allegedly) trespassing upon. The defendants claimed that the plaintiff could show no title to the road. For

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<sup>118</sup> *Ibid* 193 *et seq.*

<sup>119</sup> 3.11.13.

<sup>120</sup> Vol 1, 199.

<sup>121</sup> *Ibid* 199 – 200. D.8.5.10. (See also: Bérault, Godefroy & d'Aviron *Commentaires* vol 2, 712 (Bérault), 715 (Godefroy).)

<sup>122</sup> Bérault, Godefroy & d'Aviron *Commentaires* vol 2, 712.

<sup>123</sup> Vol 1, 199 – 200; D.8.5.10.

<sup>124</sup> *Remarques*.

<sup>125</sup> *Simon v Baudains* (1970) 1 JJ 1405 (Royal Court); *Baudains v Simon* (1971) 1 JJ 1949 (Court of Appeal).



ease of reference, the court divided the road into two sections: the first road and the second road. At first instance, the court was satisfied that the plaintiff owned the first road, but not the second.<sup>126</sup> The second defendant argued that there could be no servitude in respect of that road because the plaintiff could show no title and there is *nulle servitude sans titre*.<sup>127</sup> The court did not address that point expressly. It held that the second road must be a *chemin de voisiné*, without making it clear whether it considered that to be a form of ownership, or a servitude.<sup>128</sup> Additionally, Poingdestre's definition of *chemin de voisiné* was quoted and later paraphrased, but Poingdestre and the court conflict over whether one end must meet a public road or not.<sup>129</sup> Having lost at first instance, the defendants appealed.

The Court of Appeal upheld the Royal Court judgment.<sup>130</sup> Regarding the second road, its reasons are remarkable. The Court considered that the facts were suggestive of a servitude because evidence had been given that the second road had been used for access to the plaintiff's property "throughout living memory", and that the boundaries of the first road established by an 1876 *contrat de transaction* would be bizarre in their inutility unless there was a right to use the second road.<sup>131</sup> The President suggested two possible reasons for the lack of documentary evidence. Either the servitude had been created by acquisitive prescription when that was still possible (1771 at the latest),<sup>132</sup> or it was created when the land was subinfeudated.<sup>133</sup>

It seems that subinfeudation ceased to be practised from around the seventeenth century.<sup>134</sup> Further, if the grant of land was after 1602, it would have been registered.<sup>135</sup> Therefore, any express grant in a subinfeudation would have to be

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<sup>126</sup> *Simon v Baudains* (1970) 1 JJ 1405, 1423, 1420, per Ereat, Deputy Bailiff.

<sup>127</sup> *Ibid* 1423.

<sup>128</sup> *Ibid* 1423 – 1424.

<sup>129</sup> *Ibid* 1422 – 1423, and 1424. The court held the second road to be a *chemin de voisiné*. Compare definitions: *ibid* 1424; Poingdestre *Lois* 194 (citing D.43.8.2.22, and commentary thereon. D.43.8.2.23 is more pertinent).

<sup>130</sup> *Baudains v Simon* (1971) 1 JJ 1949, 1952, and (for example) 1955, per Settle, JA.

<sup>131</sup> *Ibid* 1953, 1954.

<sup>132</sup> The President variously took (the Code of) 1771 (*ibid* 1953) and the year 1625 (*ibid* 1954) as the point at which acquisitive prescription became impossible.

<sup>133</sup> *Baudains v Simon* (1971) 1 JJ 1949, 1953–1954, per Settle, JA. See: ch 2 B.

<sup>134</sup> 1861 Report, viii. See: ch 2 B.

<sup>135</sup> See: ch 5.

before 1602.<sup>136</sup> Consequently, if a servitude was created by either of the means suggested by the President this must have occurred before 1771. However, the Court, having concluded that there was a servitude with a “legal origin”,<sup>137</sup> decided that it was not incumbent upon it to pronounce the exact nature of that genesis.

Le Quesne, JA, agreed with the President, and thought it sufficient to establish title to the servitude that its use “for well over a century” had been demonstrated, together with “the other circumstances to which the President [...] adverted”.<sup>138</sup> The “other circumstances” appear to be the inutility of the first road – as established by the *contrat de transaction* – if there is no right over the second. Le Quesne referred to Le Geyt’s discussion of acquisitive prescription of servitudes in the *Manuscripts*, as authority that prescription was still possible after 1625 where long usage was “accompanied by other appropriate circumstances”.<sup>139</sup> At best, however, this admits the possibility of acquisitive prescription only up to 1771. According to Le Quesne, use was proved “for well over a century”,<sup>140</sup> but 1771 was a full two centuries before the case came before the Court of Appeal. The decision was, however, that for recognition of a “pre-prohibition” right, it was necessary to show use for only one hundred years or so.

This result is unproblematic for a servitude with some legitimate origin, but the difficulty is identifying when this state of affairs has arisen. Following *Baudains*, where this cannot be known (but is not negated) the court will favour the party claiming the servitude, contrary to the principle that land is presumed free from burdens.<sup>141</sup> This approach resembles acquisition by use for time immemorial,<sup>142</sup> but is also strikingly similar to the English doctrine of lost modern grant.<sup>143</sup> Perhaps

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<sup>136</sup> Alternatively, a servitude may have been created by a form of destination in the hypothetical subinfeudation, but would have been pre-1700.

<sup>137</sup> *Baudains v Simon* (1971) 1 JJ 1949, 1955, per Settle, JA.

<sup>138</sup> *Ibid* 1955 – 1956, per Le Quesne, JA.

<sup>139</sup> *Ibid* 1955. Thus, as with Le Geyt himself, Le Quesne is not specific about what these “circumstances” may be.

<sup>140</sup> *Ibid*.

<sup>141</sup> See, for example: Poingdestre *Remarques* art 607; Basnage *Servitudes* 485, 499; *Haas v Duquemin* 2002 JLR 27, 35, para 20, per Hodge, JA; *Colesberg Hotel v Alton Hotel* 2003 JLR 176, 180, para 3, per Southwell, JA. Also: (Scotland) *Cusine & Paisley*, 285 – 286. See: ch 7 n57.

<sup>142</sup> Poingdestre, 54 – 59. Also: Le Geyt *Manuscripts* vol 1, 195.

<sup>143</sup> Gray & Gray, 676. Also: Matthews & Nicolle, 11, para 1.43.

English law influenced the court's reasoning (originating with counsel's submissions).

### **(5) Conclusion**

Before *Baudains v Simon*, the prohibition on acquisitive prescription of servitudes was clear. However, *Baudains* indicates that some of the results of this prohibition are so unjust that a way around the prohibition must sometimes be found.

## **CHAPTER 7 – EXERCISE OF SERVITUDES**

### **A. INTRODUCTION**

### **B. SERVITUDES CREATED EXPRESSLY**

- (1) *Arbaugh v Leyland*
- (2) *Blackburn v Kempson*
- (3) *Representation Blampied*
- (4) *Haas v Duquemin*
- (5) *Colesberg Hotel v Alton Hotel*
- (6) *Cotillard v O'Connor*
- (7) *La Petite Croatie v Ledo*
- (8) Interpretation of Servitudes Created Expressly

### **C. SERVITUDES CREATED BY DESTINATION**

### **D. SERVITUDES CREATED BY PRESCRIPTION**

### **E. PURPOSE**

- (1) *Le Feuvre v Mathew*
- (2) Default Rule

### **F. MANNER OF EXERCISE OF SERVITUDES OF ACCESS**

### **G. USE ONLY FOR THE BENEFIT OF THE DOMINANT TENEMENT**

### **H. IMPLIED CONTENT**

- (1) General
- (2) Illustration of a Test: *Moncrieff v Jamieson*

### **I. CIVILITER PRINCIPLE**

### **J. AGGRAVATION**

- (1) Nature of Aggravation
- (2) Effect of Aggravation

### **K. RESIDUAL RIGHTS OF THE SERVIENT OWNER**

- (1) No Positive Obligation
- (2) Negative Obligation Not to Diminish the Servitude

## **A. INTRODUCTION**

The holder of a servitude, the “dominant owner”, has the right to perform or prevent some kind of action on the servient tenement. Under a positive servitude,<sup>1</sup> the dominant owner can possess part of the land. This possession is in competition with the servient owner’s possession, and the two must co-exist. The servitude creates a situation loosely analogous to that of common ownership: the needs of the servient owner must be balanced against those of the dominant owner. This balancing is

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<sup>1</sup> See: ch 6 A(2)(b).

evident in the cases and rules regarding the use that can be made, or the extent, of the servitude.<sup>2</sup>

Unlike a positive servitude, a negative servitude gives the dominant owner no right to possess part of the servient tenement, only a right to prevent some kind of action on it. Therefore, there are no competing rights of possession to be balanced. However, doubt may surround the extent of a negative servitude, requiring interpretation of the constitutive hereditary contract.

The law regarding the exercise of servitudes is found primarily in *Le Gros, Basnage*, and cases. When considering the parameters within which a servitude can be exercised, it is of first importance to determine the extent of the right. Any activity beyond that extent is not justified by the servitude and is, therefore, unlawful.<sup>3</sup> The way in which the extent of a servitude is ascertained depends to some degree on its mode of creation, so aspects of the subject are considered in that way. Thereafter, some common matters are considered.

## **B. SERVITUDES CREATED EXPRESSLY**

When a servitude has been created expressly, regard should first be paid to the deed in order to ascertain the limits of the right.<sup>4</sup> Where the deed gives limits, these must be adhered to.<sup>5</sup> If the words are insufficient or ambiguous, some method is needed of ascertaining the limits. The following seven cases involve interpretation of servitudes.

### **(1) *Arbaugh v Leyland*<sup>6</sup>**

The court sought to determine two issues. First, had the construction of a wooden hut breached a servitude which limited building, even though it had not acceded to the

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<sup>2</sup> For example: (Scotland) *Cusine & Paisley*, 387, para 12.02.

<sup>3</sup> Unless justified by another right.

<sup>4</sup> For example: *Matthews & Nicolle*, 12, para 1.46; *Nicolle Immovable 57*; *Colesberg v Alton* 2003 JLR 47, 60, para 29, per Bailhache, Bailiff.

<sup>5</sup> For example: *Carey*, 215.

<sup>6</sup> (1967) 1 JJ 745.

land?<sup>7</sup> The court referred to Pothier's first and third rules of contractual interpretation (follow the common intention of the parties over adhering to the letter of the agreement,<sup>8</sup> and when a term is capable of two readings use whichever is closer to the nature of the contract)<sup>9</sup> and an English case, *Shaw v Morley*,<sup>10</sup> in which a temporary wooden structure on a racecourse was held to be an "office" in terms of betting legislation.<sup>11</sup> The court held that the wooden hut, though moveable, could constitute a breach of a servitude, and, applying Pothier's rules, that "the common intention of the parties [was] that there should be no detached buildings on the property."<sup>12</sup> Second, a *mitoyen* boundary wall had been extended. Did this breach a negative servitude in respect of the wall?<sup>13</sup> The court held that the servitude applied "solely to the walls extant at the time of the sale of the property by the plaintiff"<sup>14</sup> (when the servitude was created), so horizontal extension of the wall (as in this case) was not a breach of the servitude: the extension was not in existence when the servitude was created, so the servitude was held not to apply to it.<sup>15</sup> Thus, the court's general approach was to seek the probable intention of the parties to the original grant, and construe any restrictions narrowly.

## **(2) *Blackburn v Kempson***<sup>16</sup>

A negative servitude prevented the building of more than one house.<sup>17</sup> The defendant wished to build an extension to her house, which would constitute a separate, self-contained household, where the defendant's daughter and her family would live. Both parties sought clarification from the court on whether this would breach the servitude. Ambiguity centred on the meaning of "une seule maison". As the term was unclear, taking its ordinary meaning would not assist matters. Consequently, the

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<sup>7</sup> *Ibid* 746, per Bois, Deputy Bailiff.

<sup>8</sup> "On doit, dans les conventions, rechercher quelle a été la commune intention des parties contractantes, plus que le sens grammatical des termes" Pothier *Traité des Obligations* para 91.

<sup>9</sup> "Lorsque dans un contrat des termes sont susceptibles de deux sens, on doit les entendre dans le sens qui convient le plus à la nature du contrat" *ibid* para 93.

<sup>10</sup> (1867–68) LR 3 Ex 137.

<sup>11</sup> Betting Act 1853 (see: *Arbaugh v Leyland* (1967) 1 JJ 745, 748, per Bois, Deputy Bailiff).

<sup>12</sup> *Arbaugh*, *ibid* 748, per Bois, Deputy Bailiff.

<sup>13</sup> *Ibid* 746.

<sup>14</sup> *Ibid* 750.

<sup>15</sup> *Ibid*.

<sup>16</sup> (1971) 1 JJ 1747.

<sup>17</sup> There was also a servitude restricting the materials that could be used for construction: *ibid* 1748, per Ereaud, Deputy Bailiff.

court looked at the “context in which the expression [was] used”<sup>18</sup> and sought to “give effect to that interpretation of the expression which appear[ed] to be most consistent with the intention of the author of the clause and hence to the intention of those who are parties to it.”<sup>19</sup> The court decided that the intention of the author was “to preserve a ratio between buildings and open space consistent with a high-class residential area, and generally to create and encourage a pleasing neighbourhood”,<sup>20</sup> and that “une seule maison” meant “a building for human habitation so designed and constructed as to be capable of occupation by one household.”<sup>21</sup> Therefore, construction of the extension would constitute a breach of the servitude.

The court provided a summary of the rules for interpretation of documents:

“The object of all interpretation of a written instrument is to discover the intention of the author. That intention must be gathered from the instrument itself; the function of the Court, therefore, is to declare the meaning of what is written in the instrument, and not of what was intended to have been written. *Prima facie*, words must be taken in their ordinary sense, but where words are susceptible to more than one meaning, assistance may be obtained from the context in which they appear, and courts will give effect to that interpretation which appears to be most consistent with the intention of the parties to the instrument.”<sup>22</sup>

Pothier is not mentioned in the judgment. However, this passage is consistent with his first and third rules of contractual interpretation (relied upon by the court in *Arbaugh*).<sup>23</sup> In general, the court’s approach was to look for the probable intention of the parties to the original grant, considering clauses in the context of the whole document if necessary.

The rendering of the court is the “intention of the author”,<sup>24</sup> but in a judicial context there is little difference between “intention”<sup>25</sup> and “probable intention”.<sup>26</sup> Similarly,

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<sup>18</sup> *Ibid* 1756.

<sup>19</sup> *Ibid*.

<sup>20</sup> *Ibid* 1757.

<sup>21</sup> *Ibid* 1758.

<sup>22</sup> *Ibid* 1756.

<sup>23</sup> See: ch 7 B(1).

<sup>24</sup> (1971) 1 JJ 1747, 1756, Ereaud, Deputy Bailiff.

<sup>25</sup> *Ibid*.

there is little between “intention of the parties” and “intention of the author”<sup>27</sup> for it is the task of the author to represent the intention of the parties in written form, and both parties ratify this written form in open court when the contract is passed. Therefore, “parties” and “author” can be taken to be synonymous.

### **(3) Representation Blampied<sup>28</sup>**

A house had been constructed in the garden of another. The issue was whether the part of the garden that the house was built upon was subject to a negative servitude, prohibiting building. A number of properties were subject to similar, but not identical, negative servitudes. Blampied sought rectification of the contracts of sale to make it clear that the house had not been built in breach of a servitude. The court was reluctant to rectify, but, on request, did interpret the clauses, and decided that the servitude had not been breached.

Reference was made by the court to Pothier’s first<sup>29</sup> and sixth (interpret a clause by reference to the other clauses)<sup>30</sup> rules of contractual interpretation. Following these, the court’s decision was based upon determination of the intention of the parties. This process was facilitated by construing the contract as a whole, that is, by reference to other terms which were not constitutive of the servitude. As in *Blackburn*, the court’s approach was to look for the probable intention of the parties to the original grant, considering clauses in the context of the whole document where necessary.

### **(4) Haas v Duquemin<sup>31</sup>**

The interaction between servitudes and common ownership of a yard was at issue. *Inter alia*, the correct approach to interpretation of contracts relating to property rights was considered. The Court of Appeal stated that a grant of a servitude, which is effective against third parties, should not necessarily be interpreted in the same

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<sup>26</sup> Basnage *Servitudes* 486.

<sup>27</sup> (1971) 1 JJ 1747, 1756, Ereat, Deputy Bailiff.

<sup>28</sup> 4 November 1998, unreported.

<sup>29</sup> See: ch 7 n8.

<sup>30</sup> “on doit interpréter une clause par les autres clauses contenues dans l’acte, soit qu’elles precedent, ou qu’elles suivent” Pothier *Traité des Obligations* para 96.

<sup>31</sup> 2002 JLR 27.



way as a simple contract.<sup>32</sup> A contract is concerned with personal rights, and is only binding on the parties to it, thus “the intentions of the contracting parties are the prime consideration.”<sup>33</sup> This is not true of deeds constitutive of real rights, “which affect others than the initial parties to the deed”.<sup>34</sup> In other words, it should be possible to look at the register and see the nature and extent of property rights affecting any piece of land without reference to the factual matrix. This is the publicity principle of property law.<sup>35</sup>

In essence, the Court of Appeal in *Haas* restated, using different language, the general approach of the courts to interpretation of hereditary contracts constitutive of servitudes. This is most clearly seen in *Blackburn v Kempson*, in which the court restricted itself to the wording of the hereditary contract, without reference to the underlying factual matrix (which would have been necessary if the true intentions of the parties had been sought).<sup>36</sup> In *Arbaugh v Leyland*,<sup>37</sup> the court was assisted by reference to English law, but did not seek to ascertain the actual intentions of the original parties to the servitude. Similarly, in *Representation Blampied*,<sup>38</sup> the court also sought the probable, rather than actual, intention of the parties, by reference solely to the hereditary contract.

The Court of Appeal in *Haas* also referred, *inter alia*, to a passage in Domat saying that, when in doubt, servitudes are to be interpreted in favour of the servient tenement.<sup>39</sup>

### **(5) *Colesberg Hotel v Alton Hotel***<sup>40</sup>

The dominant owner wanted to change the use of the dominant tenement from a small hotel car park to the site of some residential property, and also parking for flats which were to be built on adjoining land, also owned by the dominant proprietor but

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<sup>32</sup> *Ibid* 35, para 20, per Hodge JA.

<sup>33</sup> *Ibid*.

<sup>34</sup> *Ibid*.

<sup>35</sup> See: ch 5 A(2).

<sup>36</sup> (1971) 1 JJ 1747, 1756, per Ereaut, Deputy Bailiff.

<sup>37</sup> (1967) 1 JJ 745.

<sup>38</sup> 4 November 1998, unreported.

<sup>39</sup> *Haas v Duquemin* 2002 JLR 27, 40 – 41, para 44, per Hodge JA.

<sup>40</sup> 2003 JLR 47 (Royal Court); 2003 JLR 176 (Court of Appeal).

not part of the dominant tenement of the servitude. The servient owner contended that this would be an aggravation of the servitude as it would result in increased use.<sup>41</sup> Both determination of the purpose of the servitude and of the extent to which the servitude could be used rested on interpretation of the deed.

The conveyancing phrase “toutes fois et quantes et à tous usages”, used in the grant of the servitude, was held by the Royal Court to be the widest grant possible.<sup>42</sup> Consequently, the development would not breach the servitude.<sup>43</sup> The Court of Appeal – although stating that the Royal Court should not have determined the meaning of the conveyancing phrase without hearing evidence on the matter – upheld the result reached by the Royal Court,<sup>44</sup> albeit for different reasons. Based on “what must have been in the contemplation of the parties”<sup>45</sup> to the original deed (that is, the probable intention of those parties) the court held that use of the dominant tenement for parking would have been contemplated.<sup>46</sup> Therefore, this purpose for the servitude was within the grant of it. Regarding the increased use of the servitude, Southwell, JA, rejected a test – suggested by Colesberg’s counsel – of what was “contemplated by the parties to the [constitutive] deed”,<sup>47</sup> preferring “the test adumbrated by Basnage [...] that the user must not be such as to render the burden on the servient tenement more inconvenient and more onerous”.<sup>48</sup> The latter he equated with the *civiliter* principle, referred to by the Bailiff at first instance.<sup>49</sup>

The Royal Court referred, *inter alia*, to Basnage, Pothier, and *Haas v Duquemin* in discussing how to interpret the relevant deeds. In the Court of Appeal, Southwell, JA, emphasised the differences and distance between “Jersey land law” and Roman law, the laws of France pre- and post-codification, and English law.<sup>50</sup> Nevertheless, he

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<sup>41</sup> 2003 JLR 47, 52, para 6, per Bailhache, Bailiff.

<sup>42</sup> *Ibid* 57, para 20, per Bailhache, Bailiff. (This view is supported by Basnage: *Servitudes* 491.)

<sup>43</sup> *Ibid* 58, para 24.

<sup>44</sup> 2003 JLR 176, 186, para 34, and 187, para 40, per Southwell, JA.

<sup>45</sup> *Ibid* para 33.

<sup>46</sup> *Ibid* para 34.

<sup>47</sup> *Ibid* 187, paras 39.

<sup>48</sup> *Ibid* para 39, per Southwell, JA.

<sup>49</sup> *Ibid*; 2003 JLR 47, 58, para 25, per Bailhache, Bailiff. Also, see: ch 7 I.

<sup>50</sup> 2003 JLR 176, 179, para 2, per Southwell, JA.

referred approvingly to Basnage,<sup>51</sup> whose commentary demonstrates the close links between Roman law and the law of servitudes in Normandy (and thus Jersey law also). Indeed, Basnage's words quoted by Southwell, JA, are followed by citation of the *Digest*.<sup>52</sup>

#### **(6) Cotillard v O'Connor**<sup>53</sup>

A servitude prohibited construction of commercial buildings and restricted residential construction to buildings of good quality.<sup>54</sup> Mrs Cotillard sought a declaration from the court that laying a road and the demolition and construction of boundary walls on the servient land would not breach the servitude.<sup>55</sup> The court held that there would be no breach, with essentially a two-fold justification: firstly, the work was not for a commercial end; and secondly, constructing anything other than good-quality dwellings was prohibited. However, nothing was said of, for example, walls and roads associated with dwellings, and so it could be taken that there was no restriction on these.<sup>56</sup> This reasoning is consistent with the presumption that land is free from burdens.<sup>57</sup> On interpreting the servitude, the court considered Pothier's first, third, sixth, and seventh rules on interpretation of agreements,<sup>58</sup> *Blackburn v Kempson*, *Haas v Duquemin*, and *Colesberg*.

#### **(7) La Petite Croatie v Ledo**<sup>59</sup>

The defendants (servient owners) began work on a derelict cottage on the servient land, including an extension of the cottage and establishing a hardcore and rubble track to it. The plaintiff (dominant owner) sought a permanent injunction, claiming the works to be in contravention of its servitude (referred to in the judgment using

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<sup>51</sup> *Ibid* 187, para 39, per Southwell, JA.

<sup>52</sup> Basnage *Servitudes* 488. D.8.2.20.4.

<sup>53</sup> [2007] JRC005; 2007 JLR N12.

<sup>54</sup> [2007] JRC005, para 5, per Birt, Deputy Bailiff.

<sup>55</sup> *Ibid* paras 10, 11.

<sup>56</sup> *Ibid* para 26.

<sup>57</sup> See, for example: Basnage *Servitudes* 486; *Haas v Duquemin* 2002 JLR 27, 35, para 20, per Hodge, JA; *Colesberg v Alton* 2003 JLR 176, 180, para 3, per Southwell, JA.

<sup>58</sup> See: ch 7 nn8, 9, 30. Pothier's seventh rule (*Traité des Obligations* para 97): "Dans le doute, une clause doit s'interpréter contre celui qui a stipulé quelque chose, et à la décharge de celui qui a contracté l'obligation."

<sup>59</sup> 2009 JLR 116.

the English law terminology of “restrictive covenant”) prohibiting building.<sup>60</sup> Difficulty attended identification of the boundaries of the servient tenement. Consequently, there was doubt over whether the cottage was subject to the burden.<sup>61</sup> The court concluded it was not, but that another area was,<sup>62</sup> arriving at the latter conclusion based on evidence extrinsic to the register.

Extensive reference was made to English law materials<sup>63</sup> and to a Jersey case on trusts (which in turn referred to English cases),<sup>64</sup> as well as some reference to Pothier’s rules on contractual interpretation.<sup>65</sup> As in previous cases, the approach of applying principles of (non-hereditary) contractual interpretation to servitudes risks conflict with the general principle favouring freedom from burdens in cases of uncertainty.<sup>66</sup> Previous cases avoided such conflict. This case did not.

Where property rights are not concerned, the aim of interpretation can be to strive to give effect to the agreement between the parties, for it is only the parties to the contract who will be affected.<sup>67</sup> This cannot be so for hereditary contracts. Property rights affect third parties; those third parties must be able to ascertain the precise nature of the right.<sup>68</sup> This is achieved by publicity.<sup>69</sup> The servitude was created expressly by registered deed. Therefore, the extent of the servitude must be apparent from the face of the register. If this is not so, how can a party know what binds him? This point is particularly strong where, as in this case, the servitude is negative, for there will be no sign of it on the land.

The presumption that land is free from burdens supports the reliability of the register, by reducing the likelihood that off-register burdens will be recognised.<sup>70</sup> The

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<sup>60</sup> *Ibid* 119, per Clyde-Smith, Commissioner.

<sup>61</sup> *Ibid* 131, para 38, and 135, para 47.

<sup>62</sup> *Ibid* 139 – 140, paras 67 – 71.

<sup>63</sup> *Ibid* 131, para 39 *et seq*, and 137, para 57 *et seq*.

<sup>64</sup> *Ibid* 121 – 123, para 10.

<sup>65</sup> *Ibid* 120 – 121, para 8.

<sup>66</sup> See: ch 7 n57.

<sup>67</sup> This point is made in *Haas v Duquemin* 2002 JLR 27, 35, para 20, per Hodge, JA.

<sup>68</sup> *Ibid*.

<sup>69</sup> See: ch 5 A(2) (publicity principle).

<sup>70</sup> Such as by destination or based on the decision in *Baudains v Simon* (1971) 1 JJ 1949. See: ch 6 C, D(4).

presumption also dictates that ambiguity will be construed in favour of the servient tenement. That is, however, not dependent on the existence of a register, but is a societal choice: the selection of a starting point. If third parties must be able to determine from the register the nature and extent of rights which may bind them, it is obvious that those elements must be clearly delineated. Where this is not done, the presumption that the land is free from burdens means that the servitude will be construed narrowly.

This was not the approach of the Royal Court in *La Petite Croatie*. Although it noted the warning of Hodge, JA, in *Haas v Duquemin* that particular considerations apply to the interpretation of deeds constitutive of property rights,<sup>71</sup> and the “powerful submissions”<sup>72</sup> of counsel for the plaintiff on *Haas* and the “sanctity of the Registry”,<sup>73</sup> these concerns were set aside in favour of following English law.<sup>74</sup> Extrinsic evidence was used to determine the extent of the servient tenement.<sup>75</sup> Specifically, a latent ambiguity, together with evidence “of probative value”, meant that correspondence relating to the drafting of the servitude was held to be admissible.<sup>76</sup>

The court does not make its reasons for departing from established principles of Jersey law clear. In general, it may be noted that the presumption that land is free from burdens is weaker concerning the extent of a right, in comparison to consideration of whether a right has been created at all. Concerning the extent of a servitude, it is a question of balancing the rights of the two parties. Both have a real right in the same piece of land and there will always be tension between them. The court cannot treat the dominant owner’s right as less important than that of the servient owner (nor is the opposite true), but must try to give effect to the rights of both parties. If a strict application of the presumption of freedom will result in an unworkable servitude for the dominant tenement (for example, a seasonal or

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<sup>71</sup> 2009 JLR 116, 121, para 9, and 137 (where “real right” is erroneously equated with “immovable property” (see further: ch 3 D)), paras 55 and 56, per Clyde-Smith, Commissioner.

<sup>72</sup> *Ibid* 137, para 56.

<sup>73</sup> *Ibid*.

<sup>74</sup> *Ibid* para 57 *et seq*.

<sup>75</sup> *Ibid* para 53 *et seq*.

<sup>76</sup> *Ibid* 139, para 63, per Clyde-Smith, Commissioner.

nocturnal servitude of access to landlocked land), the principle should not be strictly applied. In this way, the decision could be justified, although it may be questioned whether these facts warranted departure from the usual principles: the servitude would not have been unworkable, but absent.

### **(8) Interpretation of Servitudes Created Expressly**

From the cases emerges a clear method for the interpretation of servitudes. First, and obviously, the hereditary contract constitutive of the servitude should be examined. Where there is ambiguity, the probable intention of the parties to the contract constitutive of the servitude is sought.<sup>77</sup> To this end, it may be necessary to look at the relevant clause in the context of the whole document, or even other hereditary contracts pertaining to neighbouring plots.<sup>78</sup> If there is still ambiguity, the hereditary contract must be construed in favour of the servient land (in keeping with the presumption that land is free from burdens)<sup>79</sup> subject to exception in cases where this would result in great hardship on the dominant tenement.<sup>80</sup>

This method is also set out by Basnage (to whose work the court in *Colesberg* refers)<sup>81</sup> in relation to ascertaining the manner of use and extent of a servitude of way which has been created by deed.<sup>82</sup> Additionally, aspects of it are present in other legal systems. For example, the same test is found in article 780 of the Louisiana Civil Code of 1870, which applied to servitudes of passage. That article was the basis

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<sup>77</sup> Applied in: *Arbaugh v Leyland* (1967) 1 JJ 745; *Blackburn v Kempson* (1971) 1 JJ 1747; *Representation Blampied* 4 November 1998, unreported; *Colesberg v Alton* 2003 JLR 176; *La Petite Croatie v Ledo* 2009 JLR 116.

<sup>78</sup> Applied in: *Blackburn v Kempson*, *ibid*; *Representation Blampied*, *ibid*; *La Petite Croatie v Ledo*, *ibid*.

<sup>79</sup> Applied in: *Arbaugh v Leyland* (1967) 1 JJ 745; *Cotillard v O'Connor* [2007] JRC005. See also *Blackburn v Kempson*, *ibid* 1756, per Ereaut, Deputy Bailiff: “the function of the Court, therefore, is to declare the meaning of what is written in the instrument, and not of what was intended to have been written.”

<sup>80</sup> See: ch 7 B(7) (last para).

<sup>81</sup> *Colesberg v Alton* 2003 JLR 47, 55, para 15, and 57, para 19, per Bailhache, Bailiff; *Colesberg v Alton* 2003 JLR 176, 187, para 39, per Bailhache, Bailiff.

<sup>82</sup> “Que s’il n’est point fait mention de la largeur du passage, ni de la maniere que l’on s’en pourra servir, l’on doit examiner quelle a été l’intention vraisemblable des contractans, & la fin pour laquelle le chemin a été stipulé & promis; que si ces circonstances ne donnent point assés de lumiere, il faut en cette obscurité favoriser le fonds servant” Basnage *Servitudes* 486.

for article 749 in the 1996 revision,<sup>83</sup> which is of broader application (it applies to all servitudes), but has lost the provision that the final resort is to interpret the servitude in favour of the servient tenement. Yiannopoulos, however, is of the opinion that this provision is implicit in article 749.<sup>84</sup>

### C. SERVITUDES CREATED BY DESTINATION

In *Le Feuvre v Mathew*,<sup>85</sup> a servitude of access was held to have been created by destination.<sup>86</sup> One of the issues before the court was whether the limits of the servitude had been breached by a change in purpose when the dominant owner (defendant) changed the dominant tenement from a market garden to a dwelling house. The court held that the purpose of the servitude was fixed to the purpose of the usage at the time of subdivision. Consequently, the court held that the limits of the servitude had been breached.<sup>87</sup> The plaintiff was granted a permanent injunction preventing the exercise of the servitude, and damages in respect of trespass.

A servitude is created by destination if particular servitude-like use has been made of the prospective servient tenement up to the point when that land ceases to be owned by the same person as the dominant tenement.<sup>88</sup> Therefore, it is logical that its content is determined by the use that is being made at the time of subdivision,<sup>89</sup> at which point it “crystallises” into a servitude, and whereas the probable intention of the parties is relevant to interpretation of servitudes created expressly, the will of the grantor alone is relevant for servitudes created by destination. A comparison can be made with the rule (in other jurisdictions) governing the extent of servitude acquired by prescription: *tantum praescriptum quantum possessum*.<sup>90</sup>

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<sup>83</sup> “[...] If the title is silent as to the extent and manner of use of the servitude, the intention of the parties is to be determined in the light of its purpose.”

<sup>84</sup> Yiannopoulos *Servitudes* 418 – 419, para 149, n4.

<sup>85</sup> (1973) 1 JJ 2461 (first sitting); (1974) 2 JJ 49 (second sitting).

<sup>86</sup> See: ch 6 C.

<sup>87</sup> *Le Feuvre v Mathew* (1974) 2 JJ 49, 63, per Ereaut, Deputy Bailiff.

<sup>88</sup> See: ch 6 C.

<sup>89</sup> Matthews & Nicolle, 12, para 1.46; Nicolle *Immovable* 61; ch 6 C(5). Also, for example: (France) Planiol *Treatise* vol 1, part 2, 750, para 2964; (Louisiana) Yiannopoulos *Servitudes* 420, para 149.

<sup>90</sup> For example: (Scotland) Reid *Property* 374, para 460, *Kerr v Brown* 1939 SC 140, 147, per Lord Justice-Clerk Aitchison, cited therein (although the strictness with which the maxim is applied is

## D. SERVITUDES CREATED BY PRESCRIPTION

Creation of a servitude by acquisitive prescription is not now possible in Jersey law.<sup>91</sup> However, it is possible that there are servitudes still in existence which were created by acquisitive prescription before its prohibition. This possibility was raised in *Baudains v Simon*.<sup>92</sup>

As acquisitive prescription of servitudes has not been possible in Jersey since 1771 at the latest,<sup>93</sup> the discussion here is limited. It is most likely that there will be no deed.<sup>94</sup> Therefore, the best evidence available will be the exercise that was carried out over the prescriptive period: *tantum praescriptum quantum possessum*. This is the rule applied in a number of jurisdictions which recognise acquisitive prescription of servitudes.<sup>95</sup> However, as Gordon notes, there is a question over “whether ‘use’ means use only of the particular kind established during the period of prescription, or use as a genus of which the particular kind established is a species.”<sup>96</sup> This demonstrates that the *tantum praescriptum* maxim is rather vague, which vagueness is also a problem for servitudes created by destination.

## E. PURPOSE

The purpose of a servitude can be either general or limited. In the context of a right of way, a servitude with a general purpose can be used to access the dominant land, no matter to what use that land is put, whereas “a right of way [which] is granted [...] for a particular<sup>97</sup> purpose [...] cannot be exercised for a radically different

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variable: see *Carstairs v Spence* 1924 SC 380, 387 per Lord President Clyde; (Louisiana) Yiannopoulos *Servitudes* 419, para 149. See also: ch 7 D.

<sup>91</sup> See: ch 6 D.

<sup>92</sup> (1971) 1 JJ 1949, 1954 per Settle, JA. This case is discussed above, see: ch 6 D(4).

<sup>93</sup> See: ch 6 D(4).

<sup>94</sup> It is possible, even if unlikely, that the exercise of the servitude was initially based on a contract which had not passed before the Royal Court or been the subject of a *ouïe de paroisse*. Were this still extant, it could also be used as evidence of the extent of the servitude.

<sup>95</sup> For example: (France) Jourdain *Les biens* (1995) 215, 158, Aubry & Rau, vol 3, 132; (Scotland) Reid *Property* 245 – 246, para 325; (Louisiana) Yiannopoulos *Servitudes* 419, para 149. See also: ch 7 n90.

<sup>96</sup> Gordon *Land* 751, para 24–61.

<sup>97</sup> Or limited.



purpose.”<sup>98</sup> The important question here is to determine what the default rule is in relation to the purpose of a servitude, in the case where no purpose is specified. Is a limitation of purpose implied, or can the servitude be used for any purpose?

### **(1) *Le Feuvre v Mathew***

In *Le Feuvre*,<sup>99</sup> the court held, on the facts, that the servitude was limited as to its purpose.<sup>100</sup> It appears that the court based its decision on English case law.<sup>101</sup> A passage in *Le Gros* was referred to, but this neither supports nor contradicts the court’s conclusion.<sup>102</sup> The part of *Le Gros* cited is supportive of the principle that “a servitude [...] created for a particular purpose [...] may only be exercised for that purpose”.<sup>103</sup> However, it does not follow from this that all servitudes are of limited purpose, merely that those which are cannot be exercised for another purpose. Thus, on one view, the conclusion of the court in *Le Feuvre*<sup>104</sup> is based entirely on English law, where the default rule seems to have been that easements were limited as to purpose.<sup>105</sup> Since *Le Feuvre* was decided, however, there has been an important new decision in England in this area: *McAdams Homes Ltd v Robinson*.<sup>106</sup>

In *McAdams Homes*,<sup>107</sup> a cottage and a bakery were built on one piece of land. Subsequently, they came to be in separate ownership. The bakery was demolished and two houses built in its stead. The owners of the cottage obstructed the drain through which the bakery land’s sewage system accessed the public sewer. The owners of the bakery land sued for the cost of constructing a new link to the public sewer. The court held, *inter alia*, that the bakery had a valid easement, created by

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<sup>98</sup> *Le Feuvre v Mathew* (1974) 2 JJ 49, 59, per Ereaut, Deputy Bailiff. See also: *Colesberg v Alton* 2003 JLR 47, 56, para 16, per Bailhache, Bailiff.

<sup>99</sup> (1974) 2 JJ 49.

<sup>100</sup> *Ibid* 61, per Ereaut, Deputy Bailiff.

<sup>101</sup> *Ibid* 60.

<sup>102</sup> “Elle (la servitude) ne peut être exercée que dans la limite des besoins pour lesquels elle a été constituée.” *Ibid* 59.

<sup>103</sup> *Ibid*.

<sup>104</sup> (1974) 2 JJ 49.

<sup>105</sup> SG Maurice *Gale on Easements* (15<sup>th</sup> edn, 1986) 289 *et seq* (also: 297 *et seq*) (the most recent edition is the 18<sup>th</sup>, 2008). Also: *Carstairs v Spence* 1924 SC 380, 387, per Clyde, LP (commenting on English law).

<sup>106</sup> [2005] 1 P&CR 30, para 50, per Neuberger, LJ. *McAdams* appears to apply to easements by prescription as well: Gray & Gray, 628, para 5.1.70.

<sup>107</sup> [2005] 1 P&CR 30.

implication, and that change in the use of the dominant tenement alone (absent increase in the burden on the servient tenement) would not prevent the easement from being exercised.

Neuberger, LJ, after a review of the case law, proposed its rationalisation. Whether there is breach of an easement, created by prescription or by implication, depends upon fulfilment of two criteria:

- “i) whether the development of the dominant land [...] represented a ‘radical change in the character’ or a ‘change in the identity’ of the site [...] as opposed to a mere change or intensification in the use of the site [...];
- “ii) whether the use of the site as redeveloped would result in a substantial increase or alteration in the burden on the servient land”.<sup>108</sup>

In spite of this test, it is possible that an increase in the use of the easement alone will breach the easement, under the doctrine of “excessive user”,<sup>109</sup> giving rise to an action in tort. It is not suggested that this structure is emulated in Jersey law, despite a convergence between English and Jersey tort law.<sup>110</sup> An unacceptable increase in use of a servitude in Jersey law gives rise to remedies in property law. Nonetheless, it can be seen that the result of *McAdams Homes* is to demonstrate that while some increase in the burden on the servient tenement gives rise to an action, mere change in use of the dominant tenement will not. Thus, easements created by implication or prescription in English law are all general as to purpose.<sup>111</sup>

This leaves Jersey law in a curious position. If *Le Feuvre* were to be decided by reference to English law today, the result would not be the same. The increased use of the servitude, when it was used for the transportation of building materials, may still be held to have been unlawful. If this were the case, it could be the subject of an

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<sup>108</sup> *Ibid* para 50, per Neuberger, LJ.

<sup>109</sup> *Ibid* para 27.

<sup>110</sup> Nicolle *Origin* 65 – 67, 15.23 – 15.25.5.

<sup>111</sup> According to Gray and Gray, an easement created expressly “may not be used subsequently for a purpose wholly different from that originally envisaged”, which would distinguish easements created by express grant from those created by implication or prescription: 627, para 5.1.69. However, as creation by implication and prescription in English law both “derive from deemed grants” (Gray & Gray, 628, para 5.1.70), the effect of Neuberger LJ’s judgment ought to apply to easements by express grant also. It would not be logical for different conditions to attach to a “deemed” grants as against actual grants.

injunction. However, it appears that at the point when the action was raised, the building work had been completed. If the exercise of the servitude had reverted to use by foot and with trolley, there would be no continuing unlawful action, and the single fact of the dominant tenement having changed to a residential property would not render the servitude unexercisable.

It is surprising that the Jersey court chose to follow the English law position in determining the scope of the servitude in *Le Feuvre*,<sup>112</sup> perhaps all the more so as the decision drew out a convergence between Jersey law and French law in relation to the doctrine of destination in the same case. Nonetheless, as the decision was based on the particular facts, and as there was no discussion of a default rule as to purpose, it is open to the court to decide differently in the future.

## **(2) Default Rule**

In Jersey, with one exception, there is no authority on whether the default purpose of a servitude is general or limited. A default rule cannot be satisfactorily extrapolated from *Le Feuvre v Mathew*, the single case which touches on this issue.<sup>113</sup> On the whole, a default rule that servitudes are general as to purpose is preferable, as it avoids interpretative difficulties.<sup>114</sup> If the default rule were limited purpose, there would be greater doubt over what the precise purpose is. In litigation, this doubt will have to be resolved by the courts, frequently on the basis of the presumed intention of parties who are long dead, and factual circumstances of equal age, which can be difficult to ascertain.

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<sup>112</sup> (1974) 2 JJ 49.

<sup>113</sup> See: ch 7 E(1).

<sup>114</sup> French law appears to operate on the basis of a general purpose servitude as the default rule: Aubry & Rau, vol 3, 130, para 253; Planiol & Ripert, vol 3, 964, para 983. This is not a point which has occupied much attention in more modern French doctrinal writing (for example: Carbonnier, vol 2, 1758, para 808 *et seq*; Larroumet, vol 2, 475, para 798 *et seq*. Although see: Jourdain, 218, para 160), which may suggest that it is settled, and not seen as problematic. See also: (Scotland) *Carstairs v Spence* 1924 SC 380, 386, per Clyde, LP (general, with a small number of exceptions); (Louisiana) Yiannopoulos *Servitudes* 429 – 431, para 155.

## **F. MANNER OF EXERCISE OF SERVITUDES OF ACCESS**

Roman law sets out three ways in which access can be exercised: on foot, with beasts of burden, or with a vehicle.<sup>115</sup> The greater is deemed to include the lesser,<sup>116</sup> so a right to pass with vehicle includes the right to pass with animals, and on foot. Given the Roman law origins of the Jersey law of servitudes, it is suggested that these categories may be used in Jersey. They provide reference points which help to avoid uncertainty relating to the type of use allowed by a servitude. Changes in land use, and technological advances, lead to development of the factual content of the categories. For instance, the right to pass with some form of vehicle must now include a motor vehicle. Of course, it is open to the grantor to be highly specific about the type of use allowed. In that case, it may be considered that any use mentioned in the deed was not intended to be representative of a broader category. It may also be noted that, in practice, the category of the right to pass with beast of burden may have all but fallen away.

## **G. USE ONLY FOR THE BENEFIT OF THE DOMINANT TENEMENT**

A servitude must be exercised for the benefit of the dominant tenement alone,<sup>117</sup> for “it is inconsistent with the nature of a servitude that the dominant proprietor should have power to communicate its benefit to any third party.”<sup>118</sup> For example, if the dominant proprietor has land nearby which does not form part of the dominant tenement, it is unlawful for the servitude to be used for the benefit of that other land. Equally, if land adjoining the dominant tenement is subsequently purchased by the dominant proprietor, the servitude cannot be exercised in favour of the new acquisition.

Taken to its extreme, where land other than the dominant tenement, but owned by the dominant owner, gains some incidental benefit from a servitude, the dominant owner

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<sup>115</sup> This corresponds to *iter*, *actus*, and *via*: see D.8.3.1. See also: (Scotland) Erskine *Institute* 2.9.12.

<sup>116</sup> D.8.3.1. See, for example: (Scotland) *Malcolm v Lloyd* (1886) 13 R 512.

<sup>117</sup> *Colesberg v Alton* 2003 JLR 176, 179, para 1, per Southwell, JA.

<sup>118</sup> Reid *Property* 378, para 464. See also: Basnage *Servitudes* 492; Benest “Aggravation” 73, para 2 (Jersey law and Scots law are compared).

could be prohibited from exercising the servitude. However, to interpret the requirement in this way runs contrary to the principle of balancing the respective real rights of each party with the other.<sup>119</sup> Alternatively put, this rule should not be applied so rigidly as to strip the servitude of its utility. The Court of Appeal adopted this attitude in *Colesberg*,<sup>120</sup> where two pieces of land were dominant tenements to the same servient tenement, in respect of the same type of servitude. The use of one of the dominant tenements as a car park for the other dominant tenement was held not to breach the servitude.<sup>121</sup> Use of the servitude to access a car park was seen as sufficient of an end in itself, regardless of the direct benefit conferred on land which was not the dominant tenement.

## H. IMPLIED CONTENT

A servitude may also bring with it implied content. For example, a servitude of drawing water from a well has as ancillary to it a right of way in order that the well might be reached, even when this is not expressly stated.<sup>122</sup> Implied content may also consist of a right to install a structure – such as pipes or a channel for a servitude of aqueduct – and a right to maintain that structure, which would allow access on to the servient tenement for that purpose.<sup>123</sup>

### (1) General

Le Gros recognises implied content in the Jersey law of servitudes:

“La servitude [...] peut être rendue plus commode comme l’élargissement du chemin débiteur de la servitude.”<sup>124</sup>

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<sup>119</sup> See: ch 7 A.

<sup>120</sup> 2003 JLR 176, 183 and 186, paras 23, 36, per Southwell, JA.

<sup>121</sup> *Ibid* 187, para 38 (also: 186, para 37, where the argument that each dominant tenement can make use of both servitudes is rejected).

<sup>122</sup> See also: Matthews and Nicolle, 12, para 1.46.

<sup>123</sup> Just as the right that the dominant proprietor has can be exercised by a tenant, the right of entry for maintenance could be exercised by those engaged for the performance of that task.

<sup>124</sup> Le Gros, 21.

His comment is a specific example, but is intended to represent a principle of wider application:<sup>125</sup> that which facilitates the exercise of a servitude (such as a road) may be made more commodious (such as by making it wider).

At first, it seems that Le Gros allows improvements over and above what is strictly necessary for exercise of the servitude, but the context is important. This comment has on either side of it statements that it is not permissible to go outside the limits of the servitude. The extent of a servitude is determined and fixed at its creation, including implied content. If the right to make improvements is too broadly construed, the effect would be to rob of meaning the idea that the extent of the servitude is fixed.<sup>126</sup> From Le Gros' double emphasis on the fixedness of a servitude this could not have been his intention.

At its most basic, implied content enables the servitude to be exercised. In determining implied content, French law, Quebec law, and Louisiana law indicate that necessity is a key concept. All three state that rights which are necessary for the use of a servitude<sup>127</sup> are obtained at the time of its constitution. The problem lies in knowing which rights are to be considered necessary. Although improvements that are wholly unnecessary for the exercise of the servitude may be insupportable, Le Gros' comment suggests that the standard to be applied is not to be ascetic. The test could be characterised as one of "reasonable necessity", which was the conclusion reached by the House of Lords in the landmark case of *Moncrieff v Jamieson*.<sup>128</sup> Although a Scottish appeal, it was approached, by the English judges at least, on the basis that English and Scots law on this topic was the same.

## **(2) Illustration of a Test: *Moncrieff v Jamieson***

In *Moncrieff*, the pursuers had an express servitude of access over the defenders' land. Such was the topography<sup>129</sup> that it was impossible to take a vehicle on to the

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<sup>125</sup> Indicated by "comme".

<sup>126</sup> Cf: "fixité" in French law (see: ch 7 J).

<sup>127</sup> (France) arts 696, 697 CC; (Louisiana) art 743 CC; (Quebec) art 1177 CC. For Scotland and England, see: ch 7 H(2). The position in South Africa is unclear.

<sup>128</sup> 2008 SC (HL) 1.

<sup>129</sup> The pursuers' house was at the bottom of a small cliff: *ibid*, 3, para 3, per Lord Hope of Craighead.

dominant tenement. An implied right to load, unload, and turn a vehicle was accepted.<sup>130</sup> The dispute centred on whether a right to park could be implied as ancillary to the servitude of access.<sup>131</sup> The House held unanimously that it could.<sup>132</sup>

Lords Hope, Scott, Rodger and Neuberger all considered what the test should be for the inclusion of ancillary rights. Lords Hope and Scott thought the right should be “necessary for the comfortable use and enjoyment of the servitude”,<sup>133</sup> and “reasonably necessary”,<sup>134</sup> respectively. They also thought that the parties to creation of the servitude needed to have contemplated the ancillary right.<sup>135</sup> Lord Rodger’s – more restrictive – view was that that which was ancillary should be “essential to make the servitude [...] effective or to carry out the purpose for which the servitude was granted”.<sup>136</sup> Lord Neuberger opined that the implied right must be “reasonably necessary”,<sup>137</sup> to which he added:

“Without the necessity, there would be the danger of imposing an uncovenanted burden on the servient owner, based on little more than sympathy for the dominant owner; without the reasonableness, there would be a danger of imposing an unrealistically high hurdle for the dominant owner.”<sup>138</sup>

Lord Hope made a similar, but less full, justificatory statement.<sup>139</sup> These accounts reflect the search for equilibrium between the respective rights of the dominant proprietor and the servient proprietor in this area.<sup>140</sup>

It is noteworthy that all the judges reached the same final decision, despite semantic variations, and the additional “contemplation” element given by Lords Hope and

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<sup>130</sup> *Ibid* 12, para 32; 2008 SC (HL) 1, 19, para 52, per Lord Scott of Foscote.

<sup>131</sup> Which was previously unclear. See: *Cusine & Paisley*, 182 - 188, paras 3.48 – 3.52. Parking is a recognised servitude in Jersey law: *Haas v Duquemin* 2002 JLR 27.

<sup>132</sup> Although Lord Rodger expressed some reservations: 2008 SC (HL) 1, 24 – 34, paras 65 – 99.

<sup>133</sup> *Ibid* 11, para 29, per Lord Hope.

<sup>134</sup> *Ibid* 19, para 52, per Lord Scott.

<sup>135</sup> (Hope) *ibid* 11, para 30; (Scott) *ibid* 19, para 52.

<sup>136</sup> *Ibid* 29, para 82.

<sup>137</sup> *Ibid* 36, para 112.

<sup>138</sup> *Ibid* 36, para 112.

<sup>139</sup> “The use of the words ‘necessary’ and ‘comfortable’ strikes the right balance between the interests of the servient and the dominant proprietors”: 2008 SC (HL) 1, 11, para 29.

<sup>140</sup> See: ch 7 A.

Scott. The significance of the contemplation requirement seems minimal. If the presence or absence of such contemplation is assessed objectively, by reference to the “reasonable party”, any ancillary right necessary for the exercise of the servitude would always have been in the party’s contemplation.

Lord Neuberger’s test is attractive because it is succinct and lacks the (perhaps) meaningless requirement of the “contemplation of the parties”. His justification of the inclusion of both “reasonably” and “necessary” accords with the spirit of the law: seeking an appropriate balance between ownership and a servitude. Inclusion of both “reasonably” and “necessary” may help to ensure that the rights of both parties are considered adequately.

For Jersey, Le Gros’ comment offers comparatively little to go on. However, on the basis that similitude may be claimed between servitudes in Jersey law and in other mixed jurisdictions (at least),<sup>141</sup> the decision in *Moncrieff* provides some assistance. In any event, in order to be compatible with established principles of the Jersey law of servitudes,<sup>142</sup> Le Gros’ statement needs to be construed conservatively.

## **I. CIVILITER PRINCIPLE**

An obligation on a dominant owner to exercise a servitude in a reasonable manner – or *civiliter* – is implied. The *civiliter* rule is representative of the balance that the law makes between the dominant proprietor’s servitude, and the servient proprietor’s ownership.<sup>143</sup> It can be traced back to Justinian’s *Digest*,<sup>144</sup> and, therefore, it is unsurprising that the obligation is found in many jurisdictions.<sup>145</sup>

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<sup>141</sup> The greatest divergence is found in the area of creation, where acquisitive prescription is largely prohibited. But Quebec also applies this general rule. See: ch 6 D.

<sup>142</sup> Such the freedom of land from burdens and fixedness.

<sup>143</sup> See: ch 7 A. Also: Cusine & Paisley 387, para 12.02.

<sup>144</sup> D.8.1.9. See: Basnage *Servitudes* 486, 491.

<sup>145</sup> (England) Gray & Gray, 5.1.21; (Scotland) Erskine *Institute* 2.9.34; (South Africa) Voet, vol 2, 472. In France, it appears that the obligation is found, at least in part, in the doctrine of *l’abus des droits*, (on which: Jossierand *Esprit*). Also: (Louisiana) the term is not used, but see Yiannopoulos *Servitudes* para 152; (Quebec) the term is not used, but see Lamontagne *Biens* 414 – 415, para 619.



The *civiliter* obligation is alluded to by Le Geyt (“l’on ne doit user d’aucune Servitude à heure induë”),<sup>146</sup> noted explicitly by Basnage,<sup>147</sup> and also alluded to by Le Gros (“La servitude doit être exercée de manière que celui qui en est le débiteur soit incommodé le moins possible”).<sup>148</sup> Basnage’s exposition is fullest, and seems to be framed as a general proposition, as opposed to Le Geyt’s comment, which is confined to one aspect of exercise. It is this general obligation that is found in modern case law,<sup>149</sup> in which the *civiliter* obligation is presented as exercise “in a way which minimizes inconvenience”<sup>150</sup> to the servient tenement, a formulation which is consistent with the older materials. Thus, the obligation is one to minimise inconvenience, not to cause the minimum inconvenience possible.<sup>151</sup> The dominant owner is bound to exercise the right reasonably, not to act in the best interests of the servient owner.

The *civiliter* rule must be distinguished from the extent of the servitude, discussed above.<sup>152</sup> Logically, determination of the latter is prior to consideration of the former.<sup>153</sup> For example, a servitude giving a right of way by foot only may not be exercised with a vehicle, because that is outside the extent of the right. But if it is being exercised by foot only, that exercise, which is lawful in one respect, may be unlawful in another if it breaches the *civiliter* obligation. Thus, running backwards and forwards along a track to gain nothing but its erosion would be unlawful.<sup>154</sup> Similarly, using the right of way at night while making a great deal of noise may also be unlawful, depending upon whether or not the servient owner is within earshot. In

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<sup>146</sup> *Code Le Geyt* 3.11.9.

<sup>147</sup> Basnage *Servitudes* 486, 491. Also: Houard *Dictionnaire* vol 4, 204.

<sup>148</sup> 121.

<sup>149</sup> *Haas v Duquemin* 2002 JLR 27, 40, para 44, per Hodge, JA; *Colesberg v Alton* 2003 JLR 47, 58, para 25, per Bailhache, Bailiff, and 2003 JLR 176, 187, para 39, per Southwell, JA.

<sup>150</sup> 2002 JLR 27, 40, para 44, per Hodge JA; and, 2003 JLR 47, 58, para 25, per Bailhache, Bailiff (quoted, with approval, in the Court of Appeal: 2003 JLR 176, 187, para 39, per Southwell JA).

<sup>151</sup> *Cusine & Paisley*, 512 – 514, para 12.181.

<sup>152</sup> See: ch 7 E, F, G.

<sup>153</sup> “that requirement [the *civiliter* obligation] is concerned with the manner of the exercise of a servitude right, not with the prior question of the true extent of it.” *Moncrieff v Jamieson* 2005 SC 281, 301, per Lord Hamilton. In the House of Lords, Lord Rodger rephrases this: “the crucial point is that the *civiliter* doctrine does not itself determine the extent of the servitude right; it only comes into play in order to regulate how that right is to be exercised.” 2008 SC (HL) 1, 33, para 95.

<sup>154</sup> This is akin to the French doctrine of *abus de droit* because the main aim seems to be a nuisance to one’s neighbour, with an absence, or insufficient presence, of pursuance of one’s own legitimate interests.

*Colesberg v Alton*,<sup>155</sup> Southwell, JA, remarked that using the vehicular right of way at issue in that case at “excessive speed”<sup>156</sup> or while using the horn<sup>157</sup> may result in *aggravation*.<sup>158</sup>

## J. AGGRAVATION

Typically, allegations of “aggravation” arise when there is dispute between the dominant and the servient owners over what can be done within the limits of the servitude. The term is used by Le Gros, but whether he intended it to have technical significance is a moot point. His familiarity with the French Civil Code – within which “aggravation” is a concept in the law of servitudes – may be of import. Indeed, perhaps Le Gros “transplanted” the term from French law into Jersey (or was complicit in that happening). Either way, aggravation is today a useful concept, with a certain pedigree in Jersey law.

### (1) Nature of aggravation

“Aggravation” is a term used in Jersey, France, Louisiana, and Quebec.<sup>159</sup> In Jersey, it was considered in *Le Feuvre v Mathew* and *Colesberg v Alton*.<sup>160</sup> The starting point in both cases is a short passage from Le Gros where he states that “La servitude ne peut être aggravée”,<sup>161</sup> but this is not a definition. At its most basic, it means some action by the dominant owner, which the law deems to be unacceptable.

Le Gros makes further mention of “aggravation” while discussing natural servitudes.<sup>162</sup> Of natural drain of rainwater from higher to lower ground, he writes that the owner of the higher ground “ne peut rien faire qui aggrave cette servitude”,

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<sup>155</sup> 2003 JLR 176.

<sup>156</sup> *Ibid* 188, para 41.

<sup>157</sup> *Ibid*.

<sup>158</sup> See: ch 7 J.

<sup>159</sup> (France) art 702 CC; (Louisiana) Yiannopoulos *Servitudes* 431-433, para 156, and 426, para 152. Art 778 of the 1870 CC deals with *aggravation* (the English version does not use the word), but this article is neither repeated nor included in modified form in the 1996 version; (Quebec) Lamontagne *Biens* 416, para 621, art 1186 CC.

<sup>160</sup> *Le Feuvre v Mathew* (1974) 2 JJ 49; *Colesberg v Alton* 2003 JLR 47, and 2003 JLR 176.

<sup>161</sup> Le Gros, 21.

<sup>162</sup> A natural servitude is one which arises from the relative position of the tenements. See, for example: Matthews & Nicolle, 11, para 1.41; Nicolle *Immovable* 48.

giving the example of polluting the water.<sup>163</sup> He also recites part of a case on the same subject,<sup>164</sup> where the court pronounces that the dominant owner is free to channel the water as he or she wishes on the dominant tenement, as long as the effect is not “d’aggraver artificiellement la servitude naturelle résultant de l’état des lieux ou d’incommoder indûment le voisin.”<sup>165</sup>

It is possible that neither *Le Gros* nor the court intended the verb “aggraver” to have a specific legal meaning, but the cases appear to use “aggravation” as a term of art.<sup>166</sup> Therefore, it is important to be clear about what is being aggravated. A servitude is a burden on ownership. Its limits are fixed at the time of its creation. It is, therefore, impossible for the servitude itself to be made a greater weight, for it is a right with fixed boundaries. This has been described as the *fixité* of a servitude.<sup>167</sup> When an aggravation occurs, it is the factual burden on the servient tenement that is increased. The French Civil Code expresses this clearly and accurately, as aggravation of the condition of the servient tenement.<sup>168</sup>

From the discussion in *Le Feuvre*<sup>169</sup> and *Colesberg*,<sup>170</sup> “aggravation” in Jersey law appears to have the following attributes: it is impermissible;<sup>171</sup> it may occur when the factual burden on the servient tenement is increased or altered<sup>172</sup> (the prohibition on such increase or alteration is also given by Basnage);<sup>173</sup> if the purpose for which the servitude is used changes, aggravation results if the servitude is limited as to

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<sup>163</sup> *Le Gros*, 196.

<sup>164</sup> *Gibaut v Le Rossignol* (1900) 11 CR 188.

<sup>165</sup> *Le Gros*, 199.

<sup>166</sup> *Le Feuvre v Mathew* (1974) 2 JJ 49, 59, 62 – 63, per Ereat, Deputy Bailiff; *Colesberg v Alton* 2003 JLR 47, 52 – 58, per Bailhache, Bailiff; *Colesberg v Alton* 2003 JLR 176, 183 – 184, 186 – 188, per Southwell, JA.

<sup>167</sup> (France) art 702 CC, Carbonnier, vol 2, 1770, para 816; (Louisiana) *fixité* is not referred to, but the same principle that the dominant proprietor must remain within limits pertains also (consider: Yiannopoulos *Servitudes* 423 – 424, para 152); (Quebec) Lamontagne *Biens* 416, para 621. Atias suggests that a more realistic basis for this area of the law would be the mutability, or, perhaps, instability, of expressly granted servitudes: Atias “Mutabilité”.

<sup>168</sup> Art 702 CC. Also: Yiannopoulos *Servitudes* 431, para 156.

<sup>169</sup> See: ch 7 n166.

<sup>170</sup> *Ibid.*

<sup>171</sup> *Le Feuvre v Mathew* (1974) 2 JJ 49, 59, Ereat, Deputy Bailiff.

<sup>172</sup> *Ibid* 59, 61 – 62, 63.

<sup>173</sup> *Servitudes* 488 (although Basnage is discussing a specific servitude, the obligation must apply to all servitudes. Universal application is adverted to by the marginal heading, where the obligation is said to relate generally to “une servitude”).

purpose,<sup>174</sup> but not if the servitude is general as to purpose;<sup>175</sup> action which is beyond the scope of the servitude is characterised as aggravation;<sup>176</sup> breach of the *civiliter* obligation is also characterised as aggravation.<sup>177</sup>

The fundamental element in aggravation is that the limits of the servitude have been breached: the weight on the servient tenement has been increased without the justification of a servitude, that is, its condition has been aggravated. Aggravation is a convenient umbrella term for any kind of breach of a servitude. Whether there is aggravation may be determined by reference to the factual circumstances, the position of the tenements, interpretation of titles, or even the needs of the dominant tenement, and the prejudice to the servient tenement.<sup>178</sup>

In practice, it may be that, in almost all instances where a remedy is given, prejudice has been suffered by the servient proprietor. The necessary presence of prejudice to the servient proprietor is recognised by Matthews and Nicolle.<sup>179</sup> Where there is no prejudice, it may be held that the *de minimis* exception applies.

## (2) Effect of aggravation

In *Colesberg*, it is stated – without discussion – that the result of aggravation is extinction of the servitude.<sup>180</sup> This cannot be correct. The paragraph in *Le Gros* which mentions aggravation is followed immediately by a paragraph on the ways in which a servitude can be extinguished, but *Le Gros*' account of the latter is suggestive of an exhaustive list, and aggravation is not included.<sup>181</sup> In *Le Feuvre* it was not said that aggravation of a servitude entailed its extinction, even though aggravation was held to have occurred in that case.<sup>182</sup> Instead, it was held that a

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<sup>174</sup> *Colesberg v Alton* 2003 JLR 47, 56 – 57, per Bailhache, Bailiff.

<sup>175</sup> *Le Feuvre v Mathew* (1974) 2 JJ 49, 63, Ereaud, Deputy Bailiff.

<sup>176</sup> *Colesberg v Alton* 2003 JLR 176, 186, para 37, per Southwell, JA.

<sup>177</sup> *Ibid* 187-188, para 41.

<sup>178</sup> See: (France) Planiol & Ripert, vol 3, 965, para 984; (France) Jourdain, 217, para 160; (Louisiana) Yiannopoulos *Servitudes* 431, para 156; (Quebec) Lamontagne *Biens* 417, para 621.

<sup>179</sup> 12, para 1.47.

<sup>180</sup> *Colesberg v Alton* 2003: JLR 47, 52, para 6, and 53, para 9, per Bailhache, Bailiff, and JLR 176, 183, para 20, per Southwell, JA.

<sup>181</sup> *Le Gros*, 21.

<sup>182</sup> See: ch 7 E, for greater discussion. The conclusion that there was aggravation in that case may have been wrong.

change of purpose of a limited-purpose servitude rendered it no longer able to be exercised.<sup>183</sup> Therefore, were the dominant proprietor to restore the dominant tenement to its original use, the servitude could be exercised again (assuming it had not been extinguished by prescription).<sup>184</sup> The origin of the idea in *Colesberg* that aggravation extinguished the servitude is not clear.<sup>185</sup> However, on the basis of *Le Gros* and *Le Feuvre v Mathew*,<sup>186</sup> it would appear to be erroneous.

On the facts in *Colesberg*, were aggravation to lead to extinction, the result would be absurd. For example, a dominant proprietor in a car could be half way across the servient tenement and sound the horn. Supposing this noise to be a breach of the *civiliter* obligation, there is aggravation, the servitude is extinguished, and the dominant proprietor is a trespasser for the remainder of the journey. It may be possible for a resolutive condition to be included in the servitude grant which would have the effect of extinguishing the right upon aggravation. However, even if a grant did contain such a condition, the extinction would be the result of agreement between the parties.<sup>187</sup> Aggravation without prior agreement regarding its effect does not extinguish the right.

## **K. RESIDUAL RIGHTS OF THE SERVIENT OWNER**

### **(1) No positive obligation**

It is common to all servitudes that no positive obligation is placed on the servient owner. This is the passive nature of servitudes.<sup>188</sup>

### **(2) Negative obligation not to diminish the servitude**

The servient owner has the right to use his property, except insofar as this is limited by the servitude. Accordingly, the owner cannot do anything which results in

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<sup>183</sup> *Le Feuvre v Mathew* (1974) 2 JJ 49, 63, per Ereat, Deputy Bailiff.

<sup>184</sup> See: ch 8 F.

<sup>185</sup> *Colesberg v Alton* 2003 JLR 47, 52, para 6, and 53, para 9, per Bailhache, Bailiff (Royal Court). The wording of the Court of Appeal judgment is less conclusive (“the right of way was or should be extinguished”) *Colesberg v Alton* 2003 JLR 176, 183, para 20, per Southwell, JA.

<sup>186</sup> (1974) 2 JJ 49.

<sup>187</sup> See: *Le Gros*, 21.

<sup>188</sup> See: ch 6 A(2)(a).

diminution of the servitude right.<sup>189</sup> This is a straightforward consequence of the grant of servitude; a grant must not be derogated from.<sup>190</sup>

The obligation not to diminish a servitude was enforced in *Turner v Société Tyler*.<sup>191</sup> The defendant company carried out works, including some excavation, with the effect that the plaintiff's servitudes of passage and of drawing water became all but incapable of exercise. The court ordered the company to restore the land to the state it had been in before the works began.

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<sup>189</sup> Le Gros, 36.

<sup>190</sup> *Mercer v Bowers* (1973) 1 JJ 2453.

<sup>191</sup> (1913) 228 Ex 116.



## **CHAPTER 8 – EXTINCTION OF SERVITUDES**

- A. INTRODUCTION
- B. AGREEMENT
- C. CONFUSION
- D. *DEGREVEMENT*
- E. EXPROPRIATION
- F. EXTINCTIVE PRESCRIPTION
- G. PARTIAL PRESCRIPTION
- H. DESTRUCTION
- I. END OF FIXED TERM
- J. FULFILMENT OF RESOLUTIVE CONDITION
- K. AVOIDANCE OF TITLE TO LAND

### **A. INTRODUCTION**

Of the Jersey sources on the extinction of servitudes, the most comprehensive account is given by Le Gros.<sup>1</sup> By contrast, the commentaries on the Reformed Custom do not generally purport to give an exhaustive list of methods of extinction, but focus on article 607, which provides for extinction by prescription. The five causes of extinction given by Le Gros are: agreement, confusion, renunciation by virtue of *dégrévement*, expropriation, and non-use for forty years.<sup>2</sup> The court in *Felard Investments Ltd v The Trustees of “The Church of Our Lady, Queen of the Universe”*,<sup>3</sup> recites this list, adding extinction “by destruction”.<sup>4</sup> With the exception of renunciation by virtue of *dégrévement*, which is specific to Jersey, these methods of extinction are commonly found in other jurisdictions.<sup>5</sup>

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<sup>1</sup> Le Gros, 21.

<sup>2</sup> *Ibid.*

<sup>3</sup> (1978) JJ 1.

<sup>4</sup> *Ibid* 9, per Ereaut, Bailiff.

<sup>5</sup> For example: (France) arts 705, 706 CC; (England) Gray & Gray, 681 – 685; (Louisiana) arts 751, 753, 765 CC; (Quebec) art 1191 CC, *Loi sur l’expropriation* LRQ, c E-24, art 55.2 *et seq*; (Scotland) Cusine & Paisley, ch 17; (South Africa) Badenhorst & Pienaar, 336 – 338.



## B. AGREEMENT

As a real right in land, a servitude can be extinguished by passing a contract to that effect before the Royal Court.<sup>6</sup> Le Gros gives this method as “Par la convention”,<sup>7</sup> and “convention” may be translated as “agreement”. If the servient owner wishes to extinguish the servitude, agreement of the dominant owner is necessary. However, there is nothing to suggest that the dominant owner cannot extinguish the servitude unilaterally by passing a renunciation at the Contract Court.

## C. CONFUSION

Le Gros says that confusion operates to extinguish a servitude “lorsque le fonds dominant et le fonds servant sont réunis dans la même main”.<sup>8</sup> Basnage makes the important point that not only must the dominant and servient tenements come into the same ownership, but they must do so in their entirety.<sup>9</sup> If one part is missing from this unity, the servitude still exists. He also observes that extinction by confusion was possible in Roman law (as was extinction by prescription).<sup>10</sup>

Lalaure, an eighteenth-century commentator on *l'ancien droit*, highlights another question: what type of title must a person hold in the dominant and servient tenement? If the owner of the dominant tenement acquires a right of usufruct in the servient tenement, or *vice versa*, the servitude is not lost by confusion<sup>11</sup> because usufruct, like a praedial servitude, is a burden on the property, as opposed to ownership of it.<sup>12</sup> The same is true of all the subordinate real rights.<sup>13</sup> However, if ownership of one tenement and bare ownership of the other are brought together, confusion will result. Both are ownership: bare ownership is simply ownership burdened by a particular subordinate real right (usufruct).

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<sup>6</sup> For example: *Felard v Church of Our Lady* (1978) JJ 1, 9, 10, per Ereat, Bailiff. See: ch 5.

<sup>7</sup> 21.

<sup>8</sup> 21 (cited with approval in *Felard v Church of Our Lady* (1978) JJ 1, 9, per Ereat, Bailiff). See also: Carey, 215.

<sup>9</sup> Basnage *Servitudes* 494. For example: *Johnson v Summers* (1971) 1 JJ 1889.

<sup>10</sup> Basnage *ibid.*

<sup>11</sup> Lalaure *Servitudes* 64.

<sup>12</sup> See: ch 3 K.

<sup>13</sup> *Ibid.*

Regarding common property, Lalaure argues that if A and B have separate pieces of land, which are both dominant tenements in relation to C's land, and A and B then become common owners of C's land, these servitudes are not extinguished by confusion.<sup>14</sup> If, however, A and B held the dominant tenement(s) in common ownership as well, the servitude would be extinguished. The type of ownership in dominant and servient tenement must be identical.

The orthodox view of the effect of confusion is that it extinguishes, rather than merely suspends, a servitude.<sup>15</sup> On the basis of *Le Feuvre v Mathew*,<sup>16</sup> this appears to be the position in Jersey. Had the servitude subsisted, unextinguished, during the time that dominant tenement and servient tenement were held by the same person, there would have been no need for it to be created anew (by destination) on re-division.

#### **D. DEGREVEMENT**

Le Gros's third method of extinction is "Par la renonciation en vertu de la procédure du Dégrèvement".<sup>17</sup> *Dégrèvement* is a procedure which enables the holder of a hypothec to enforce the security. Le Gros refers to the 1880 Law generally (which introduced the procedure) but not to any specific article. Article 50 appears most relevant, under which "le détenteur [therefore, the dominant owner] de bonne foi" of a servitude can elect to renounce it during a *dégrèvement*. (The reference to good faith appears to relate to the exception that persons with a voidable title do not have the option to keep their right in a *dégrèvement*.) The procedure is described by Nicolle:

"If the servient tenement becomes subject to *dégrèvement* under the provisions of the *Loi (1880) sur la propriété foncière*, and the servitude was created by a contract passed before the Court subsequent to the acquisition of the servient tenement by the person whose property is *en dégrèvement*, the contract creating the servitude will be listed in the *dégrèvement*, and the

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<sup>14</sup> Lalaure *Servitudes* 64.

<sup>15</sup> For example: *ibid* 65.

<sup>16</sup> (1973) 1 JJ 2461; (1974) 2 JJ 49.

<sup>17</sup> 21.

owner of the dominant tenement will be called on to accept tenure of the property *en dégrèvement* or to renounce his contract. If he renounces his contract, the servitude ceases to exist.”<sup>18</sup>

The principal insolvency proceeding in Jersey is now *désastre*.<sup>19</sup> The Bankruptcy (Désastre) (Jersey) Law 1990 has no equivalent to article 50 of the 1880 Law.

## E. EXPROPRIATION

Le Gros’s fourth way of extinguishing a servitude is “Par l’expropriation pour cause d’utilité publique”.<sup>20</sup> Several Laws confer on a minister the power to extinguish a servitude, the most important being the Compulsory Purchase of Land (Procedure) Law 1961.<sup>21</sup> Compulsory purchase, including compulsory extinction of a servitude, is competent only in pursuance of a “Law confirmed by Order of Her Majesty in Council”.<sup>22</sup>

Other Laws which expressly confer the power to extinguish a servitude include: the Housing (Jersey) Law 1949, article 4(2)(b);<sup>23</sup> the Postal Services (Jersey) Law 2004, article 44(4)(b); the Planning and Building (Jersey) Law 2002, article 119(3)(b); the Education (Jersey) Law 1999, article 63(2)(b); the Telecommunications (Jersey) Law 2002, article 30(4)(b); and the Drainage (Jersey) Law 2005, article 33(4)(b).

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<sup>18</sup> *Immovable* 85 – 86.

<sup>19</sup> Matthews & Nicolle, 78, para 7.53.

<sup>20</sup> 21.

<sup>21</sup> Arts 2(2)(b), 5.

<sup>22</sup> Compulsory Purchase of Land (Procedure) Law 1961, art 2(1).

<sup>23</sup> According to the Housing (Jersey) Law 1949, art 4(1), and the Postal Services (Jersey) Law 2004, art 44(1), compulsory purchase must be done in accordance with the provisions of the Compulsory Purchase of Land (Procedure) (Jersey) Law 1961. This means that the power of compulsory purchase can only be exercised in pursuance of a “Law confirmed by Order of Her Majesty in Council”: art 2(1), Compulsory Purchase of Land (Procedure) (Jersey) Law 1961.

## F. EXTINGTIVE PRESCRIPTION

Le Gros's fifth method of extinction is "Par suite du non-usage pendant quarante ans".<sup>24</sup> The reason he gives for this is that the servitude is presumed to have been renounced if it has not been asserted for such a length of time.<sup>25</sup> This method of extinction is also given in the Code of 1771, in a passage similar to article 607 of the Reformed Custom.<sup>26</sup>

The conditions for extinctive prescription are not the same for all servitudes. Some begin to prescribe when the dominant proprietor ceases to exercise the right (positive servitudes), while others require an act contrary to the servitude before prescription will start to run (negative servitudes). Basnage, Godefroy, and Lalaure identified the former group as (generally) rustic servitudes and the latter as (generally) urban servitudes.<sup>27</sup> However, while there may be some loose correlation between when prescription operates and the categories of rustic and urban, this is incidental. Clearly, the conditions for the commencement of extinctive prescription depend upon whether the servitude is positive or negative.<sup>28</sup>

Basnage states that extinctive prescription will not start to run unless the dominant proprietor is negligent or at fault.<sup>29</sup> Thus, it will not run in the case of *force majeure*, because "on ne lui pourroit imputer de l'avoir abandonné".<sup>30</sup> In such a case of impossibility of exercise, it may be best to think of the servitude as suspended. It is of comparative interest that this is no longer the case in Quebec: the law was changed in the interest of "stabilité des titres immobiliers".<sup>31</sup>

Basnage offers a final quirk: if B has a right of way over two properties, both of which are owned by A, extinctive prescription is interrupted by exercising the right

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<sup>24</sup> 21.

<sup>25</sup> *Ibid.*

<sup>26</sup> "A la Cour du Samedi". See also: Poingdestre *Remarques* on art 607.

<sup>27</sup> Basnage *Servitudes* 494, 495; Godefroy *Coustume* 456; Lalaure *Servitudes* 69.

<sup>28</sup> Houard *Dictionnaire* vol 4, 204.

<sup>29</sup> Basnage *Servitudes* 494.

<sup>30</sup> *Ibid.* Also: Lalaure, 72.

<sup>31</sup> Lafond *Précis* 915.

over one of the properties alone.<sup>32</sup> At the least, this is a statement that should not be made without qualification. If the two servient tenements formed part of a path, it is easier to see why exercise of one of the servitudes may also preserve the other from extinction by prescription. In this example, the servitudes are both of the same type, and there is a strong connection between them, as they form part of the same path. These are exceptional circumstances, and likely to be rare in practice. Were the servitudes not so connected, it is hard to see any justification for holding that use of one alone preserves the other also.

For negative servitudes, it seems that raising an action in respect of the breach should interrupt prescription because that is an assertion of the right. Whether the justification for extinctive prescription is taken to be the negligence,<sup>33</sup> presumed abandonment,<sup>34</sup> or presumed renunciation<sup>35</sup> of the dominant proprietor, instigating court proceedings counters each of these allegations. For positive servitudes, one single instance of exercise during that period will halt the running of prescription, which must then recommence from the beginning again. The servitude does not need to be exercised to its full extent for this to happen. Partial exercise is sufficient.<sup>36</sup>

A thirty or forty year period used to be typical for extinctive prescription. However, this has been shortened in many jurisdictions. In France, the periods under the *Ancien Régime* differed: for example, in Normandy it was forty years, but thirty in Orléans.<sup>37</sup> Now, under article 706 of the French Civil Code a thirty-year period applies. South Africa also applies a thirty-year period.<sup>38</sup> A ten-year period applies in Quebec and Louisiana.<sup>39</sup> In Scotland, a middle ground of twenty years has been applied since 1973.<sup>40</sup> The forty-year period applicable to Jersey is the longest among these

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<sup>32</sup> Basnage *Servitudes* 494.

<sup>33</sup> *Ibid.* Of the three, it is this justification which rings most true if prescription cannot run following, for example, an act of God, but see: Johnston *Prescription* 16 – 17, paras 1.58 – 1.63.

<sup>34</sup> Basnage *Servitudes* 494.

<sup>35</sup> Le Gros, 21.

<sup>36</sup> Basnage *Servitudes* 494. Pesnelle, 618, n2.

<sup>37</sup> Pothier *Coutume d'Orléans, Des Servitudes réelles* art 226.

<sup>38</sup> Prescription Act 68 of 1969, s7.

<sup>39</sup> (Quebec) art 1191 CC; (Louisiana) art 753 CC.

<sup>40</sup> Prescription and Limitation (Scotland) Act 1973, s7(1). 40 years had applied previously.

jurisdictions. Shortening the period, as has been done in Guernsey,<sup>41</sup> may now be appropriate.

## G. PARTIAL PRESCRIPTION

Given that is it possible for a servitude to be lost by non-use, is it possible to lose only part of a servitude in the same way? For example, if part of a piece of land burdened by a servitude of way or by a servitude prohibiting building is built upon, can prescription operate to reduce the scope of the servitude to the extent of the land not developed? Alternatively, if a servitude of access is only exercised on foot for forty years, is the right to pass over the servient tenement by vehicle lost? These questions are not discussed by Poingdestre, Le Geyt, or Le Gros.

Basnage considers prescription of the modes in which a servitude of access can be exercised. He suggests that the determinative factor is whether the rights are in “separate titles”:

“Si celui qui a droit de chemin à pied, à cheval, à charrue & charrette, y passé seulement à pied durant le temps prefix pour la prescription de la liberté, sera-t-il censé avoir conservé le droit d’y passer à cheval & avec charrette? L’on fait cette distinction, que si ces droits ont été donnés par titres séparés, le droit de l’un ne se conserve point par la possession de l’autre; mais s’ils sont compris sous un même titre, il suffit d’y avoir passé à pied, pour conserver le droit d’y passer à cheval & avec charrette”.<sup>42</sup>

The word “titre” is ambiguous,<sup>43</sup> which renders the meaning of the passage obscure. It is common for two or more servitudes to be contained in one conveyance. Therefore, it is unlikely that “titre” refers to a physical document because it is clear that individual servitudes within a single conveyance are capable of independent extinctive prescription. “Titre” could mean clearly individual servitudes (that is, in separate clauses) whether in one document or not. A third possibility is that it refers to the level of detail given in the deed. If the right is simply stated as “servitude of

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<sup>41</sup> 20 years: 1909 Law, s1. See also: “Review of Legislation, 1909” 11 (1910 – 1911) 2 Journal of the Society of Comparative Legislation 340, 351.

<sup>42</sup> Basnage *Servitudes* 494.

<sup>43</sup> Also true in other areas. See: ch 6 D.

access” (or equivalent), exercise on foot preserves the right to pass by vehicle from extinctive prescription; if each of the modes of exercise is given, use on foot will not preserve the others, use with a vehicle. However, even if this is the correct reading of Basnage, it seems likely that use with a vehicle will always preserve use on foot, because the greater includes the lesser.<sup>44</sup>

The second and third possibilities are similar: have the modes been set out separately, in such a way that they may be “crossed off”? Basnage does not use the term “partial prescription”, so it seems that he considered prescription of modes to be prescription proper, and thus each stipulated mode to be, in effect, a separate grant.

In *Colesberg v Alton*,<sup>45</sup> although a servitude of access had been exercised only on foot for a number of years, partial prescription of the right to pass with a vehicle was rejected.<sup>46</sup> The servitude had been created by an express grant, which was general as to mode of exercise.<sup>47</sup> The decision is consistent with Basnage. However, the Bailiff’s reason for rejecting prescription seems to exclude partial prescription completely:

“in relation to a consensual *servitude*, it is necessary to look at the title and the intention of the parties is to be drawn from the terms of the deed.”<sup>48</sup>

If the extent of a servitude is always drawn from the deed, subsequent (non-)usage is irrelevant. In fact, this approach would exclude any extinctive prescription, partial or otherwise. This cannot be what the Bailiff intended. On that assumption, *Colesberg* indicates that partial prescription of a mode of exercise cannot take place where the grant is non-specific as to the ways in which the servitude can be exercised.

Prescription affecting only part of the area burdened by a servitude does not appear to be discussed in the Jersey sources. However, it is recognised in some other

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<sup>44</sup> See: ch 8 F.

<sup>45</sup> 2003 JLR 47 (Royal Court).

<sup>46</sup> *Ibid* 57, para 21, per Bailhache, Bailiff.

<sup>47</sup> The servitude is recited *ibid* 51, para 3.

<sup>48</sup> *Ibid* 57, para 21.

jurisdictions.<sup>49</sup> A strong argument in favour of its recognition can be made. For example, if building has taken place in contravention of a negative servitude or over land burdened by a positive servitude, it is reasonable to afford security to the owner of that building upon the expiry of the prescriptive period, if no challenge has been raised. The building itself provides adequate publicity of the reduction of the right, to any interested party. The law could also respond to the breach by holding the servitude to be wholly extinguished, but that would favour the servient owner over the dominant owner, where it is not necessary to do so.<sup>50</sup>

There are circumstances in which recognition of partial prescription would be undesirable. For example, it would be inconvenient if a servitude of *égouts*,<sup>51</sup> created during a year of particular high rainfall, were partially to prescribe following (albeit perhaps improbably) forty years of very low rainfall. Subsequent high rainfall would lead to aggravation of the servitude. *Égouts* is a continuous servitude: it is not exercised by human intervention.<sup>52</sup> It seems improbable, however, that the class of continuous servitudes could be considered incapable of partial prescription. A servitude prohibiting building is also continuous and is surely capable of partial prescription, otherwise an unlawful building which covered the burdened land entirely would become lawful after forty years, whereas one which only partially covered the burdened land would not. It may be, therefore, that a continuous servitude can partially prescribe when the relevant act is of human origin (such as building, and unlike rainfall).

It may be noted that partial prescription consisting only of the loss of an accessory servitude is impossible. If the accessory servitude has not been used for forty years, neither will the primary servitude have been used, so both will be extinguished

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<sup>49</sup> For example: (France) art 708 CC, Planiol & Ripert, vol 3, 978, para 995 (and case law therein), Larroumet, 545, para 882; (Quebec) Lamontagne *Biens* 430 – 431, para 646. In Louisiana there is no partial prescription (art 759 CC) but see earlier (1870) position, described by Yiannopoulos *Servitudes* 455 – 457, para 167.

<sup>50</sup> See: ch 6 A(3).

<sup>51</sup> Eavesdrop or eavesdrip.

<sup>52</sup> The Civilian sense: ch 6 C(4)(a).



together. Also, Basnage notes that exercise of an accessory servitude alone does not preserve the primary servitude from extinctive prescription.<sup>53</sup>

## H. DESTRUCTION

Destruction was recognised by the court in *Felard*<sup>54</sup> as a way in which a servitude could be extinguished. It seems that destruction of either the dominant or the servient tenement will extinguish the servitude if, for example, “the structure was demolished with no intention to rebuild or is permanently converted to an entirely different facility.”<sup>55</sup> Generally speaking, as a servitude burdens the land, not what is built upon it, a building on the servient tenement that is destroyed or demolished will still be subject to the servitude if it is rebuilt. Destruction, or loss, of a piece of land is unusual. In Jersey it may occur if, for example, reclaimed land is retaken by, or given back to, the sea.

## I. END OF FIXED TERM

A servitude created “à fin d’héritage” is perpetual. Logically, however, it is possible to create a servitude for a fixed term.<sup>56</sup> At the expiry of this term, the servitude is extinguished.

## J. FULFILMENT OF RESOLUTIVE CONDITION

There appears to be no impediment to creating a servitude subject to a resolutive condition. The servitude would be extinguished upon fulfillment of the condition.<sup>57</sup>

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<sup>53</sup> *Servitudes* 494.

<sup>54</sup> (1978) JJ 1, 9, per Ereat, Bailiff.

<sup>55</sup> *Cusine & Paisley*, 692.

<sup>56</sup> Discussed in: (Scotland) *Cusine & Paisley*, 701 – 702, para 17.32; (Louisiana) Yiannopoulos *Servitudes* 467 – 477, para 172; (Quebec) Lamontagne *Biens* 426, para 639; (South Africa) Badenhorst & Pienaar, 338.

<sup>57</sup> See: (France) Larroumet, 537, para 873; (Louisiana) Yiannopoulos *Servitudes* 467 – 477, para 172; (Scotland) *Cusine & Paisley*, 701 – 702, para 17.32; (South Africa) van der Merwe & de Waal *Servitudes* 503 – 504, para 617.

## K. AVOIDANCE OF TITLE TO LAND

It is unclear whether avoidance of title to land is retroactive in Jersey law. If it is, and one of the parties to the constitution of a servitude subsequently has his title reduced, any servitudes would be extinguished.<sup>58</sup> The use of “extinguished” is a loose one, because if reduction is retroactive, the servitude was never validly constituted as one of the parties to its creation was not an owner, and so incapable of the act he or she purported to perform.

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<sup>58</sup> For example: (France) Larroumet, 537, para 873; (Quebec) Lamontagne *Biens* 431, para 647.



## **CHAPTER 9 – VOISINAGE AND NUISANCE<sup>1</sup>**

### **A. INTRODUCTION**

- (1) English Law and Nuisance
- (2) Some Mixed Jurisdictions
- (3) French Law: *Troubles Anormaux ou Excessifs de Voisinage*
- (4) Similarities and Differences

### **B. VOISINAGE AND NUISANCE IN JERSEY**

- (1) Early Cases and Materials
- (2) *Key v Regal* and *Searley v Dawson*
- (3) After *Searley*
- (4) *Rockhampton* Litigation
- (5) After *Rockhampton*

### **C. HOW MANY DOCTRINES?**

- (1) Nuisance Only
- (2) *Voisinage* Only
- (3) Two Doctrines with Identical Spheres of Application
- (4) Two Doctrines with Overlapping Spheres of Application
- (5) Two Doctrines with Distinct Spheres of Application

### **D. DOCTRINAL BASES**

- (1) Nuisance
- (2) *Voisinage*

### **E. PREREQUISITES FOR LIABILITY**

- (1) Nuisance
- (2) *Voisinage*
- (3) Conclusion

### **F. LIMITS OF LIABILITY**

- (1) Personal Injury
- (2) Identity of Parties
  - (a) *Who can be sued?*
  - (b) *Who can sue?*
- (3) Defences
- (4) Remedies

### **G. NEIGHBOURHOOD LAW**

### **H. CONCLUSION**

### **A. INTRODUCTION**

This chapter is concerned with an aspect of the relationship between the law of property and the law of tort. What is the law applicable when one neighbour, through use of his or her land, interferes with the land of another neighbour? This may take

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<sup>1</sup> An earlier version of this chapter was published as “*Voisinage* and Nuisance” (2009) JGLR 274. The consent of the editor for reproduction here has been obtained.

the form of physical damage to, or interference with enjoyment of, immovable property. “Interference with property” is used to refer to these collectively.

In Jersey case law, the court has often granted remedies in respect of interferences with property with reference either to “nuisance” or the doctrine of “*voisinage*”. Recent litigation has raised questions concerning the place and nature of these legal concepts in Jersey law. Are they functional equivalents? Under what circumstances does each apply? Is it even the case that they are both part of Jersey law? *Gale & Clarke v Rockhampton Apartments*<sup>2</sup> concerned damage to a building resulting from activity on neighbouring land. In the Royal Court, it was held that the appropriate basis for the action was the law of *voisinage*.<sup>3</sup> The Court of Appeal, upholding these findings, further suggested that *voisinage* might be restricted to cases where there was damage to buildings.<sup>4</sup> In the subsequent case of *Yates v Reg’s Skips*,<sup>5</sup> noise generated on one property adversely affected the enjoyment of another.<sup>6</sup> In the Royal Court, both parties agreed that the doctrine of *voisinage* was applicable.<sup>7</sup> The Royal Court granted the injunction sought by the plaintiffs.<sup>8</sup> On appeal the decision was upheld, but the court was unsure about the basis of the action.<sup>9</sup> The law now appears uncertain.

In Roman law, a *Digest* text records that discharging smoke into the building above was impermissible.<sup>10</sup> However, Roman sources also present the apparently conflicting rule that the inevitable escape of smoke into neighbouring premises,

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<sup>2</sup> *Gale v Rockhampton* 2007 JLR 27 (Royal Court); *Rockhampton v Gale* 2007 JLR 332 (Court of Appeal).

<sup>3</sup> *Gale v Rockhampton* 2007 JLR 27, 41 – 42, paras 30 – 31, per Bailhache, Bailiff.

<sup>4</sup> *Rockhampton v Gale* 2007 JLR 332, 384, paras 151 and 154, and 387, para 164, per McNeill, JA.

<sup>5</sup> *Yates v Reg’s Skips* 2007 JRC 237, unreported (Royal Court) (also: 2007 JLR N65); *Reg’s Skips v Yates* 2008 JLR 191 (Court of Appeal). On this case see: *Voisinage and Customary Law: Review*, lodged at the Greffe on 5 January 2009 by Senator BE Shenton; and the response, *Voisinage and Customary Law: Review (P.1/2009) – Comments* presented to the States on 6 March 2009 by the Council of Ministers. A Jersey Law Commission Consultation Paper on *voisinage* has been drafted, but this has not been published on the Commission’s website (<http://www.lawcomm.gov.je>).

<sup>6</sup> *Yates v Reg’s Skips* 2007 JRC 237, unreported, para 4, per Bailhache, Bailiff.

<sup>7</sup> *Ibid* para 8.

<sup>8</sup> *Ibid* para 34.

<sup>9</sup> *Reg’s Skips v Yates* 2008 JLR 191, 200 – 201, para 30, and 202, para 34, per Jones, JA.

<sup>10</sup> D.8.5.8.5. See, for example: Gordley “Nuisance”.

concomitant to lighting a fire in a hearth, was permissible.<sup>11</sup> Thus, causing inconvenience to one's neighbour was on some occasions lawful, but on others it was not. The reconciliation of these rules is an enduring legal problem. Though the factual and legal contexts vary, the underlying issue is the same, namely, balancing the competing rights of the parties. This is true of both Common Law and Civilian jurisdictions, but also in the mixed jurisdictions, of which Jersey is one. The debate in Jersey over the respective places of nuisance and the doctrine of *voisinage* has been cast in terms of whether a Common Law or Civilian approach prevails in this area of the law.<sup>12</sup> For Jersey, this could be stated more specifically: does the influence of English law or the influence of French law prevail? For this reason, the approaches of these two jurisdictions will be reviewed briefly. Some of the mixed jurisdictions are considered also – including Guernsey – in order to locate Jersey law within that class. These mixed jurisdictions exhibit variations on the English and French themes. Following this, the Jersey materials are examined.

### **(1) English Law and Nuisance**

In England, physical damage to, or interference with enjoyment of, the immovable property of a neighbour can constitute a private nuisance.<sup>13</sup> This is a tort, for which the victim may obtain an injunction or damages. The activity need not be unlawful in itself;<sup>14</sup> it is the resulting effect which generates the wrong. A characteristic doctrine of English law, and of the Common Law world more generally, nuisance is unknown in the Civil Law world.

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<sup>11</sup> D.8.5.8.6.

<sup>12</sup> Hanson "Tort".

<sup>13</sup> Distinguished from a public nuisance, which is a criminal offence and "affects the reasonable comfort and convenience of a class of Her Majesty's subjects who come within the sphere or neighbourhood of its [the nuisance's] operation": Dugdale & Jones *Clerk & Lindsell* 20–03. Interference with easement and profits, and some types of encroachment also fall within the scope of private nuisance: Dugdale & Jones *Clerk & Lindsell* 20–06.

<sup>14</sup> Also, that planning permission has been granted does not in itself render an owner immune from liability for interference with property: see ch 9 B(5), and comments to a similar effect in the Guernsey case of *Fruit Export Company Ltd v Guernsey Gas Light Company* 3 May 1994 (Guernsey Royal Court) 20, per de Vic Graham Carey, Deputy Bailiff.

Balancing the parties' rights against one another is the principal exercise involved in establishing whether there is liability.<sup>15</sup> This is expressed through the principle of unreasonable user (or the maxim *sic utere tuo ut alienum non laedas*), which applies to all (private) nuisances.<sup>16</sup> A distinction is made between instances of physical damage to property and instances of interference with enjoyment of it,<sup>17</sup> but this division should not be overstated.<sup>18</sup> Whether user was unreasonable is determined by reference to the level of harm where damage is physical, while a number of other factors, including the character of the neighbourhood<sup>19</sup> and the duration of the nuisance,<sup>20</sup> are considered where interference with enjoyment is the subject of the complaint.

The role of fault in establishing liability for nuisance is a troubled question.<sup>21</sup> In the leading case of *Cambridge Water v Eastern Counties Leather*,<sup>22</sup> Lord Goff stated that although the principle of reasonable user lies at the heart of the tort of nuisance, this does not mean that the “defendant should be held liable for damage of a type which he could not reasonably foresee.”<sup>23</sup> This illustrates the general position of the law, which is that liability is not now strict.<sup>24</sup>

In addition to the law of nuisance, the rule in *Rylands v Fletcher*<sup>25</sup> also provides redress in some circumstances. Originally, the rule imposed strict liability where the harm complained of was the consequence of a non-natural use of land. Non-natural use is constituted by bringing something “not naturally there” on to the land,<sup>26</sup> although that action must bring with it “increased danger to others”.<sup>27</sup> The potentially

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<sup>15</sup> *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, 903, per Lord Wright; *Dugdale & Jones Clerk & Lindsell* 20–01.

<sup>16</sup> *Miller v Jackson* [1977] QB 966, 980, per Lord Denning, MR.

<sup>17</sup> *St Helens Smelting Co v Tipping* (1865) 11 HLC 642, 650, per Lord Westbury, LC.

<sup>18</sup> See: *Deakin Tort* 511 – 512.

<sup>19</sup> *Sturges v Bridgman* (1879) LR 11 Ch D 852, 865, per Thesiger, LJ.

<sup>20</sup> *Dugdale & Jones Clerk & Lindsell* 20–16.

<sup>21</sup> See: *Goldman v Hargrave* [1967] 1 AC 645, 657, per Lord Wilberforce; *Deakin Tort* 526 – 528.

<sup>22</sup> [1994] 2 AC 264.

<sup>23</sup> *Ibid* 300, noting the influence of the law of negligence.

<sup>24</sup> *Dugdale & Jones Clerk & Lindsell* 20–37, 20–38. Also: *Deakin Tort* 528.

<sup>25</sup> (1868) LR 3 HL 330.

<sup>26</sup> *Rylands v Fletcher* (1868) LR 3 HL 330, 340, per Lord Cairns.

<sup>27</sup> *Rickards v Lothian* [1913] AC 263, 280, per Lord Moulton. Also: *British Celanese v AH Hunt (Capacitors) Ltd* [1969] 1 WLR 959.

wide ambit of the rule has been restricted by subsequent case-law,<sup>28</sup> and the strict liability of the rule has also been eroded by the introduction of a requirement of foreseeability as a component of *Rylands* liability.<sup>29</sup>

English law in this area has influenced some mixed jurisdictions, including Guernsey, Scotland and South Africa.

## (2) Some Mixed Jurisdictions

Several Guernsey cases apply a law of nuisance, but the context in which that law sits is not clear. For example, does Guernsey have a law of tort, or a law of torts? That is, is there a list of nominate torts or is tort a general category of (civil) “wrongness”? The extent of the presence or influence of English law is also unclear. Case-law suggests that there are at least similarities between the law of nuisance in Guernsey and that of English law.<sup>30</sup>

In Scotland, the law of nuisance was subject to a number of early influences, but, sometime after 1750,<sup>31</sup> English law became dominant among these.<sup>32</sup> Although there are similarities between Scots and English law in this area,<sup>33</sup> there are also differences. For example, the Scots law of nuisance is narrower in scope and the rule in *Rylands v Fletcher*<sup>34</sup> does not apply.<sup>35</sup> Additionally, the doctrine of *aemulatio vicini*, a limited form of liability for abuse of right, is present in Scots law.<sup>36</sup>

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<sup>28</sup> For example: *Read v Lyons* [1947] AC 156.

<sup>29</sup> *Cambridge Water v Eastern Counties Leather* [1994] 2 AC 264, 306, per Lord Goff of Chieveley.

<sup>30</sup> See: *Dadd v Guernsey Rifle Club* 10 May 1993 (Guernsey Royal Court), 3 August 1994 (Guernsey Court of Appeal). *Fruit Export Company Ltd v Guernsey Gas Light Company Ltd* 3 May 1994 (Guernsey Royal Court), 2 October 1995 (Guernsey Court of Appeal); *Morton v Paint* 9 February 1996 (Guernsey Court of Appeal) 5, per Southwell, JA. See generally: Dawes *Laws* 691 – 701.

<sup>31</sup> Whitty *Nuisance* para 16.

<sup>32</sup> *Ibid* paras 7, 16.

<sup>33</sup> For example: *ibid* paras 32 (law will not provide redress in all instances), 39, 41; *Watt v Jamieson* 1954 SC 56, 58, per Cooper, LP (test of objective intolerability); *RHM Bakeries v Strathclyde Regional Council* 1985 SC (HL) 17 (liability is not strict, and fault required to be proved before damage will be awarded).

<sup>34</sup> (1868) LR 3 HL 330.

<sup>35</sup> *RHM Bakeries v Strathclyde Regional Council* 1985 SC (HL) 17, 42, per Lord Fraser of Tullybelton. Generally: Whitty *Nuisance* paras 18–25.

<sup>36</sup> Whitty *Nuisance* paras 33–36. Reid “Abuse” particularly 153 – 155.



South African law has undergone a partial reception of English law in this area.<sup>37</sup> However, private nuisance is restricted to interference with enjoyment of property, as the *actio legis Aquiliae* covers physical damage.<sup>38</sup> Also, the South African law of nuisance is generally thought to be a strict-liability doctrine, although it has been argued (in the context of a comparison with Scots law) that this divergence is largely one of “form rather than substance”.<sup>39</sup>

### **(3) French Law: *Troubles Anormaux ou Excessifs de Voisinage***

The French law of civil liability (*responsabilité civile*) is based on articles 1382 to 1386 of the Civil Code, supplemented by special regimes, or rules created post-codification dealing with specific factual situations, such as road traffic accidents. All contribute to form the law applicable when one neighbour, through the use of his or her land, causes physical damage to, or interference with enjoyment of, the land of another neighbour.

Where the damage complained of has been caused by the fault, negligence, or recklessness of the wrongdoer, liability attaches by virtue of articles 1382 and 1383 of the Civil Code. In addition, article 1384-1<sup>40</sup> makes a person strictly liable for the damage caused by things under his guardianship, and, as “things” includes immovable property, liability under article 1384-1 may be invoked in some circumstances where there is interference with property. Similarly, article 1386, (liability for damage caused by a ruined building which is, in effect, strict),<sup>41</sup> will be applicable in some instances.

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<sup>37</sup> Church & Church *Nuisance* para 167. D Van Der Merwe, “Neighbour Law” in Zimmermann & Visser *Southern* 759.

<sup>38</sup> Church & Church *Nuisance* para 169.

<sup>39</sup> F Du Bois & E Reid “Nuisance” in Zimmermann & Visser *Mixed* 589 – 590.

<sup>40</sup> This part of the article was originally intended as an introduction only; its interpretation as a source of liability began in 1896 (*l’arrêt Teffaine* 18 Juin 1896: *D.1897.1.433*, conclusions Sarrut, note Saleilles). Also: Borghetti “Responsabilité”.

<sup>41</sup> There is an irrebuttable presumption that the owner of the building was at fault: Roubier “1386” para 1, I.

The judge-made doctrine of *troubles de voisinage*<sup>42</sup> (or “neighbourhood disturbances”) protects “the peace of private individuals” where the “normal inconveniences of life in a neighbourhood” have been exceeded.<sup>43</sup> Elements of this type of liability are found in the work of pre-codification jurists, but the origin of the modern doctrine is a case from 1844, in which the noise from a factory was declared to have exceeded the level a neighbour is obliged to tolerate.<sup>44</sup> Thereafter, the rule developed that the problem must be in some way “abnormal” and the damage “excessive” before liability arises.<sup>45</sup> Anything below this threshold must be tolerated, but the wrongdoer is strictly liable<sup>46</sup> for anything above the threshold. A variety of activities have been held to constitute *troubles*, for example: noise from a flat,<sup>47</sup> dust,<sup>48</sup> smoke,<sup>49</sup> deprivation of view,<sup>50</sup> and construction works resulting in cracks and fissures in neighbouring property.<sup>51</sup> Additionally, *trouble* may also be constituted by the risk of damage occurring, for instance, through of proximity to a golf course.<sup>52</sup>

In respect of *troubles de voisinage*, it is possible to obtain an injunction, damages or both. What is awarded is the sole province of the judge. As with *responsabilité civile* under articles 1382 to 1386, there must be a *fait générateur* (juridical fact<sup>53</sup> triggering legal consequences), damage, and a causal link between the two.<sup>54</sup> The abnormal use of property constitutes the *fait générateur*.<sup>55</sup> Much juristic ink has been expended in seeking the basis for the doctrine.<sup>56</sup> The search ended with a definitive

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<sup>42</sup> See, for example: Dalloz’ note to article 544, “Responsabilité pour troubles anormaux de voisinage”. The doctrine of *troubles de voisinage* has caused conceptual problems because it is not found in the exhaustive list of limitations on ownership in art 544.

<sup>43</sup> G Viney “Tort Liability” in Bermann & Picard *Introduction* 254.

<sup>44</sup> Civ 27 nov 1844, S. 1844.1.811.

<sup>45</sup> Viney & Jourdain *Conditions* 1199 – 1200, para 939.

<sup>46</sup> In cases where the problem occurs more than once, however, Reid and du Bois’s argument could be applied (see: ch 9 A(2) final para).

<sup>47</sup> Such as vacuuming and footfall: Civ 2<sup>e</sup>, 3 janv 1969: *D. 1969. 323*.

<sup>48</sup> Civ 2<sup>e</sup>, 22 oct 1964: *D. 1965. 344*.

<sup>49</sup> Civ 1<sup>er</sup>, 1<sup>er</sup> mars 1977: *Bull. civ. I, n° 112*.

<sup>50</sup> 26 janv 1993 (N° de pourvoi: 91-15352).

<sup>51</sup> Civ 3<sup>e</sup>, 25 oct 1972: *Bull. civ. III, n° 560* (N° de pourvoi: 71-12434).

<sup>52</sup> Civ 2<sup>e</sup>, 10 juin 2004 (N° de pourvoi: 03-10434), which can be compared with the English case *Miller v Jackson* [1977] QB 966.

<sup>53</sup> On this concept: ch 9 D(2).

<sup>54</sup> Viney & Jourdain *Conditions* 1218, para 953.

<sup>55</sup> *Ibid.*

<sup>56</sup> For a brief summary: *ibid* 1202 – 1205. Also: Yocas *Troubles*; Leyat *Responsabilité*.

statement by the *Cour de cassation* that it was a form of no-fault liability,<sup>57</sup> distinguishing the doctrine from *responsabilité civile* generally, and from the doctrine of abuse of rights (*abus des droits*).<sup>58</sup> Where the *juges du fonds*<sup>59</sup> determine that a particular damage falls under liability for *troubles de voisinage*, liability under articles 1384-1, and 1386 can no longer be applied.<sup>60</sup>

The French are currently considering codal revisions. The property law reforms suggested by the *Association Henri Capitant* in its *Avant-projet de réforme du droit des biens* include codification of the French doctrine of *troubles de voisinage*.<sup>61</sup> The comparable laws in Quebec and Louisiana are codified and are similar to the French law, having been influenced by it.

Article 976 of the Quebec Civil Code provides that “[n]eighbours shall suffer the normal neighbourhood annoyances that are not beyond the limit of tolerance they owe each other, according to the nature or location of their land or local custom.” The concept expressed by this article carries the same name as its French law counterpart: *troubles de voisinage*. As with French law, Quebec law makes a distinction between normal and abnormal inconveniences.<sup>62</sup> Damages, injunction or both are available as remedies.<sup>63</sup> Fault is not a necessary component of liability.<sup>64</sup> Liability can also arise under the general delictual provisions in the Code.<sup>65</sup> In contrast to article 1384-1 of the French Civil Code, article 1465 of the Quebec Civil Code does not create strict liability in respect of damage caused by things under the wrongdoer’s control, but only a presumption of fault. Article 1467 of the Quebec Code (relating to ruinous buildings or those with a defect of construction, and

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<sup>57</sup> *Responsabilité sans faute*: Civ 2<sup>e</sup>, 24 avr 1989, 87-16696.

<sup>58</sup> On which, see: Jossierand *Esprit*.

<sup>59</sup> Judges of both fact and law. This excludes the *Cour de cassation*.

<sup>60</sup> Civ 2<sup>e</sup>, 18 juill 1984: *Bull. civ. II, n° 136*.

<sup>61</sup> Arts 629, 630 (see: <http://www.henricapitant.org/node/70>, accessed on 12 August 2011). Reform of the law of obligations is the first priority.

<sup>62</sup> For example: *Katz c Reitz* [1973] CA 230; *Dumas Transport Inc c Cliche* [1971] CA 160 (this decision is doubtful on other grounds. See: Lafond *Précis* 411).

<sup>63</sup> Arts 1601, 1607 QCC. Lamontagne *Biens* 179, para 238.

<sup>64</sup> *Gourdeau c Letellier de St-Just* 2002 CanLII 41118 (QC CA) para 44, per Thibault, JCA; Popovici “Poule”.

<sup>65</sup> Art 1457 QCC is equivalent to art 1382 FCC; Art 1467, para 1 QCC is equivalent to art 1386 FCC.

equivalent to article 1386 of the French Code) imposes strict liability. Under article 1457, fault-based liability can arise for negligence and carelessness.

In the Louisiana Civil Code, articles 667 to 669 apply specifically to relations between neighbours. These articles are located in the property law section of the Code. They are said to create legal servitudes<sup>66</sup> (which may be described as limitations on ownership arising *ex lege*),<sup>67</sup> but this classification has been criticised, particularly in relation to article 669, because of the absence of distinct dominant and servient estates.<sup>68</sup> Articles 667 and 669 impose restrictions on the right of ownership.<sup>69</sup> The former states that a proprietor shall not do anything on his or her own land “which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him”. Liability for damages under this article is not strict, except where the activity complained of is pile-driving or blasting with explosives. Under article 669 neighbours can incur liability for “different inconveniences” that they cause to one another.<sup>70</sup> Yiannopoulos argues that the threshold for liability under article 669 is determined by reference to use which is “abnormal” or “exceptional” and “causes damage or excessive inconvenience to neighbors” (which is similar to the French law terminology of abnormal or excessive neighbourhood disturbances and the English law principle of unreasonable user).<sup>71</sup> In the application of article 669, the courts have sometimes had regard to elements of Common Law “nuisance”, but this has been criticised as incompatible with Louisiana law.<sup>72</sup>

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<sup>66</sup> See: *Parish of East Feliciana v Guidry* 923 So2d 45 (La App 1 Cir 2005) 52, per McClendon, J.

<sup>67</sup> For example: *Yokum v 615 Bourbon Street, LLC* 977 So2d 859 (La 2008) 872, per Kimball, J. For Jersey, see also: ch 6 D(2).

<sup>68</sup> See: *Robichaux v Huppenbauer* 245 So2d 385 (La 1971) 392, per Barham, J.

<sup>69</sup> Yiannopoulos *Servitudes* 98, para 34.

<sup>70</sup> A note to this article says: “The English text of CC 1808 is a more complete and preferable translation of the French text than the present English text.” The 1808 equivalent is art 17: “The works or other thing which every one may make or have in his own grounds, and which send into the apartments of others who dwell in the same house, or into the neighboring houses, a smoke or smells that are offensive, such as the works of tanners and diers, and the other different inconveniences [inconveniences] which one neighbor may cause to another, ought to be borne with, if the service of them is established, or if there be no service settled, the inconvenience shall either be borne with or hindered [hindered], according as the rules of the police or usage may have provided in said matter.”

<sup>71</sup> Yiannopoulos *Servitudes* 119, para 42.

<sup>72</sup> *Ibid* 157 – 158, para 53.

Under article 668, some inconvenience must be tolerated. Accordingly, the negative side of ownership is restricted,<sup>73</sup> that is, the capacity to prevent others from acting in a way which infringes one's ownership. Breach of the obligations under these articles can give rise to damages, an injunctive remedy or both.<sup>74</sup> Liability under articles 668 and 669 is strict.

Liability may also arise under the general delictual provisions<sup>75</sup> of the Code, which include liability without reference to negligence for "ultrahazardous activities" (other than those covered by article 667).<sup>76</sup> Liability can attach to a person for abuse of right, either under article 2315 or article 667.<sup>77</sup>

#### **(4) Similarities and Differences**

Each jurisdiction so far considered employs either a distinction between normal and abnormal inconveniences or a test of what is objectively reasonable<sup>78</sup> in order to locate the threshold for liability. It is submitted that there is no significant difference between the two and that, therefore, there is no difference on this point between the Civilian approach (normal and abnormal inconveniences), as adopted in France, Quebec, and Louisiana, and the Common Law approach (objectively reasonable) of England, Scotland, and South Africa. This is perhaps unsurprising: it is a common-sense approach to a thoroughly practical problem. Gordley's view is that the Common Law maxim *sic utere tuo ut neminem laedas*,<sup>79</sup> first found in Blackstone's *Commentaries*,<sup>80</sup> is a restatement of Odofredus's commentary on *Digest* 8.5.8.5:

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<sup>73</sup> Yiannopoulos *Servitudes* 98, para 34.

<sup>74</sup> *Ibid* 139, para 50, and 176, para 61.

<sup>75</sup> Art 2315 – 2324 LaCC.

<sup>76</sup> Yiannopoulos *Servitudes* 107, para 38. *Langlois v Allied Chemical Corp* 249 So2d 133, 139 – 140 (1971) per Barham, J.

<sup>77</sup> For example: *Higgins Oil & Fuel Company v Guaranty Oil Company* 145 La 223, 82 So 206 (1919); Yiannopoulos *Servitudes* 146, para 51.

<sup>78</sup> On "reasonableness" in this context, see also: *Gale v Rockhampton* 2007 JLR 27, 37, para 18, per Bailhache, Bailiff.

<sup>79</sup> Alternatively given as *sic utere tuo ut alienum non laedas* [so use your own property as not to injure that of another] (see, for example: *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, 903, per Lord Wright). See: *Searley v Dawson* (1971) 1 JJ 1687, 1699, per Le Masurier, Bailiff; Yiannopoulos *Servitudes* para 32 "the common reservoir of the civilian tradition", and 156, para 53.

<sup>80</sup> Blackstone *Commentaries* 3.217.

*unusquisque debet facere in suo quod non officiat alieno*.<sup>81</sup> If that is correct, the law in this area finds its origins in the *Digest* for both the Common Law and the Civilian systems. The primary principle in all of the systems considered, therefore, is that the respective rights of the parties should be balanced against one another, however that may be expressed.

A second similarity is that, in each system, more than one set of rules is potentially applicable. Thus, while there are specific rules concerning, for example, nuisance or *troubles de voisinage*, the general law of negligence may also be applicable.

Although there is some convergence between the laws of the jurisdictions considered, they also diverge, for example, in relation to whether liability is strict, fault-based, or a mixture of both.<sup>82</sup> Thus, the precise circumstances in which a remedy will be granted also differ. Further, the types of inconvenience deemed to be unacceptable are also not identical, and the systems considered show variation in where the balance between the parties' rights is deemed to lie. The structure of the law is not uniform. In South Africa, an important distinction is made between interference with enjoyment (which is covered by nuisance) and physical damage (which is covered by the general law of negligence). Another divergence of potential significance is that the relevant rules are not always found in the law of tort, but are sometimes located in the law of property, such as in the case of Louisiana.

It may be helpful to measure these different systems against the English law of nuisance. Scots law (and probably also Guernsey law) has a law of nuisance which is substantially similar to that of English law. In South Africa, this is partially true (the law of nuisance only applying where there is interference with enjoyment). The equivalent Louisianan law, found in articles 667 to 669 of the Civil Code, is directly comparable to the English law of nuisance. The equivalent law in France and

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<sup>81</sup> Gordley *Method* 83, citing "Odofredus, *Lectura super digesto veteri* at D 8.5.8.5 (1550)" (*Opera iuridica rariora* vol 2).

<sup>82</sup> Strict, for example: (France) *troubles de voisinage*, and art 1384-1 liability; (South Africa) liability for nuisance in South Africa (at least nominally); (Louisiana) liability under arts 668, 669 CC; (Quebec) liability under art 976 CC. Arts 667 – 669 of the Louisiana CC demonstrate a mixture of strict liability and fault-based liability. In English law, and in Scots law, liability is fault-based.

Quebec, however, is more fragmented, being spread across the doctrine of *troubles de voisinage*, articles on acts of things under one's guardianship, and articles on liability for ruinous buildings or those suffering from a defect of construction. Of these, the primary functional comparator is the doctrine of *troubles de voisinage*, the other articles providing for specific instances of liability. *Troubles de voisinage* creates liability for excessive inconvenience within the framework of a neighbourhood, giving it the necessary generality and geographical dimension to make it most analogous to nuisance.

Jersey law in this area is uncertain. The foregoing comparative survey presents some specific questions which can be asked of Jersey law in order to achieve clarification. For example: is the applicable Jersey law property law, tort law, or both? How many doctrines make up the law which is functionally comparable to the English law of nuisance? Is liability strict or not? What is the threshold for liability? What are the available remedies? With these in mind, the Jersey sources are now considered.

## **B. VOISINAGE AND NUISANCE IN JERSEY**

### **(1) Early Cases and Materials**

What may be the earliest mention of this area of the law in the Jersey sources appears in Hemery and Dumaresq's *Statement of the Mode of Proceeding and of Going to Trial in the Royal Court of Jersey* of 1789.<sup>83</sup> (A more definitive statement cannot be made without further historical research, which is beyond the scope of this thesis.)<sup>84</sup> Regarding the jurisdiction of the Saturday's (*Samedi*) Court, Hemery and Dumaresq write that this concerns "principally actions of waste, nuisance, trespass, disturbance, and such like injuries, committed to the prejudice of houses, woods, or lands."<sup>85</sup> The context suggests that "nuisance" already had a specific technical meaning in Jersey. Nonetheless, it cannot be assumed that this passage refers to the *English* law of nuisance. Although Hemery and Dumaresq wrote in English (for an English

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<sup>83</sup> See: ch 1 n61.

<sup>84</sup> The "querela novae dissaisinae" is found in the *Très-Ancien Coutumier*, but this is a forerunner to, rather than an early example of, the modern regime in this area. See further: the final paragraph of this section.

<sup>85</sup> Hemery & Dumaresq, 30.

audience), French was the legal language of the jurisdiction. It is, therefore, possible that the English legal term was used only because it most closely fitted the existing Jersey legal concept.<sup>86</sup>

Le Geyt does not consider “nuisance”, or an equivalent. Poingdestre uses the word “*voisinage*” in his commentary on servitudes in the Reformed Custom of Normandy,<sup>87</sup> but it seems unlikely that it is used as a term of art, for it appears as part of a list of otherwise loosely synonymous words, and therefore the best translation is probably “neighbourliness” or similar.<sup>88</sup> Le Gros uses the word “voisinage” twice. The first use seems to mean “neighbourliness”.<sup>89</sup> The second use is as part of the statement that “le droit de voisinage oblige les voisins à souffrir quelque incommodité les uns pour les autres”, but it occurs within a quotation of Basnage,<sup>90</sup> with which passage Le Gros goes on to disagree.<sup>91</sup> Le Gros repeats the principle at the beginning of another section,<sup>92</sup> but provides no information on how it is to be enforced: by an action in *voisinage*, or (as in English law) by an action in tort? For this, cases must be examined.

A number of unreported Jersey cases would be analysed today as instances of private nuisance, *troubles de voisinage* or some equivalent. Nine such cases are here considered, dating from 1889 to 1962. In *Curry v Horman* (1889),<sup>93</sup> manure piled on one property resulted in a nauseating stench on neighbouring land. The defendant, having worked the offending matter into the ground and so eliminated the problem, was condemned only to pay the costs of the action. Damages were awarded in *Arm v*

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<sup>86</sup> Also: *Rockhampton v Gale* 2007 JLR 332, 375, para 127, per McNeill, JA.

<sup>87</sup> “amité voisinage familiarité courtoisie ou semblables causes” *Remarques* “Servitudes”, introductory passage.

<sup>88</sup> *Gale v Rockhampton* 2007 JLR 27, 33-34, para 9; *Rockhampton v Gale* 2007 JLR 332, 348, para 32, per McNeill, JA.

<sup>89</sup> 36 – 37.

<sup>90</sup> 119. See: Basnage *Servitudes* 499. His words are resonated in Pothier.

<sup>91</sup> On the ownership of fruits falling on neighbouring land, and on which Le Gros is probably wrong. (See: *Code Le Geyt* 3.11.10; Matthews & Nicolle, 15, paras 1.59 – 1.60; Nicolle *Immovable* 45 – 46. The law appears to be that the fruit is divided between the owner of the tree and the owner of land on which it fell. Following the normal rule for accession of fruits (see: ch 4 E(4)) the owner of the tree would alone be entitled to the fruit. That is Le Gros’ view, although he cites only English law to support it.)

<sup>92</sup> 222: “Le propriétaire d’un héritage doit jouir et user de sa propriété de manière qu’il n’incommode pas indûment son voisin.”

<sup>93</sup> (1889) 213 Ex 511.



*De La Mare* (1899)<sup>94</sup> because of smoke and cinders coming from a chimney on the defendant's property, connected to his printing business. *Dutton v Constable of St Helier* (1901)<sup>95</sup> concerned noise, smell and fine dust connected with the operation of a parish incinerator, which affected enjoyment of the plaintiff's property and resulted in some damage to his vegetation. Both damages and an injunction were granted. Noise, smell and soot gave rise to an injunctive remedy in *Chisholm v Glendewar* (1924).<sup>96</sup> Noise and vibrations from the defendant's industrial saws and damp from his defective plumbing were the cause of complaint in *Keough v Farley* (1937).<sup>97</sup> As the defendant had taken steps to remedy the problem neither damages nor an injunction were granted. In *Herivel v Harman* (1947),<sup>98</sup> the plaintiff complained of numerous types of noise emanating from an adjacent house, which was used as a school. He was granted injunctive relief in respect of some of his complaints.<sup>99</sup> No decision is recorded in *Penseney v Philip Le Sueur & Sons Ltd* (1951),<sup>100</sup> where the problems complained of were dust, noise and strain on a party wall as a result of movement and storage of coal on the defendant company's land. In *Coutanche v Lefebvre* (1955),<sup>101</sup> property damage was caused by dust, which resulted in the death of some trees, and damages were awarded. Finally, in *Lysaght v Channel Islands Property Holdings* (1961 and 1962),<sup>102</sup> damages were awarded for inconvenience caused by building work.

“Voisinage” is mentioned in *Arm v De La Mare*<sup>103</sup> and in *Chisholm v Glendewar*.<sup>104</sup> In both cases the context suggests that “neighbourhood” is the most appropriate translation. The word “trouble” is used in *Lysaght v Channel Islands Property*

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<sup>94</sup> (1899) 220 Ex 28.

<sup>95</sup> (1901) 221 Ex 120.

<sup>96</sup> (1924) 233 Ex 31.

<sup>97</sup> (1937) 12 CR 373.

<sup>98</sup> (1947) 243 Ex 200; (1947) 243 Ex 222.

<sup>99</sup> (1947) 243 Ex 222, 223.

<sup>100</sup> (1951) 247 Ex 117.

<sup>101</sup> (1955) 249 Ex 390.

<sup>102</sup> (1961) 253 Ex 204; (1962) 254 Ex 10.

<sup>103</sup> (1899) 220 Ex 28, 29: “qui est non seulement une nuisance mais un danger au voisinage”.

<sup>104</sup> (1924) 233 Ex 31, 33: “de ne plus en incommoder le voisinage”.

*Holdings*,<sup>105</sup> but not in conjunction with “voisinage”. Overall, it seems that no legal significance was attached to the words in these instances.

The word “nuisance” appears in a number of the unreported cases.<sup>106</sup> “Tort” also appears frequently.<sup>107</sup> However, “nuisance” and “tort” are never found in combination, such as “tort de nuisance”, or similar. The frequency with which “tort” is used and the context in which it is found at least bear the argument that the word has some legal significance. (“Tort” has the natural meaning of “wrong” in the French language.) The same could also be said of “nuisance”, but, looking at the records alone, the argument that nuisance carried no technical meaning is tenable. It is interesting to note, however, that the noun “nuisance” had fallen into desuetude in France by the seventeenth century,<sup>108</sup> and did not reappear until just after the middle of the twentieth (via the English language).<sup>109</sup> Thus, of the court records considered, the first seven cases (from 1889 to 1951) were decided when the word “nuisance” was all but unknown in the continental French language.<sup>110</sup> Nevertheless, there are differences between French as used in France and French as used in Jersey, and the disappearance of “nuisance” from the French language cannot lead to a certain

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<sup>105</sup> (1961) 253 Ex 204: “le locateur doit garantir le locataire de tout trouble qui pourrait être apporté à sa jouissance”.

<sup>106</sup> *Curry v Horman* (1889) 213 Ex 511, 513 “la nuisance dont s’agit”; *Arm v De La Mare* (1899) 220 Ex 28, 29 “qui est non seulement une nuisance”, and 30 “le défendeur a refusé de faire cesser la nuisance dont se plaint ledit acteur”; *Dutton v Constable of St Helier* (1901) 221 Ex 120, 121 “la nuisance intolérable”, “à ladite nuisance”, “autres désagréments et nuisances”, “afin que les nuisances”, “les dites nuisances”; *Chisholm v Glendewar* (1924) 233 Ex 31, 32 “nuisance intolérable”, “ladite nuisance causée”, “ladite nuisance”, and 33 “ladite nuisance”; *Keough v Farley* (1937) 12 CR 373, 375 “qu’ils fasse cesser les nuisances”, and 376 “jusqu’au jour qu’il aura fait cesser lesdites nuisances”, and 379 “a porté remède à cette nuisance; que pendant que ladite nuisance existait”; *Lysaght v Channel Islands Property Holdings* (1962) 254 Ex 10, 11 “legal nuisance”.

<sup>107</sup> *Curry v Horman* (1889) 213 Ex 511, 512 “tant pour le tort causé”; *Arm v De La Mare* (1899) 220 Ex 28, 29 “Sieur De la Mare a causé un tort sérieux au Remontrant”, and 30 “pour le tort subi”; *Herivel v Harman* (1947) 243 Ex 200, 201 “les conditions [...] causent un tort et un préjudice tout particulier”; *Penseney v Philip Le Sueur & Sons Ltd* (1951) 247 Ex 117, 118 “de mettre fin à ces torts”, and 119 “la société défenderesse lui fait tort”; *Coutanche v Lefebvre* (1955) 249 Ex 390, 391 “à l’égard des torts qu’ils subissent”, “pour mettre fin à ces torts”, “le tort causé”.

<sup>108</sup> Caballero *Essai* 1 – 2. According to Caballero (2, n4) “nuisance” is in none of the editions of the *Dictionnaire de l’Académie française* from 1798 to 1951. The word is certainly absent from the 8<sup>th</sup> edition (1932 – 1935). It is also absent from Bescherelle *Dictionnaire* (1880) but not from Hatzfeld & Darmesteter *Dictionnaire* (1926) vol 2, 1606, although it is described as “vieilli”.

<sup>109</sup> *Le Petit Robert* (1977) 1288 states that “nuisance” first entered the French language in 1120 and entered it again around 1960 from the English language.

<sup>110</sup> *Curry v Horman* (1889) 213 Ex 511; *Arm v De la Mare* (1899) 220 Ex 28; *Dutton v Constable of St Helier* (1901) 221 Ex 120; *Chisholm v Glendewar* (1924) 233 Ex 31; *Keough v Farley* (1937) 12 CR 373; *Herivel v Harman* (1947) 243 Ex 200, (1947) 243 Ex 222; *Penseney v Le Sueur* (1951) 247 Ex 117.

conclusion that the word had a legal meaning where it appears in the court records. It does, however, render such a conclusion more likely.

While reference to “nuisance” is made consistently from *Curry v Horman* (1889) to *Keough v Farley* (1937), the word is not used in the next three case records.<sup>111</sup> This inconsistency could be seen to support the argument that the court had no clear concept of nuisance in mind. It is of potential significance, therefore, that in the (English-language) reasons for the court’s decision in *Lysaght v Channel Islands Property Holdings* (1962), the defendant’s actions are described as amounting to a “legal nuisance”.<sup>112</sup> This phrase seems clearly to indicate application of a specific legal concept called “nuisance”. Of course, this does not mean that this Jersey nuisance and English nuisance were identical, but that there was some likeness between the two seems to have been the view of the Bailiff in *Lysaght*, who made an unqualified reference to an English case in relation to damages.<sup>113</sup> In summary, it is quite possible that a Jersey concept of nuisance was in the mind of the court in cases of interference with enjoyment of, or physical damage to, property, from *Curry* (1889) to *Lysaght* (1962).

Regarding the provenance of, and influences on, this Jersey concept, two speculations may be made. The English tort of nuisance developed from the assize of novel disseisin<sup>114</sup> (itself influenced by the Canonical *actio spoli*),<sup>115</sup> which “provided for the trial of the question whether A has disseised or dispossessed B of his freehold”.<sup>116</sup> Therefore, a similar connection between the Jersey *bref de nouvelle dessaisine* and this area of law is possible.<sup>117</sup> Alternatively, it may be that, rather than English law and Jersey law developing in parallel, the legal development in England was subsequently followed in Jersey, giving rise to or modifying the Jersey concept. Without further study, nothing can be concluded about the exact historical

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<sup>111</sup> *Herivel v Harman* (1947) 243 Ex 200, (1947) 243 Ex 222; *Penseney v Le Sueur* (1951) 247 Ex 117; *Coutanche v Lefebvre* (1955) 249 Ex 390.

<sup>112</sup> A term used in English case-law (see: *Read v Lyons* [1947] AC 156, 183, per Lord Simonds).

<sup>113</sup> *Grosvenor Hotel v Hamilton* [1894] 2 QB 836, 840, per Lindley, LJ.

<sup>114</sup> *Simpson History* 107; *Fifoot History* ch 1, particularly 5, 9 – 11. Loengard “Assize”.

<sup>115</sup> *Pollock & Maitland History* 47.

<sup>116</sup> *Holdsworth History* vol 1, 275.

<sup>117</sup> On the *bref de nouvelle dessaisine*, see: Terrien 8.3; Poingdestre *Commentaires* 45 – 46, 47; Le Gros, 173 – 174.

development of this area of the law, but, on the basis of Hemery and Dumaresq's *Report*, some form of the concept seems certain to pre-date 1789.

## **(2) *Key v Regal* and *Searley v Dawson***

The first Jersey Judgments case is *Key v Regal* in 1962,<sup>118</sup> which preceded the decision in *Lysaght* by a few months.<sup>119</sup> This case is important: the court's analysis of the law has been founded upon in subsequent decisions.<sup>120</sup> Physical damage and interference with enjoyment<sup>121</sup> were argued to be consequences of construction work on the defendant's land. The action failed in respect of the alleged physical damage because causation was not proved,<sup>122</sup> and on the other matters because the court held that the "limit which any normal person could be expected to have to bear" had not been exceeded.<sup>123</sup> Neither nuisance nor *voisinage* was mentioned in the judgment, but the following principles were expressed:

"(1) The occupier of land is entitled to the quiet and unimpeded enjoyment of that land.

"(2) The owner of land is entitled to do as he pleases with that land."<sup>124</sup>

These principles encapsulate the issue.<sup>125</sup> People living close to one another may cause each other harm as a result of their proximity, because one party doing as he pleases may infringe the right to quiet and unimpeded enjoyment of land of the other. The rights of each must always be balanced.

Nine years later, the same judge (Le Masurier, now Bailiff) decided the next case: *Searley v Dawson*.<sup>126</sup> This decision marks the beginning of a divergence between cases concerning damage to property (where *Searley* is applied)<sup>127</sup> and cases

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<sup>118</sup> (1962) 1 JJ 189, Le Masurier, Deputy Bailiff.

<sup>119</sup> *Key v Regal* (10 February 1962, 2 March 1962); *Lysaght v Channel Islands Property Holdings* (26 June 1962).

<sup>120</sup> Notably: *du Feu v Granite Products* (1973) 1 JJ 2441.

<sup>121</sup> Noise, dust, vibration and litter. Damage to the plaintiff's health was also alleged ((1962) 1 JJ 189, 191 – 192, per Le Masurier, Deputy Bailiff).

<sup>122</sup> *Ibid* 193.

<sup>123</sup> *Ibid* 194.

<sup>124</sup> *Ibid* 192.

<sup>125</sup> See: ch 9 A.

<sup>126</sup> (1971) 1 JJ 1687, Le Masurier, Bailiff.

<sup>127</sup> *Browne v Premier Builders* (1980) JJ 95; *Rockhampton v Gale* 2007 JLR 332.

concerning interference with enjoyment (where *Searley* is not applied),<sup>128</sup> and is the origin of the (modern) doctrine of *voisinage* in Jersey law. The plaintiff's house suffered structural damage due to excavation on the defendant's land, which was found to have been carried out negligently.<sup>129</sup> The court held the defendant liable on the basis of a passage in Pothier, which identified an obligation on neighbours to use their property in such a way as not to occasion harm to that of others:

“Chacun des voisins peut faire ce que bon lui semble sur son héritage, de manière néanmoins qu'il n'endommage pas l'héritage voisin.”<sup>130</sup>

This strongly resembles the court's analysis in *Key*. Indeed the underlying principle is the same:<sup>131</sup> the rights of owners must be balanced against one another. However, Pothier goes further than *Key*, asserting what in his view is the basis of the law. Of neighbourhood obligations in general, he states:

“Le voisinage est un quasi-contrat qui forme des obligations réciproques entre les voisins, c'est-à-dire, entre les propriétaires ou possesseurs d'héritages contigus les uns aux autres.”<sup>132</sup>

Later, in the same appendix, he restates the principle operating in this area of the law:

“Le voisinage oblige les voisins à user chacun de son héritage, de manière qu'il ne nuise pas à son voisin.”<sup>133</sup>

Thus, Pothier identifies what he asserts to be the basis of the law: quasi-contract. It is neighbourhood law that obliges neighbours to behave in this manner, and neighbourhood law is a quasi-contract. The court had also cited a passage from

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<sup>128</sup> *Du Feu v Granite Products* (1973) 1 JJ 2441; *Magyar v Jersey Strawberry Nurseries* (1982) JJ 147; *Cornick v Le Gac* 2003 JLR N43.

<sup>129</sup> *Searley v Dawson* (1971) 1 JJ 1687, 1689, 1698, per Le Masurier, Bailiff.

<sup>130</sup> *Ibid* 1701. Pothier also gives an example of an interference for which the law will not provide redress: “Je puis faire sur mon héritage quelque chose qui prive mon voisin de la commodité qu'il en retiroit, par exemple, des jours qu'il en retiroit.” Pothier *Coutume d'Orléans, Introduction au titre des servitudes réelles* para 24, 2<sup>e</sup> règle. Whitty makes a similar point in relation to Scots law (*Nuisance* para 32). See also: art 668 LaCC.

<sup>131</sup> *Searley v Dawson* (1971) 1 JJ 1687, 1699, 1701, per Le Masurier, Bailiff.

<sup>132</sup> Pothier *Traité du contrat de société* 2<sup>nd</sup> appendix, para 230.

<sup>133</sup> *Ibid* para 235. Yiannopoulos *Servitudes* para 32, translates “*Le voisinage*” as “vicinage”.

Domat's *Loix civiles*,<sup>134</sup> expressing the general principle that an owner cannot make use of his land in a way which either causes damage to, or interferes with enjoyment of, a neighbour's land. The passage in Domat is located in a title on the law of servitudes and does not describe the relationship between neighbours as quasi-contractual. Pothier's analysis was adopted by the court in *Searley*: "Each [neighbour] is under an obligation to the other arising quasi ex-contractu not so to use his property as to cause damage to the property of the other".<sup>135</sup>

Two apparent oddities of the *Searley* decision can be observed. Firstly, the plaintiff claimed that the defendant was liable for negligence.<sup>136</sup> Having determined that "there was negligence in this case",<sup>137</sup> the court turned to consider "whether Mr. Dawson, as the owner of 'Oldholme' owed a duty of care to Mr. Searley".<sup>138</sup> Nonetheless, references to "negligence" and "duty of care" are absent in the court's own summary of its decision.<sup>139</sup> It appears that the consideration of negligence did not affect the court's decision. Liability in negligence was rejected by the court for want of a duty of care.<sup>140</sup> A typical approach of English law was considered: had an easement of support between the buildings been acquired by prescription?<sup>141</sup> This was not possible in Jersey law because of the prohibition on acquisitive prescription of servitudes.<sup>142</sup> The court also questioned whether the maxim *sic utere tuo ut alienum non laedas* could be applied. Translating this as "So use your own property as not to injure the rights of another",<sup>143</sup> the court held that this approach was not open to Jersey law because the right at issue was the right of support building-to-building, which did not exist.<sup>144</sup> The possibility that the right infringed might be

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<sup>134</sup> (1756 edn) 1.12.2.8, 119: "Quoiqu'un propriétaire puisse faire dans son fonds ce que bon lui semble, il ne peut y faire d'ouvrage qui ôte à son voisin la liberté de jouir du sien, ou qui lui cause quelque dommage."

<sup>135</sup> *Searley v Dawson* (1971) 1 JJ 1687, 1702, per Le Masurier, Bailiff.

<sup>136</sup> *Ibid* 1697, 1698.

<sup>137</sup> [emphasis added] *Ibid* 1698.

<sup>138</sup> *Ibid*.

<sup>139</sup> *Ibid* 1702.

<sup>140</sup> McNeill, JA, suggests a reason for this: *Rockhampton v Gale* 2007 JLR 332, 353, para 50.

<sup>141</sup> *Dalton v Angus* (1881) 6 AC 740.

<sup>142</sup> *Searley v Dawson* (1971) 1 JJ 1687, 1699, per Le Masurier, Bailiff. See also: ch 6 D.

<sup>143</sup> Rejecting the translation "Enjoy your own property in such a manner as not to injure that of another person": *ibid*.

<sup>144</sup> *Ibid*.

ownership itself (rather than a right of support) was not considered. Nor, it seems, was the possibility of liability in negligence investigated further.

In 1962, the judge in *Searley*<sup>145</sup> had delivered the judgment of the court in *Key* (where two guiding principles were enunciated) and in *Lysaght* (where reference was made to the law of nuisance). Therefore, the second oddity is that, while seeking a basis for liability in *Searley*, he did not seek to employ the principles set out in either of the earlier cases.<sup>146</sup> This may have been because the primary problem in the previous cases was interference with enjoyment and *Searley* concerned physical damage (though an allegation of physical damage formed part of the complaint in *Key*). Alternatively, the reason may be that the defendant in *Searley* did not carry out the operations that were the cause of the damage himself; they were the work of a contractor.

### (3) After *Searley*

*Du Feu v Granite Products*<sup>147</sup> (dust) is the first decision in which unambiguous reference is made to a “tort of nuisance”.<sup>148</sup> In addition to a number of English law materials,<sup>149</sup> the court considered the principles in *Key*.<sup>150</sup>

In *Browne v Premier Builders (Jersey) Ltd*<sup>151</sup> (physical damage), *Searley* was used as authority for the decision that the defendant owed the plaintiff a “duty of care”.<sup>152</sup> Concluding that the obligation in *Searley* was “akin to the duty imposed in tort”,<sup>153</sup>

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<sup>145</sup> Le Masurier, Bailiff.

<sup>146</sup> Damage to property was one of the issues complained of in *Key v Regal*: (1962) 1 JJ 189, 192, per Le Masurier, Deputy Bailiff.

<sup>147</sup> (1973) 1 JJ 2441, Ereaud, Deputy Bailiff.

<sup>148</sup> *Ibid* 2447.

<sup>149</sup> *Ibid* 2444, 2447, 2448, 2449.

<sup>150</sup> *Ibid* 2447. See: ch 9 B(2).

<sup>151</sup> (1980) JJ 95, Crill, Deputy Bailiff. *Mercer v Bower* (1973) 1 JJ 2453 and *Dale v Dunell's Ltd* (1976) 2 JJ 291 were decided between *du Feu v Granite Products* (1973) and *Browne v Premier Builders* (1980). Interference with enjoyment was the issue in *Mercer*, but the case was decided on the basis of a contract between the parties. The judgment in *Dale* suggests that the case concerns private nuisance. On the facts, it seems closer to public nuisance (as that term is understood in English law). Therefore, neither of these cases contributes to the present discussion.

<sup>152</sup> (1980) JJ 95, 104, per Crill, Deputy Bailiff.

<sup>153</sup> *Ibid* 105.

the court then made reference to English decisions on negligence.<sup>154</sup> This decision is apt to mislead. The court in *Searley* does not refer to a duty of care in its own summary of its judgment, nor does it draw any comparison between Pothier's obligation (on which the decision was founded) and the law of tort. Recent case law has not adopted the terminology used in *Browne*.<sup>155</sup>

The court in *Magyar v Jersey Strawberry Nurseries Ltd*<sup>156</sup> (noise) relies on *du Feu* and *Key*: the former as a case in which Jersey nuisance law had been “thoroughly canvassed”,<sup>157</sup> the latter as authority for an objective standard to be applied in assessing the gravity of the problem complained of.<sup>158</sup>

Jersey sources are less in evidence in *Mitchell v Dido Investments Ltd*<sup>159</sup> (damp), where the court was “satisfied that, in respect of nuisance, the law of Jersey follows the law of England”.<sup>160</sup> *Searley* is referred to, but it is described as “founded in negligence”.<sup>161</sup> This goes one step further than *Browne*, where the court analysed *Searley* as having established a duty “akin to the duty imposed in tort”,<sup>162</sup> rather than a tortious duty *tout court*. The judgment in *Mitchell* appears to be confused.<sup>163</sup>

Between *Mitchell* and the next case, Matthews and Nicolle's *The Jersey Law of Property* was published,<sup>164</sup> in which *voisinage* is described as imposing “on the owners of adjoining properties certain reciprocal rights and duties, which do not constitute *servitudes*, nor indeed do they require any *titre* to establish their

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<sup>154</sup> *Ibid.*

<sup>155</sup> *Gale v Rockhampton* 2007 JLR 27, 34, para 12. See also: *Rockhampton v Gale* 2007 JLR 332, 373, para 121; *Yates v Reg's Skips* 2007 JRC 237, unreported, paras 32 – 34, per Bailhache, Bailiff; *Reg's Skips v Yates* 2007 JLR 191, 197 paras 14 and 15, 198, para 17, 203, para 37 – 39, 203 – 204, para 41, 205 – 206, para 48, 207, paras 53 and 54, 210, para 67, 212 – 213, para 75, 213, para 76, and 220, para 104.

<sup>156</sup> (1982) JJ 147.

<sup>157</sup> *Ibid* 149, per Crill, Deputy Bailiff.

<sup>158</sup> *Ibid* 153 *et seq.*

<sup>159</sup> 1987-88 JLR 293.

<sup>160</sup> *Ibid* 304, para 30, per Tomes, Deputy Bailiff, citing *Dale v Dunell's Ltd* (see: ch 9 n151) in support of this proposition.

<sup>161</sup> *Ibid* 310, para 35.

<sup>162</sup> *Browne v Premier Builders* (1980) JJ 95, 105, per Crill, Deputy Bailiff.

<sup>163</sup> *Mitchell v Dido Investments* 1987-88 JLR 293, 312, para 30, per Tomes, Deputy Bailiff. *Mitchell* was not followed in *Rockhampton v Gale* 2007 JLR 332, 378 – 380, paras 135 – 141, per McNeill, JA.

<sup>164</sup> (1991).



existence.”<sup>165</sup> The authors note that, unlike the English law of nuisance which is part of the law of torts, the Jersey law of *voisinage* is part of the law of property.<sup>166</sup>

*Du Feu* was again cited in *Cornick v Le Gac* (noise),<sup>167</sup> in support of applying an objective test in order to assess the gravity of the problem. Again on the basis of *du Feu*, it was held that anyone who causes unreasonable inconvenience to his neighbour will “be guilty of nuisance”.<sup>168</sup>

These cases illustrate that, following *Searley*, the law appears to have bifurcated. Where physical damage is at issue, the *Searley* approach is taken. *Key* is applied where there is interference with enjoyment.

#### **(4) Rockhampton Litigation**

The third case of particular importance in this area (after *Key* and *Searley*) is *Gale and Clarke v Rockhampton Apartments*.<sup>169</sup> The first defendant owned a block of flats. The second defendant was the developer of those flats, and the third defendant was the main contractor in respect of their construction. The construction work was alleged to have caused subsidence and significant damage to the plaintiff’s property.<sup>170</sup> The factual similarity between this case and *Searley* is immediately apparent.<sup>171</sup> The plaintiffs initially argued that the defendants were liable in negligence. They also argued for the defendants’ liability on the basis of the obligation arising from neighbourhood law, which informed the decision in *Searley*.<sup>172</sup> The negligence action having been found to have prescribed, the Royal Court had to determine the appropriate period of extinctive prescription for the alternative claim.<sup>173</sup> The plaintiffs argued that this was ten years. The defendants

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<sup>165</sup> *Ibid* 13, para 1.50; Nicolle *Immovable* 31.

<sup>166</sup> Matthews & Nicolle, *ibid*.

<sup>167</sup> 2003 JLR N43.

<sup>168</sup> *Ibid*, per Le Cras, Commissioner.

<sup>169</sup> 2007 JLR 27 (Royal Court); 2007 JLR 332 (Court of Appeal).

<sup>170</sup> *Gale v Rockhampton* 2007 JLR 27, 30, para 2, per Bailhache, Bailiff.

<sup>171</sup> Noted by the Bailiff: *ibid* 30, para 4.

<sup>172</sup> *Ibid* 29 – 30, para 1.

<sup>173</sup> *Ibid*. Torts are subject to a three year prescriptive period: Law Reform (Miscellaneous Provisions) (Jersey) Law 1960, art 2(1).

argued that the doctrine of *voisinage* was not part of Jersey law at all.<sup>174</sup> The court disagreed, holding that the tort of nuisance was not part of Jersey law, that an action in *voisinage* (a quasi-contract) was appropriate,<sup>175</sup> and that that action was subject to a ten-year prescriptive period.<sup>176</sup> The defendants appealed.

On appeal it was again argued that the doctrine of *voisinage* was not part of Jersey law.<sup>177</sup> Nuisance was the appropriate action, and the three-year prescriptive period should apply.<sup>178</sup> Further, the concept of quasi-contract was “out-moded”, and anything which was said to be based on it should now more properly be considered to be based in tort.<sup>179</sup> In reply, the respondents argued that *voisinage* and nuisance were both present in Jersey law, but that they were “entirely separate concepts”.<sup>180</sup> The choice between them depended on whether the properties were contiguous (a necessary condition before *voisinage* could apply), which they were in this case.<sup>181</sup> A number of additional authorities were put before the Court of Appeal. Having thoroughly reviewed this material, the Court decided in favour of the respondents: *voisinage* is part of Jersey law and applicable to the present facts,<sup>182</sup> it is based on quasi-contract,<sup>183</sup> and the ten-year extinctive prescription applies.<sup>184</sup>

Although the facts in *Rockhampton* resembled those in *Searley*, the broader legal context had changed. Several cases in the intervening period had expressly applied a tort of nuisance, with reference to English law. Although these cases concerned interference with enjoyment, reference to English law (where nuisance covers all types of interference with property) probably contributed to the defendant’s assumption that this tort applied to physical damage. In the event, the applicability of the tort to physical damage was rejected by the Royal Court and the Court of Appeal

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<sup>174</sup> *Ibid* 30, para 3.

<sup>175</sup> *Ibid* 38, para 23.

<sup>176</sup> *Ibid* 43, para 39.

<sup>177</sup> *Rockhampton v Gale* 2007 JLR 332, 338, para 5, and 351, para 44, per McNeill, JA.

<sup>178</sup> *Ibid* 338, para 5.

<sup>179</sup> *Ibid* 338, para 5, and 385, paras 156 and 159.

<sup>180</sup> *Ibid* 338, para 6.

<sup>181</sup> *Ibid*.

<sup>182</sup> *Ibid* 389, para 171.

<sup>183</sup> *Ibid* 386, paras 160 and 387, para 165.

<sup>184</sup> *Ibid* 392, para 182.

alike. The Court of Appeal took the view that the sources supported two doctrines:<sup>185</sup> the obligation arising in *voisinage*, which applies to physical damage where properties are contiguous, and a tort of nuisance. This view does not conflict with the Royal Court decision if that is taken to mean “that Jersey had not adopted the *English* law tort of nuisance”,<sup>186</sup> a reading supported by comments of the same Bailiff in *Jersey Financial Services Commission v AP Black (Jersey) Ltd.*<sup>187</sup>

### **(5) After *Rockhampton***

In *Yates v Reg’s Skips*,<sup>188</sup> the defendant was a tenant on farmland which shared a boundary with the plaintiffs’ land.<sup>189</sup> The plaintiffs sought an injunction and damages in respect of the noise generated by the defendant’s skip business.<sup>190</sup> Both parties agreed that this was an action in *voisinage*.<sup>191</sup> The Royal Court held that the “duty of *voisinage* [...] owed to the plaintiffs” had been breached,<sup>192</sup> and granted the injunction sought.<sup>193</sup> The defendant appealed.

The appellants argued that *voisinage* was inapplicable here because this case did not concern damage to property, but interference with enjoyment of it.<sup>194</sup> Surprisingly, the court considered it unnecessary to decide this point because it was not contested that a right of action existed, whatever its jurisprudential basis:

“we do not think it necessary to decide whether or not this case falls within the law of *voisinage*, it may do so and, accordingly, we determine that ground upon the hypothesis that it does.”<sup>195</sup>

Furthermore, “the essential facts which the respondents had to establish in order to succeed were the same” whether the action was one in *voisinage* or not.<sup>196</sup>

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<sup>185</sup> *Ibid* 384, paras 151 and 154, 387, para 164, and 392, para 182.

<sup>186</sup> [emphasis added] *Ibid* 374, para 124.

<sup>187</sup> 2002 JLR 294, 308 – 309.

<sup>188</sup> [2007] JRC 237.

<sup>189</sup> *Ibid* paras 1 and 2, per Bailhache, Bailiff.

<sup>190</sup> *Ibid* para 7.

<sup>191</sup> *Ibid* para 8.

<sup>192</sup> *Ibid* para 32.

<sup>193</sup> *Ibid* para 34.

<sup>194</sup> *Ibid* para 28 *et seq.*

<sup>195</sup> *Ibid* para 34 (also para 30).

<sup>196</sup> *Ibid* para 31.

A second argument for the appellants was that only a landowner, and not a tenant, can be liable in *voisinage*.<sup>197</sup> This was rejected. Making reference to Pothier, the court held that the “duty of *voisinage* is an obligation incumbent on neighbours”, and considered this to include both occupiers and owners.<sup>198</sup>

Thirdly, it was argued that the Royal Court had erred in not applying an objective test to the level of noise to be tolerated.<sup>199</sup> This failed. The Court of Appeal held that an objective “average person” test had been applied by the Royal Court.<sup>200</sup>

A final argument was that the Royal Court had erred in finding against the defendant because the noise generated by the skip business was “lawful” on account of the planning permission granted for that use of the land.<sup>201</sup> This also failed: the planning permission did not legalise the problem.<sup>202</sup> Although planning permission may alter the character of a neighbourhood (meaning that a previously unacceptable use of land is now no longer so), this had not happened in this case.<sup>203</sup>

The court’s express refusal to determine the basis of the action –<sup>204</sup> and thus to follow its own decision in *Rockhampton* – both illustrates and contributes to the uncertainty of the law. Are there two doctrines operating in this area? If so, what are they, and how do they differ? If there is only one, what is it?

### **C. HOW MANY DOCTRINES?**

Arguably, the case law has divided into two strands. One is based on *Key*, and *Key*’s application in *du Feu* (nuisance); the other, starting with *Searley*, is ultimately based on Pothier (*voisinage*).

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<sup>197</sup> *Ibid* para 35.

<sup>198</sup> *Ibid* para 54.

<sup>199</sup> *Ibid* para 55.

<sup>200</sup> *Ibid* para 64.

<sup>201</sup> *Ibid* paras 65, 66.

<sup>202</sup> *Ibid* para 67.

<sup>203</sup> *Ibid* para 87.

<sup>204</sup> *Ibid* para 34.

	<b>Nuisance strand</b>	<b>Voisinage strand</b>
1962	<i>Key</i> (unclear)	
1962	<i>(Lysaght)</i>	
1971		<i>Searley</i>
1973	<i>Du Feu</i>	
1980		<i>Browne</i>
1982	<i>Magyar</i>	
1987	<i>Mitchell</i>	
2003	<i>Cornick</i>	
2007		<i>Rockhampton</i>
2007	<i>Yates</i> (unclear) <sup>205</sup>	

From this, five hypotheses seem to be worth considering:

1. Only nuisance exists, covering all interference with property.
2. Only *voisinage* exists, covering all interference with property.

Nuisance and *voisinage* both exist and –

3. the spheres of application are identical.
4. the spheres of application overlap.
5. the spheres of application are entirely different.

### **(1) Nuisance Only**

Arguably, nuisance has a long history in Jersey law: from before 1789 to the present day. If this is the only doctrine in this area of the law, the decision in *Searley* must either be wrong, or form part of the law of nuisance. The courts have rejected the suggestion that *Searley* was wrongly decided.<sup>206</sup> In the face of this, it cannot be said that only nuisance exists unless *voisinage* forms part of nuisance. The Court of

<sup>205</sup> *Reg's Skips v Yates* 2008 JLR 191, 202, para 34, per Jones, JA.

<sup>206</sup> *Gale v Rockhampton* 2007 JLR 27, 38, para 23, per Bailhache, Bailiff; *Rockhampton v Gale* 2007 JLR 332, 389, para 171, per McNeill, JA. Also: Matthews & Nicolle, 13 – 14, paras 1.50 – 1.53; Law of Immoveable Property and Conveyancing Syllabus (Revised 2006), part 3; Nicolle *Immovable* 35.

Appeal in *Yates* held that the essential facts to be established in a claim in *voisinage* and a claim under nuisance are the same. If this is true, it may be that there is only one doctrine, covering the whole of this area. However, it seems unlikely that this single doctrine could be nuisance: the obligation in *Searley* is stated to be quasi-contractual in nature; while there has never been any such statement in relation to nuisance, and cases since *Key* indicate that tort is the basis of the action. Therefore, this hypothesis is unsatisfactory.

## **(2) Voisinage Only**

As the sources are clear that there are two doctrines this hypothesis also falls to be rejected.

## **(3) Two Doctrines with Identical Spheres of Application**

Is this third hypothesis the same as saying that there is only one doctrine? This would be true if there were two doctrines, with the same doctrinal basis, which produced the same result when applied to the same set of facts. Otherwise, there is simply concurrency of liability.

On the basis of *Key* and of *Yates* in the Royal Court, this hypothesis is tenable. In *Key*, physical damage to property appears to have been considered without demur. Therefore, it is possible that the nuisance strand covers both types of interference. However, the subsequent application of *Key*, and the decision in *Searley* and its application to cases of physical damage, suggest that this is no longer the case. *Yates* concerned interference with enjoyment. In the Royal Court, both parties agreed that *voisinage* was the appropriate basis for the claim.<sup>207</sup> However, when this agreement was retracted at appeal,<sup>208</sup> the Court of Appeal was sufficiently uncertain that a claim in *voisinage* could be made in respect of interference with enjoyment that it declined to make a definitive statement on the point.<sup>209</sup> Firmly holding that a claim in *voisinage* could be made in respect of interference with enjoyment would have

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<sup>207</sup> Narrated in *Reg's Skips v Yates* 2008 JLR 191, 196 – 197, para 13, per Jones, JA.

<sup>208</sup> *Ibid* 198, para 18.

<sup>209</sup> *Ibid* 200 – 201, para 30.

contradicted the division in the case-law since *Searley*.<sup>210</sup> This division was impliedly affirmed by the same court in *Rockhampton*, which held that claims in *voisinage* are applicable where “there is substantial damage to land or buildings”.<sup>211</sup> That the scope of *voisinage* is restricted to claims in respect of physical damage is supported by a narrow reading of the decision in *Searley* that there is an obligation “not so to use [one’s] property as to cause *damage* to the property of the other”.<sup>212</sup> Therefore, the sources suggest that *voisinage* does not apply to interference with enjoyment, nuisance does not apply to physical damage, and consequently that the third hypothesis does not reflect the law.

#### **(4) Two Doctrines with Overlapping Spheres of Application**

Nuisance seems indubitably to cover interference with enjoyment; *voisinage* seems indubitably to cover physical damage. If they have overlapping spheres of application (not identical: that has been considered above), one doctrine must cover its own ground as well as that of the other, or each (or either) doctrine must cover its own ground as well as part of the ground of the other. The discussion above,<sup>213</sup> in particular the cases to which each doctrine has been applied by the courts, suggests that this hypothesis too is improbable.

#### **(5) Two Doctrines with Distinct Spheres of Application**

As already stated, the case-law since *Key* has divided into two strands: nuisance and *voisinage*. Thus the sources bear the reading that these doctrines do not overlap.

Although a trend may be noted in the cases from *Searley* to *Rockhampton*, the sources as a whole are not clear and none of the above hypotheses is fully compatible with them. Nonetheless, it is asserted that, in the modern law, there are two doctrines operating in Jersey law. These are not functional equivalents because *voisinage* applies to cases of physical damage (between contiguous properties), whereas nuisance applies to cases of interference with enjoyment. Consequently, the

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<sup>210</sup> See the table above.

<sup>211</sup> See: ch 9 B(4), above; *Rockhampton v Gale* 2007 JLR 332, 384, para 154, per McNeill, JA.

<sup>212</sup> [emphasis added] *Searley v Dawson* (1971) 1 JJ 1687, 1702, per Le Masurier, Bailiff.

<sup>213</sup> Ch 9 C(3).

influences of English and French law<sup>214</sup> appear to be balanced. Perhaps fortunately, as was seen earlier, both these laws have much in common, and the underlying principle in both is the same: the respective rights of the parties must be balanced. This principle is also seen in both *voisinage* and nuisance in Jersey law. Reassuringly, Jersey is not the only jurisdiction to apply different doctrines to interference with enjoyment and physical damage: in South Africa, the law is structurally comparable. Thus, although the division in the Jersey law (*voisinage* and nuisance) may be viewed as undesirable, the South African experience demonstrates that such a solution can work.

## D. DOCTRINAL BASES

Nuisance has been stated to be tortious,<sup>215</sup> *voisinage* to be quasi-contractual.<sup>216</sup> An examination of these attributes follows.

### (1) Nuisance

In the materials from 1789 to 1962, the conceptual basis of this area of law is unclear.<sup>217</sup> The court in *Key* talks of liability “in law”.<sup>218</sup> This could suggest that the action followed the alleged breach of an obligation arising *ex lege*, or this may simply indicate that the basis of liability was not considered at all.

Whatever the nature of the Jersey concept had originally been, it came to be regarded as a tort in the case law on interference with enjoyment (nuisance). The first of these cases was *du Feu*, which applies *Key*, but also refers to English materials on the tort of nuisance. Express reference is made to tort as the basis of liability.<sup>219</sup> Subsequent cases in this line also refer to tort.<sup>220</sup> Judicial opinion is that, despite reference to

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<sup>214</sup> Meaning both pre- and post-codification law. It would be wrong to characterise this as “civilian” because other civilian systems have different approaches to that taken in France. See: Tunc *Encyclopedia*.

<sup>215</sup> For example: *du Feu v Granite Products* (1973) 1 JJ 2441, 2447, per Ereat, Deputy Bailiff.

<sup>216</sup> For example: *Searley v Dawson* (1971) 1 JJ 1687, 1702, per Le Masurier, Bailiff.

<sup>217</sup> See: ch 9 B(1).

<sup>218</sup> *Key v Regal* (1962) 1 JJ 189, 195, per Le Masurier, Deputy Bailiff.

<sup>219</sup> *Du Feu v Granite Products* (1973) 1 JJ 2441, 2447, per Ereat, Deputy Bailiff.

<sup>220</sup> *Magyar v Jersey Strawberry Nurseries* (1982) JJ 147, 149, per Crill, Deputy Bailiff. *Cornick v Le Gac* 2003 JLR N43, per Le Cras, Commissioner.



English law, the English tort of nuisance has not been received into Jersey law.<sup>221</sup> One view, therefore, is that this is a *Jersey* tort of nuisance.<sup>222</sup> It is submitted that the sources bear such a reading. Consequently, it seems that the basis of Jersey nuisance is tortious.

## **(2) Voisinage**

Based on Pothier,<sup>223</sup> the court in *Searley* attributed the doctrine of *voisinage* to quasi-contract.<sup>224</sup> This was restated in *Browne*,<sup>225</sup> *Rockhampton*,<sup>226</sup> and *Yates* (in the Royal Court).<sup>227</sup> Pothier's approach is understandable, at least in the context of the eighteenth century. Certain obligations exist between neighbours that do not arise by agreement between the parties. Therefore, they are not contractual. To classify these obligations in the law of tort would not reflect the pre-existing relationship between the parties. (Quasi-delict may also be rejected on this ground.) By recourse to quasi-contract, two features of neighbourhood law obligations are brought out: adoption of the obligations is involuntary; and the nexus of rights and obligations resembles a contract.

Pothier defines quasi-contract as:

“le fait d'une personne permis par la loi, qui l'oblige envers une autre, ou oblige une autre personne envers elle, sans qu'il intervienne aucune convention entre elles.”<sup>228</sup>

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<sup>221</sup> *Gale v Rockhampton* 2007 JLR 27, 35, para 13, per Bailhache, Bailiff; *Rockhampton v Gale* 2007 JLR 332, 364, para 89, 374, paras 124 – 126, and 377, paras 131 and 132, per McNeill, JA.

<sup>222</sup> *Rockhampton v Gale* 2007 JLR 332, 380, para 141, per McNeill, JA.

<sup>223</sup> “Le voisinage est un quasi-contrat”: Pothier *Traité du contrat de société* 2<sup>nd</sup> appendix, para 230.

<sup>224</sup> *Searley v Dawson* (1971) 1 JJ 1687, 1701 – 1702, per Le Masurier, Bailiff, referring to Pothier *Traité du contrat de société* 2<sup>nd</sup> appendix. See: Zimmermann *Obligations* 14 – 21 for a short historical account of the classification of obligations.

<sup>225</sup> *Browne v Premier Builders* (1980) JJ 95, 105, per Crill, Deputy Bailiff.

<sup>226</sup> *Gale v Rockhampton* 2007 JLR 27, 35, para 14, and 42, para 34, per Bailhache, Bailiff; *Rockhampton v Gale* 2007 JLR 332, 386, paras 160 and 163, per McNeill, JA.

<sup>227</sup> 2007 JRC 237, unreported, para 9, per Bailhache, Bailiff.

<sup>228</sup> Pothier *Traité des Obligations* para 113. Pothier's definition is not dissimilar to that in Bell's *Dictionary* 878: “A quasi-contract differs from a proper contract in this, that it is not constituted by express consent, but *ex re*—that is, by one of the parties doing deeds which import an obligation on him in favour of the other party, or *vice versa*”.

According to this definition, there is one active element in the creation of a quasi-contract: “le fait d’une personne”. If the “fait” is a juridical act (a “lawful volitional act intended to have legal consequences”)<sup>229</sup> it is hard to see how this definition applies to *voisinage*.<sup>230</sup> the obligations of *voisinage* are not voluntarily assumed. Interpreting “fait” as a juridical fact (an event to which the law attaches certain consequences without the intervention of the will of the obligee) does not advance the matter: there is still no change of circumstances to which the law could attach consequences because one is always in the state of being a neighbour. This is not true of other quasi-contracts. Unjust(ified) enrichment and *negotiorum gestio* are two of the examples of quasi-contracts which follow Pothier’s definition.<sup>231</sup> For each of these, there is a clear juridical fact.

If *voisinage* does not fit easily into quasi-contract, the category itself can also be criticised. It may be observed that Pothier’s definition of quasi-contract is wide enough to include tort law,<sup>232</sup> and so does not explain the difference between the two. A similar observation may be made about the definition of quasi-contract in the French Civil Code.<sup>233</sup> This definitional problem and the lack of coherence between the nature of the different quasi-contracts tends to support the criticism that the category is insufficiently precise to be meaningful. Peter Birks has referred to the quasi categories as “hopeless”, and observes that they are little more than an ineffective attempt to respond to “the challenge of the residual miscellany” left behind by acceptance of “Gaius’s two main causative events, contract and wrong”.<sup>234</sup> This acceptance, he notes, “all too easily metamorphoses into the rather different affirmation that they [other obligations] arise either from a quasi-contract or a quasi-wrong”.<sup>235</sup> This “is only a variation upon the theme that all birds be either pigeons or sparrows. It merely says that all those which are neither pigeons nor sparrows must

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<sup>229</sup> Garner *Black’s* 26. Also, for example: Litvinoff *Transactions* vi.

<sup>230</sup> Or any other quasi-contract.

<sup>231</sup> Pothier *Traité des Obligations* 56, para 113.

<sup>232</sup> The same can be said of Houard’s definition of quasi-contract: *Dictionnaire* vol 4, 3.

<sup>233</sup> Art 1371.

<sup>234</sup> P Birks “Definition and Division: A Meditation on *Institutes* 3.13” in Birks *Classification* 18. Also: Zimmermann *Obligations* 15 – 16.

<sup>235</sup> Birks *ibid* 18 – 19.

be counted either as though they were pigeons or as though they were sparrows.”<sup>236</sup> Classification as a quasi-contract also overlooks the fact that *voisinage* (like nuisance) is always found in the context of particular relationships to land.

Louisiana law presents an alternative explanation for what it calls “vicinage”:<sup>237</sup> a legal servitude. Legal servitudes, however, stand in the same relationship to conventional servitudes as quasi-contracts do to contracts. In other words, the legal servitude itself is something of a “quasi” category, and does not improve on a quasi-contractual analysis.

Whatever may have been the view of at the time of Pothier, modern legal analysis tends to discard quasi-contract, often by re-classifying obligations as tortious, or simply as obligations arising *ex lege*. With the exception of Louisiana, in the jurisdictions considered, this area of the law is regarded as entirely tort-based. Of particular significance for Jersey is the fact that French law has rejected Pothier’s classification in respect of *troubles de voisinage* in favour of tort.<sup>238</sup> Given the analytical difficulties attendant to understanding *voisinage* as a quasi-contract, it may be that Jersey law will choose to develop in this direction in the future. As matters stand, quasi-contract suffices as a convenient label, as long as no legal consequences are attributed to *voisinage* merely on the basis of that appellation.

## E. PREREQUISITES FOR LIABILITY

For both nuisance and *voisinage*, two fundamental questions must be answered: where is the threshold above which liability attaches; and, is the presence of fault necessary? The method by which the threshold for liability is determined differs according to whether it is a matter of nuisance (interference with enjoyment) or a matter of *voisinage* (physical damage) because, although each involves balancing the

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<sup>236</sup> *Ibid* 19.

<sup>237</sup> For example: Yiannopoulos *Servitudes* para 32.

<sup>238</sup> Although unjust(ified) enrichment (art 1376 *et seq*) and *negotiorum gestio* (art 1372 *et seq*) are still classified as quasi-contracts.

respective rights of the neighbours, the considerations taken into account in order to strike that balance are not the same.<sup>239</sup>

## (1) Nuisance

The threshold in an action for nuisance is determined by reference to a number of circumstantial elements (considered below). In all cases, some abnormality about the circumstance must be present.<sup>240</sup> A person is expected to tolerate reasonable interference<sup>241</sup> and what is reasonable is calculated in relation to “the needs of the average person in the particular neighbourhood”.<sup>242</sup> Was the inconvenience “so great as to exceed in degree that which the average person should have to accept”?<sup>243</sup> In essence, the rights of one party must be balanced against those of the other.

The threshold determined, must the victim prove the wrongdoer’s fault before the court will award damages for (non-physical) harm? In English law and in Scots law, this fault requirement exists. In English law, fault in nuisance is not identical to that required for liability in negligence, but “some degree of personal responsibility is required”.<sup>244</sup> The presence of fault is determined by reference to the degree of foreseeability of the harm occasioned;<sup>245</sup> where the degree of foreseeability is sufficient, fault will be imputed. The Scottish position is similar. In *RHM Bakeries (Scotland) Ltd v Strathclyde Regional Council*,<sup>246</sup> the court held that, damage and causation being proved, the onus was on the defender to show lack of fault.<sup>247</sup> In English law and in Scots law, an injunction to prevent the action complained of may be obtained by demonstrating that there is a nuisance, but damages will not be awarded unless fault can also be shown.

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<sup>239</sup> See: *Key v Regal* (1962) 1 JJ 189, 193, per Le Masurier, Bailiff.

<sup>240</sup> As in French law: Viney & Jourdain *Conditions* 1218, para 953. Also: ch 9 A(4), above.

<sup>241</sup> *Key v Regal* (1962) 1 JJ 189, 192, per Le Masurier, Bailiff. Also: *du Feu v Granite Products* (1973) 1 JJ 2441, 2446, 2451, per Ereat, Deputy Bailiff; *Yates v Reg’s Skips* 2007 JRC 237, unreported, para 13 “the noise was intolerable”, per Bailhache, Bailiff; *Reg’s Skips v Yates* 2008 JLR 191, 202, para 36, per Jones, JA.

<sup>242</sup> *Key v Regal* (1962) 1 JJ 189, 192, per Le Masurier, Bailiff; *Cornick v Le Gac* 2003 JLR N43, per Le Cras, Commissioner.

<sup>243</sup> *Key v Regal* (1962) 1 JJ 189, 192 (also: 194) per Le Masurier, Bailiff. Also: *du Feu v Granite Products* (1973) 1 JJ 2441, 2447, 2448, 2449, per Ereat, Deputy Bailiff.

<sup>244</sup> *Sedleigh-Denfield v O’Callagan* [1940] AC 880, 897, per Lord Atkin.

<sup>245</sup> *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty* [1967] 1 AC 617, 639, per Lord Reid.

<sup>246</sup> 1985 SC (HL) 17.

<sup>247</sup> *Ibid* 45, per Lord Fraser of Tullybelton.

A fault requirement is not discussed in the Jersey cases on interference with enjoyment. However, if fault may be inferred from the facts, the presence or absence of a fault requirement may yet be discerned from the cases. The question is this: if the alleged wrongdoer's use of land breaches the threshold of acceptability, can immunity from damages be obtained by proving absence of fault? In practice the wrongdoer would be required to show that he or she was ignorant of the nuisance. Three cases are of particular interest.

In *du Feu* (dust), the plaintiff was awarded damages in respect of the interference with enjoyment of his land.<sup>248</sup> The defendant's argument that the quantity of dust had never been unreasonable or excessive was rejected by the court. Further, the court noted that it was "only recently that the defendants [had] taken really effective steps to reduce the emanation of dust", steps which "could, and should, have been taken much earlier."<sup>249</sup> This last statement may be indicative of fault on the defendant's part. These comments appear in the court's own presentation of its conclusions, where, presumably, the court presents only the points directly affecting its decision. Nonetheless, when the court sets out the "relevant rules"<sup>250</sup> to be applied, "striking a just balance"<sup>251</sup> is considered and fault is not. If fault is important, it is odd that it is not mentioned.

In *Magyar*, an injunction was granted, with the court leaving over "the question of damages for past nuisance."<sup>252</sup> The "beneficial owner" of the defendant company (Mr Racz) described the noise complained of as "horrifying",<sup>253</sup> both parties "expected [that the glass-blowing activity] could be carried out without causing inconvenience by noise",<sup>254</sup> and Mr Racz "took immediate steps to try to change matters."<sup>255</sup> However, it seems that the steps taken did not include turning the

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<sup>248</sup> *Du Feu v Granite Products* (1973) 1 JJ 2441, 2451, per Ereat, Deputy Bailiff.

<sup>249</sup> *Ibid* 2450.

<sup>250</sup> *Ibid* 2447 – 2449.

<sup>251</sup> *Ibid* 2448.

<sup>252</sup> *Magyar v Jersey Strawberry Nurseries* (1982) JJ 147, 155, per Crill, Deputy Bailiff.

<sup>253</sup> *Ibid* 149.

<sup>254</sup> *Ibid* 148.

<sup>255</sup> *Ibid* 149.

machinery off (doing so would have caused irreparable damage to the furnace.)<sup>256</sup> Arguably, there was fault in the continuance of the activity, because the defendant was apprised of the noise nuisance.

Damages were also sought in respect of noise nuisance in *Cornick*. According to the note of the decision:

“in order to claim damages, the nuisance must be substantial to the person occupying the property irrespective of his position in life, age or state of health [...] when considered as a whole the defendant’s actions were unreasonable and the plaintiff was entitled to damages for nuisance.”<sup>257</sup>

Thus put, the determinative factor for an award of damages appears to be whether the nuisance was “substantial”, and whether the defendant’s actions were “unreasonable”. Is unreasonableness a synonym for fault in this context? Perhaps it is not. The note of the judgment makes reference to unreasonable inconvenience. “Unreasonable” action in the quotation above seems to refer to that. Arguably, therefore, what is required for an award of damages according to *Cornick* is a substantial nuisance, which is also an unreasonable (or abnormal?) inconvenience. Both conditions are calculated objectively.

Fault is not considered expressly in these cases. Coupled with the conclusions of the court in *Cornick*, this tends to support the view that showing fault is not a necessary prerequisite for an award of damages. On this point, therefore, the Jersey position appears to be closer to one of no-fault liability. Nonetheless, although its presence is not necessary, it may be that fault is *one* of the facts and circumstances that can contribute to a finding of liability.<sup>258</sup> A number of other factors are also taken into account.

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<sup>256</sup> *Ibid* 152.

<sup>257</sup> *Cornick v Le Gac* 2003 JLR N43, per Le Cras, Commissioner. It is also stated that “it was open to the court to award damages even if the plaintiff was not entitled to an injunction to halt the defendant’s actions. The sum awarded would represent the sum which the plaintiff could reasonably have demanded as a *quid pro quo* for allowing the infringement of her rights.” However, this statement relates to the matter of trespass, not nuisance.

<sup>258</sup> For a similar conclusion on Quebec law see: Popovici “Poule” 247.

Time: An activity which could not give rise to complaint at one time may do so if it is carried out at another. For example, in *Cornick* a neighbour's nocturnal external improvements were held to be unacceptable.<sup>259</sup>

Location: The character of the neighbourhood is taken into account.<sup>260</sup> However, this “does not mean that a person who lives in [...] a noisy neighbourhood can never complain of any additional noise”.<sup>261</sup> Rather, the effect is that the total level of noise required to cross the threshold of unreasonableness is higher. What is considered to be a nuisance differs according to the context in which it is set.<sup>262</sup> That the plaintiff came to the nuisance is no defence.<sup>263</sup>

Manner: In *Magyar*, there is a suggestion that the manner in which the activity is carried out is relevant to liability.<sup>264</sup> It is not clear what this means. It may refer to whether the defendant has taken steps to limit the problem, which the defendant in that case had done.<sup>265</sup>

Intensity, continuity and duration have also been given by the court as issues for consideration.<sup>266</sup> Continuity and duration are likely to come together. The precise quantitative requirement will depend wholly on the circumstances, but it is likely that one occurrence will be insufficient. In *du Feu* (dust), three alleged occasions sufficed.<sup>267</sup>

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<sup>259</sup> *Cornick v Le Gac* 2003 JLR N43. House construction (which impliedly includes renovations and repairs) is (normally) a reasonable use of land: *Key v Regal* (1962) 1 JJ 189, 194 – 195, per Le Masurier, Bailiff.

<sup>260</sup> For example: *Key v Regal* (1962) 1 JJ 189, 192, per Le Masurier, Bailiff.

<sup>261</sup> *Du Feu v Granite Products* (1973) 1 JJ 2441, 2449. Also: *Magyar v Jersey Strawberry Nurseries* (1982) JJ 147, 150 – 151, per Crill, Deputy Bailiff.

<sup>262</sup> For example: *Yates v Reg's Skips* 2007 JRC 237, unreported, para 12, per Bailhache, Bailiff.

<sup>263</sup> See: ch 9 F(3).

<sup>264</sup> *Magyar v Jersey Strawberry Nurseries* (1982) JJ 147, 150, per Crill, Deputy Bailiff.

<sup>265</sup> *Ibid* 149.

<sup>266</sup> *Ibid* 154, 154, 150, respectively. For continuity and duration, see also: *du Feu v Granite Products* (1973) 1 JJ 2441, 2449, per Ereat, Deputy Bailiff.

<sup>267</sup> *Du Feu v Granite Products* (1973) 1 JJ 2441, 2451, per Ereat, Deputy Bailiff.

Finally, what is unreasonably excessive is calculated objectively.<sup>268</sup> The hypersensitivity of the plaintiff will not increase liability, nor give rise to it where it would not otherwise be present.<sup>269</sup>

## **(2) Voisinage**

Physical damage was at issue in *Searley*, in *Browne* and in *Rockhampton*. In each of these cases, the damage was “serious”,<sup>270</sup> or more than trivial,<sup>271</sup> or “substantial”.<sup>272</sup> This indicates that, as with an action for nuisance, the problem must be above a certain level before there is liability, but it provides no guidance for determination of the minimum. In *Key*, physical damage was alleged, but the plaintiff was unsuccessful on this point<sup>273</sup> because causation was not proved. Further, the cracks in the plaintiff’s property were described by the court as “insignificant”.<sup>274</sup> If it is possible to prove causation in a case of insignificant damage, would liability exist? It seems likely that it would not. Arguably, the guiding principle should be *de minimis non curat lex*. The law should not concern itself with trivialities. To do so could encourage frivolous or vexatious litigation.

According to the Court of Appeal in *Yates*, the essential facts which must be proved for both nuisance and *voisinage* are the same: that the damage exceeded the limit any ordinary person was supposed to bear.<sup>275</sup> If that is correct there is no fault requirement. From the facts in some of the cases,<sup>276</sup> it could be argued that fault was present, but this does not make fault a necessary prerequisite to an award of damages. Nonetheless, its presence may be one factor leading a court to hold a party liable.

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<sup>268</sup> *Magyar v Strawberry Nurseries* (1982) JJ 147, 153, per Crill, Deputy Bailiff. Also: *du Feu v Granite Products* (1973) 1 JJ 2441, 2450, Ereat, Deputy Bailiff; *Yates v Reg’s Skips* 2007 JRC 237, unreported, para 26, per Bailhache, Bailiff; *Reg’s Skips v Yates* 2008 JLR 191, 201, para 31, and 209, paras 63, 64.

<sup>269</sup> *Magyar v Strawberry Nurseries* (1982) JJ 147, 149 – 150, per Crill, Deputy Bailiff.

<sup>270</sup> *Searley v Dawson* (1971) 1 JJ 1687, 1698, per Le Masurier, Bailiff.

<sup>271</sup> *Browne v Premier Builders* (1980) JJ 95, 102, per Crill, Deputy Bailiff.

<sup>272</sup> *Gale v Rockhampton* 2007 JLR 27, 30, para 2, per Bailhache, Bailiff.

<sup>273</sup> And every other. See: ch 9 B(2).

<sup>274</sup> *Key v Regal* (1962) 1 JJ 189, 193, per Le Masurier, Deputy Bailiff.

<sup>275</sup> *Reg’s Skips v Yates* 2008 JLR 191, 201, para 31, per Jones, JA.

<sup>276</sup> For example: *Searley v Dawson* (1971) 1 JJ 1687; *Browne v Premier Builders* (1980) JJ 95; and the *Rockhampton* litigation, 2007 JLR 27, 2007 JLR 332. Also: *du Feu v Granite Products* (1973) 1 JJ 2441; *Magyar v Jersey Strawberry Nurseries* (1982) JJ 147; *Cornick v Le Gac* 2003 JLR N43.



Unlike the Court of Appeal in *Yates*, the judgment of the court in *Key* seems to separate the two types of interference, and bears the reading that exceeding the degree the average person should have to accept<sup>277</sup> applies to interference with enjoyment, whereas for physical damage it need only be shown that (significant) damage occurred as a result of the alleged wrongdoer's activity.<sup>278</sup> However, the same principle is at work in both instances: when non-trivial physical damage is occasioned, this is an example of interference exceeding the degree the average person should have to accept.

The courts have stated that, in cases of physical damage, the obligation in *voisinage* only arises between neighbours whose properties are contiguous.<sup>279</sup> This rule may be criticised as drawing an arbitrary division between damage caused to immediate neighbours, and damage caused to those who do not share a boundary with the wrongdoer but who are, nevertheless, closely proximate. For example: A's land and C's land are separated by that of B. A's activities damage C's land. C may have an alternative basis for an action against A, such as an action for negligence, but if there is none and contiguity of properties is requisite, C has no redress, simply because C and A have no common boundary. Given that this rule is not applied in any of the other systems examined, it should be re-examined.

### **(3) Conclusion**

In *Yates*, the Court of Appeal said that the essential facts to be proved were the same, whether the action was one of nuisance or of *voisinage*: the court had to be satisfied that the "activities were productive of noise which, on an objective view, exceeded that which the 'average' or 'ordinary' or 'normal' person could be expected to tolerate."<sup>280</sup> That much may be accepted. Where, however, the Court of Appeal appears to err is in suggesting that *voisinage* applies to interference with enjoyment.<sup>281</sup> Further, there is a difference between *voisinage* and nuisance

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<sup>277</sup> *Key v Regal* (1962) 1 JJ 189, 193, per Le Masurier, Deputy Bailiff.

<sup>278</sup> *Ibid.*

<sup>279</sup> *Searley v Dawson* (1971) 1 JJ 1687, 1701, per Le Masurier, Bailiff; *Rockhampton v Gale* 2007 JLR 332, 384, para 154, per McNeill, JA. Pothier *Traité du contrat de société* 2<sup>nd</sup> appendix, para 230.

<sup>280</sup> *Reg's Skips v Yates* 2008 JLR 191, 201, para 31, per Jones, JA.

<sup>281</sup> See: ch 9 C.

regarding the way in which the threshold for liability is determined. For *voisinage* the physical damage must be more than trivial. For nuisance, the threshold is determined in reference to certain circumstantial elements. The contiguity requirement for an action in *voisinage* would be another difference in the essential facts to be proved, but it is argued that this rule should be rejected.<sup>282</sup> In either case, it is not clear whether liability is fault-based. It is suggested that it is not, but, in the case of an action in nuisance, the presence of fault is one of the elements considered in ascertaining whether the threshold for liability has been breached.

## F. LIMITS OF LIABILITY

### (1) Personal Injury

Some of the earlier cases deal both with interference with property and with personal injury and do not distinguish them as separate claims.<sup>283</sup> Later cases are unclear over whether personal injury caused by the activities of a neighbour is part of the doctrine covering interference with property. In both *Key* and *du Feu*, personal injury to the plaintiff was alleged.<sup>284</sup> In the latter case the question was not decided. In *Key*, it was said that, although the plaintiff's illness was the result of the defendant's action, this "does not necessarily make him liable in law".<sup>285</sup> "Necessarily" suggests that the defendant may be liable in some instances. In a later case it was said that "it is not necessary in an action for nuisance [...] to show that there had been injury to health".<sup>286</sup> Conversely, the Court of Appeal in *Rockhampton* opined that *voisinage* does not include personal injury claims.<sup>287</sup>

Personal injury may be distinguished from interference with property because there is no necessary connection between the victim and the land.<sup>288</sup> This is not so,

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<sup>282</sup> See: ch 9 E(2).

<sup>283</sup> For example: *Keough v Farley* (1937) 12 CR 373; *Coutanche v Lefebvre* (1955) 249 Ex 390. See also: *Rockhampton v Gale* 2007 JLR 332, 375 – 376, paras 128, 129, per McNeill, JA.

<sup>284</sup> *Key v Regal* (1962) 1 JJ 189, 192, per Le Masurier, Deputy Bailiff; *du Feu v Granite Products* (1973) 1 JJ 2441, 2443 – 2444, per Ereat, Deputy Bailiff.

<sup>285</sup> *Key v Regal* (1962) 1 JJ 189, 195, per Le Masurier, Deputy Bailiff.

<sup>286</sup> *Magyar v Jersey Strawberry Nurseries* (1982) JJ 147, 153, per Crill, Deputy Bailiff.

<sup>287</sup> *Rockhampton v Gale* 2007 JLR 332, 384, para 154, per McNeill, JA.

<sup>288</sup> See: *Hunter v Canary Wharf* [1997] AC 655, 706, per Lord Hoffmann. In Scotland, it seems that recovery in nuisance for personal injury is possible: Whitty *Nuisance* para 80.

however, where personal injury is a consequence of either physical damage to land or interference with enjoyment of it. Thus it is suggested that, in cases of *voisinage*, provided the physical damage to the land is sufficiently serious as to give rise to liability, damages may also be awarded for some instances of personal injury which were direct consequences of the damage to the land. Similarly, in an action for nuisance, recovery for personal injury consequent on the interference with enjoyment ought to be possible in some cases. As with *voisinage*, however, damages should only be awarded where there is a successful claim for some harm to the land (in this case, interference with enjoyment) because, without that, there would be an insufficient (or no) causal link between the alleged wrongful act and the damage for which compensation is sought. Even where a claim for personal injury under nuisance or *voisinage* can be made out, there is no reason why there should not be concurrent liability in negligence.

## **(2) Identity of Parties**

### *(a) Who can be sued?*

The party who has caused the loss can be sued. The cases indicate that liability may be ascribed to an owner or a lessee.<sup>289</sup> By analogy this should also be true of a usufructuary.<sup>290</sup> It is submitted that these conclusions apply to both nuisance and *voisinage*.

In *Searley* the court said that the obligation arising in *voisinage* on an owner could not be divested “by transferring it to another”.<sup>291</sup> In *Yates*, where the defendant was a tenant, it was held that the plaintiff could also have pursued the owner.<sup>292</sup> Therefore, it seems that the owner remains liable, even when not in occupation. However, where land is subject to a usufruct or a lease, seeking to enjoin the owner (or bare-owner) in a bid to prevent further interference with property would be ineffective. Where damages are sought (assuming fault is not a necessary condition), both the occupier and the owner may be sued.

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<sup>289</sup> Lessee: *Reg's Skips v Yates* 2008 JLR 191, 207, para 54, per Jones, JA.

<sup>290</sup> It may also be true of a licensee: *Mercer v Bower* (1973) 1 JJ 2453, 2454, 2458, per Le Masurier, Bailiff. Note, however, that this case was decided on the basis of a contract between the parties.

<sup>291</sup> *Searley v Dawson* (1971) 1 JJ 1687, 1702, per Le Masurier, Bailiff.

<sup>292</sup> *Rockhampton v Gale* 2007 JLR 332, 354, para 54, per McNeill, JA.

For *voisinage*, Pothier's notion of the parties appears to be based on their relationship as neighbours.<sup>293</sup> A question, therefore, arises over the precise nature of a neighbour. If *voisinage* is based on quasi-contract, is the unlawful occupier part of this nexus? This question may also be raised in relation to who can sue.

*(b) Who can sue?*

The owner can sue,<sup>294</sup> but it may be that the victim property is lawfully occupied by someone other than the owner. The lawful occupier may sue, whether it is a case of *voisinage* or of nuisance. Can a non-occupying owner also raise an action? This should be possible in *voisinage*, whatever the remedy sought, because the owner has the right to stop or vindicate physical damage to the immovable. For nuisance, whether an award of damages can be made will depend upon whether the non-occupying owner has suffered loss (although an injunction is the primary remedy). Where the property is subject to a lease, it may be that failure of a tenant to renew could be construed as loss for this purpose. Where the land is subject to a usufruct, it is hard to imagine a situation where a bare-owner will suffer loss as a result of interference with enjoyment. Therefore, it seems likely that bare-owners will only be able to sue in respect of physical damage.

### **(3) Defences**

Showing that causation is lacking, or that the damage suffered is trivial, will prevent liability attaching to the defendant. These cannot truly be described as defences: the plaintiff's case has simply not been made out.

Arguing that the plaintiff came to the nuisance is not a defence.<sup>295</sup> If a plaintiff has moved into a house, which was previously occupied by someone who was deaf, the fact that a neighbour has been playing the tuba from 2am to 3am five days a week for the past five years does not prevent the plaintiff from getting an injunction against this activity. If, however, there is no change of ownership and the victim tolerates the

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<sup>293</sup> Pothier *Traité du contrat de société* 2<sup>nd</sup> appendix, para 235.

<sup>294</sup> For example: *Rockhampton* litigation (2007 JLR 27; 2007 JLR 332); *Magyar v Jersey Strawberry Nurseries* (1982) JJ 147.

<sup>295</sup> *Magyar v Jersey Strawberry Nurseries* (1982) JJ 147, 148, 150, per Crill, Deputy Bailiff. *Reg's Skips v Yates* 2008 JLR 191, 211, para 70, 214 – 215, para 85, and 215, paras 86, 87, per Jones, JA.

tuba for three years, is there a right of action? The answer is probably no. Each new incident of tuba playing could be argued to constitute a fresh nuisance, thus avoiding the extinction by prescription of the right of action, but it seems likely that the taciturn plaintiff's action might be vulnerable to a defence of estoppel.<sup>296</sup>

An action for compensation for physical damage occasioned during a previous owner's tenure cannot be raised by a successor owner because the latter is not the person to whom loss has been caused. Of course, the right of action could be assigned to the successor owner.

If the plaintiff has contributed to the problem, the defendant is liable only to the extent of his own contribution. For example, if construction work on the defendant's land caused subsidence and damage to buildings on the plaintiff's land, but the plaintiff's own activities have worsened the problem, the defendant is not liable for all the damage. However, again, this is not strictly a defence, but a statement of the obvious: wrongdoers are liable only for the wrong that they themselves have committed.

In cases of nuisance, if the problem has already ceased this may be sufficient to avoid the imposition of an injunction on, or an award of damages against, the defendant,<sup>297</sup> unless it is likely that the problem will recur.

#### **(4) Remedies**

Where there has been, or is, interference with property the court can grant damages,<sup>298</sup> an injunctive remedy<sup>299</sup> or both.<sup>300</sup> As well as prohibiting a particular activity, the court may also compel the wrongdoer to carry out certain action as a condition of being allowed to continue an activity. This occurred in *Magyar*, where

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<sup>296</sup> For example: *Maçon v Quérée* 2001 JLR 80.

<sup>297</sup> See: *Curry v Horman* (1889) 213 Ex 511, 513.

<sup>298</sup> For example: *Lysaght v Channel Islands Property Holdings* (1961) 253 Ex 204; (1962) 254 Ex 10; *Searley v Dawson* (1971) 1 JJ 1687; *du Feu v Granite Products* (1973) 1 JJ 2441; *Browne v Premier Builders* (1980) JJ 95; *Gale v Rockhampton* 2007 JLR 27.

<sup>299</sup> *Chisholm v Glendewar* (1924) 233 Ex 390; *Yates v Reg's Skips* 2007 JRC 237, unreported.

<sup>300</sup> *Dutton v Constable of St Helier* (1901) 221 Ex 120; *Magyar v Jersey Strawberry Nurseries* (1982) JJ 147; *Cornick v Le Gac* 2003 JLR N43.

the defendant was ordered to take specified steps to reduce the amount of noise conveyed to the plaintiff's property as a result of his glass-blowing works.<sup>301</sup> It seems probable that awards of damages will be made only when the problem complained of has ceased, or will cease because an order to this effect has also been made, for damages will not be granted in order to legalise wrongful action<sup>302</sup> (which would be the effect if they are granted where there is no certain prospect of the problem ceasing).

## G. NEIGHBOURHOOD LAW

*Voisinage* is used in at least two different ways in the modern law. *Voisinage* as a specific legal doctrine has been considered above. *Voisinage* can also be translated more broadly, as "neighbourhood law".<sup>303</sup> In this sense, it is an organising concept, akin to family law, gathering parts of the law together on the basis of where they apply in the physical world, but not altering the legal nature of those parts.<sup>304</sup>

The courts have observed that the law on *éboulements*, natural drain of water from higher to lower ground, water in general, enclosures of land and *branchage* all form part of this general area.<sup>305</sup> (It has been suggested that these could be classified as natural servitudes,<sup>306</sup> although some appear to be legal servitudes.) According to Pothier, a number of rules and regimes constitute the law of the neighbourhood. The obligation not to harm one's neighbour by the use of one's property is part of this.<sup>307</sup> His account also includes: *bornage*,<sup>308</sup> the action to ward off rainwater,<sup>309</sup> the natural servitude of drain from higher to lower ground,<sup>310</sup> and the *tour d'échelle*.<sup>311</sup> Le Gros

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<sup>301</sup> *Magyar v Jersey Strawberry Nurseries* (1982) JJ 147, 154 – 155, per Crill, Deputy Bailiff.

<sup>302</sup> *Du Feu v Granite Products* (1973) 1 JJ 2441, 2452, per Ereat, Deputy Bailiff.

<sup>303</sup> For example: *Gale v Rockhampton* 2007 JLR 27, 38, para 23, per Bailhache, Bailiff. Fournel *Voisinage* concerns this sense of the word. See also: Yiannopoulos *Servitudes* 40, para 12.

<sup>304</sup> *Rockhampton v Gale* 2007 JLR 332, 356, para 60, per McNeill, JA.

<sup>305</sup> *Gale v Rockhampton* 2007 JLR 27, 38, para 23, per Bailhache, Bailiff. Also: *Rockhampton v Gale* 2007 JLR 332, 357 – 358, paras 63 – 65, per McNeill, JA.

<sup>306</sup> *Gale v Rockhampton* 2007 JLR 27, 38, para 23, per Bailhache, Bailiff; *Rockhampton v Gale* 2007 JLR 332, 357, para 65, per McNeill, JA.

<sup>307</sup> Pothier *Traité du contrat de société* 2<sup>nd</sup> appendix, para 235.

<sup>308</sup> *Ibid* para 231 *et seq.*

<sup>309</sup> *Ibid* para 236.

<sup>310</sup> *Ibid.*

<sup>311</sup> *Ibid* paras 244 and 246.

covers some of the same points,<sup>312</sup> and, from his work, the following apposite additions may be made:<sup>313</sup> *clôture*, or the right to enclose one's land;<sup>314</sup> *enclave*, or the way of necessity;<sup>315</sup> the rules concerning fruits hanging over neighbouring land;<sup>316</sup> further aspects of the law of water;<sup>317</sup> *branchage*, or the obligation to cut off branches which protrude over a neighbour's land;<sup>318</sup> the law relating to tree roots;<sup>319</sup> and the regime relating to constructions on a boundary.<sup>320</sup> It is interesting to note that the French *Avant-projet de réforme du droit des biens*<sup>321</sup> employs a similar structure, where the title on *voisinage* includes *troubles de voisinage*, *arbres et plantations*, *clôtures*, *mitoyenneté*, *les jours et vues*, *l'égout des toits*, *le bornage*, and *les servitudes légales*.<sup>322</sup> The law of the neighbourhood is the genus, under which there are a number of species (rights).

## H. CONCLUSION

What is the law applicable when one neighbour, through use of his or her land, interferes with the land of another neighbour? The doctrine of *voisinage* provides redress where there is physical damage and the law of nuisance applies where there is interference with enjoyment. In both cases, an injunctive remedy or damages are available, but the doctrines also differ. Nuisance is tortious, whereas *voisinage* is said to be quasi-contractual. To an action in nuisance, the three-year extinctive prescription applies.<sup>323</sup> To an action in *voisinage*, the period is ten years.<sup>324</sup> The way in which the thresholds for liability are ascertained differs also.

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<sup>312</sup> Albeit with no reference to an overarching structure.

<sup>313</sup> Noted in *Rockhampton v Gale* 2007 JLR 332, 360, para 73, per McNeill, JA.

<sup>314</sup> Le Gros, 36.

<sup>315</sup> *Ibid* 38 (and T Hanson's note, 517).

<sup>316</sup> *Ibid*. Also: Matthews & Nicolle, 15, paras 1.59, 1.60; Nicolle *Immovable* 45 – 46.

<sup>317</sup> Le Gros, 195.

<sup>318</sup> *Ibid* 222 (and T Hanson's note, 546).

<sup>319</sup> *Ibid* 226 (and T Hanson's note, 546).

<sup>320</sup> *Ibid* 18 – 20, 261 (and T Hanson's notes, 514, 550).

<sup>321</sup> A proposal for the reform of the property provisions in the French Civil Code.

<sup>322</sup> <http://www.henricapitant.org/node/70>, accessed 12 August 2011.

<sup>323</sup> Law Reform (Miscellaneous Provisions) (Jersey) Law 1960, art 2(1).

<sup>324</sup> *Rockhampton v Gale* 2007 JLR 332, 392, para 182, per McNeill, JA.

How should the law develop? Three possible improvements are suggested. The contiguity requirement for an action in *voisinage* should be rejected. Also, the quasi-contractual basis of the doctrine of *voisinage* could be replaced, possibly by assimilating *voisinage* into the law of tort. Finally, the existence of two doctrines is not ideal as in some cases it will be difficult to separate physical damage from interference with enjoyment. This problem would be ameliorated by rendering uniform the periods for extinctive prescription for each action.



## **FINAL CONCLUSION**

Jersey law, and within it Jersey property law, have received little academic attention. If volume of legal research is proportionate to population size this is understandable, if unmerited. There is much to interest and occupy the researcher in Jersey law, given its rich historical development and the interplay of different legal traditions. This thesis has examined some specific areas of Jersey property law in detail before considering the nature and structure of Jersey property law as a whole.

Jersey property law bears the influence of Norman feudal law, the civil law, and English common law. The first of these is largely, but not completely, extinct; indeed the extent to which it survives is itself an important question. The second and third have competed for hegemony, in property law as elsewhere in private law. One of the purposes of this thesis has been to consider whether the dominant voice in property law is the common law or the civil law.

As the chapter on Feudal Land Tenure shows, feudal law has retreated so much that what remains today is a largely empty structure, save the duty of suit of court on fewer than a score of *seigneurs* and a handful of obligations on four *seigneurs* with respect to a visiting monarch. It can be seriously doubted whether any of these obligations would be enforced in the event of failure to perform. As the substance of feudalism has declined, so the conception of the right of the *tenant*, or vassal, at the bottom of the feudal chain has become more like the absolute ownership of modern civilian systems; as the influence of feudal law has retracted, so the civilian influence has expanded.

Although Jersey law as a whole can be something of a battleground between the civilian influence of French law (both before and after 1804) and the common law influence of English law – as seen in the chapter on *Voisinage* and Nuisance – there are clear indications that much of the foundations and substance of Jersey property law are civilian. The sources refer frequently to Roman law and the *ius commune*

development of it, as well as to more modern French law. This has been seen in the chapters on the law of Servitudes, the chapter on the Classification of Property, and the chapter on Real Rights. Although the sources refer to English law also, such references are far less frequent than those to civilian materials.

Further, it can be seen from the chapters on Real Rights and the Classification of Property that Jersey property law is largely civilian as to structure. Admittedly, Jersey law, like English law, remains vestigially feudal but, as the legal systems of France and Scotland demonstrate, the presence of elements of feudal land tenure is not a determinative marker of a common law system. In Jersey law, unlike in English law, there is no separation of Law and Equity. When the sources are synthesised into a whole, the overall impression is of a civilian system of property law.

Comparative reference to other legal systems was also part of the approach adopted for this thesis. Given the relative paucity of native legal materials, this has been unavoidable but also invaluable, providing context, illuminating the present law, and assisting identification of appropriate possibilities for future development. As the first chapter explains, Jersey is a mixed jurisdiction, influenced by French law (broadly construed) and English law. And as well as French law and English law, the mixed jurisdictions of Louisiana, Quebec, Scotland, South Africa, and Guernsey (Jersey's sister jurisdiction) were obvious systems for comparative study. It is further noted in the first chapter that property law in mixed jurisdictions tends not to be mixed, but almost entirely civilian, and that the same may be said of Jersey property law also.

Finally, a thought to the future: the main language of Jersey is English. Since the cessation of conveyancing in French in 2006, all legal business is conducted in English. Old commentaries, court reports, legislation, conveyances and other sources, however, remain in French. As proficiency in French amongst the legal profession declines this presents a problem, for example, with respect to continuity of doctrines and concepts. Further systematic writing on Jersey law will be needed before the sources become inaccessible to those who practise it.