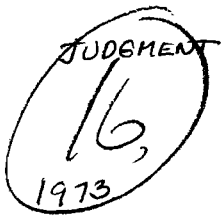

IN THE PRIVY COUNCIL

NO. 29 OF 1970

ON APPEAL FROM

THE COURT OF APPEAL (CIVIL DIVISION) GUERNSEY

B E T W E E N :

ADOLPHUS HENRY VAUDIN — Appellant

- and -

ADOLPHUS JOHN HAMON and ALAN JAMES MESNEY and DOROTHY LUCIEN MESNEY (nee Price) his wife — Respondents

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IN THE PRIVY COUNCIL NO.29 of 1970

ON APPEAL FROM THE COURT OF APPEAL
(CIVIL DIVISION) GUERNSEY

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RECORD OF PROCEEDINGS

INDEX OF REFERENCE

IN THE PRIVY COUNCIL No.29 of 1970

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B E T W E E N : ADOLPHUS HENRY VAUDIN
Appellant

- and -

ADOLPHUS JOHN HAMON and
ALAN JAMES MESNEY and
DOROTHY LUCIEN MESNEY
(nee Price) his wife
Respondents

RECORD OF PROCEEDINGS

NO. 1

No.1

ACT OF THE COURT OF THE SENESCHAL OF SARK

Act of the Court of the Seneschal of Sark

In the Court of the Seneschal of Sark

The 23rd day of November, 1968, before William Baker, Esq. M.B.E. Seneschal.

23rd November 1968

Upon hearing the action of Adolphus Henry Vaudin of "Maris Stella" Les Hubits in the parish of Saint Martin in the Island of Guernsey against Adolphus Hamon of La Duvallerie, Little Sark in the Island of Sark and Alan James Mesny and Dorothy Lucien Mesny (nee Price) his wife, both of Le Port à la Jument in the Island of Sark to see him present a petition to the Court praying the Court:-

Remontre:-

Que je suis fils de Joseph Vaudin et petit fils de feu le Reverend Adolphus Vaudin fils légitime de feu Thomas Vaudin du Port à la Jument en cette qualité, je suis l'heritier legal a la succession de Marie Elizabeth Vaudin ma cousine issue de Germain

1. Que suivant la succession de Mademoiselle Mary Elizabeth Vaudin ma cousine issue de Germain qui décéda en 1938, a l'Ile de Serk, la succession de la

No. 1

Act of the Court of the Seneschal of Sark

23rd November 1968 (continued)

Maison Ancestrale appelée Le Port à la Jument fut par manque de renseignements a mon sujet attribuée à feu Monsieur John Hamon fils de Bernel Hamon.

2. Votre remontrant prie tres humblement votre Cour:

(a) de mentendre, aux fins de déclarer que le titre de la propriété du Port à la Jument a été mal attribuée;

(b) de déclarer et ordonner que la vente de la propriété par Monsieur Adolphus Hamon est nulle et de nul effet;

(c) d'ordonner que le dit Adolphus Henry Vaudin a droit a la possession de la propriété qui de fait lui appartient;

(d) de faire, tel autre Ordre ou de prendre telles autres mesures que votre Cour dans sa sagesse trouvera juste et equitable, et votre remontrant sera toujours tenu de prier.

Ce 23 Aout Mil neuf cent soixante-huit.

And upon hearing the Plaintiff and the Advocates for the Defendants the Court adjudged that, by virtue of Section 1 of the "Loi relative a la Prescription Immobiliere 1909" registered on the records of the said Island of Sark in the month of April, 1909 the action of the Plaintiff was prescribed by reason of the lapse of at least twenty years from the date on which the Plaintiff's cause of action arose, which the Court found to be on the 19th day of September, 1938 the date of death of Mary Elizabeth Vaudin, whom all parties to the action accepted to be the rightful owner of the tenement known as "Le Port a la Jument" in the Island of Sark.

Plaintiff gave notice of appeal.

Hilary Carre
Greffier of Sark

William Baker
Seneschal.

Extract from the Records of this Island
Hilary Carre
Greffier
Sark this 9th day of December, 1968.

Certified true copy
R.H. Videlo.
Registrar.

NO. 2

OFFICIAL REPORT OF PROCEEDINGS IN THE ROYAL COURT OF GUERNSEY (ORDINARY DIVISION) INCLUDING JUDGMENT

NO. 2

Royal Court of Guernsey (Ordinary Division)

Official Report of Proceedings

14th January 1969

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Tuesday January 14th and
Tuesday January 21st., 1969

Before:- Sir Wm. Arnold Kt., C.B.E., C.St.J.

Appeal from the Court of the Seneschal of Sark

ADOLPHUS HENRY VAUDIN — Appellant

v.

ADOLPHUS HAMON, ALAN JAMES MESNEY and DOROTHY LUCIEN (nee Price) his wife — Respondents

The Appellant conducted his own case.

Advocate C.K. Frossard appeared for the Respondent Adolphus Hamon.

Advocate D.W.M. Randell appeared for the Respondents Alan James Mesney and wife.

Official report of the proceedings.

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

Tuesday, January 14th., 1969.

Before:- Sir Wm.Arnold., Kt., C.B.E., C.St.J.

Appeal from the Court of the Seneschal of Sark

ADOLPHUS HENRY VAUDIN — Appellant

v.

ADOLPHUS HAMON, ALAN JAMES MESNEY and DOROTHY LUCIEN (nee Price) his wife — Respondents

No. 2

Royal Court of Guernsey (Ordinary Division)

Official Report of Proceedings

14th January 1969 (continued)

H.M. Greffier reads the following cause:-

"Cour Royale de Guernsey.

ADOLPHUS HENRY VAUDIN de Maris-Stella, Les Hubits, St. Martin en l'Ile de Guernsey.

ACTIONNE Monsieur Adolphus Hamon, Monsieur Alan James Mesney et Mme. Dorothy Lucien Price épouse du dit Monsieur Alan James Mesney tous trois d l'Ile de Sercq à voir dire et juger, par la Cour Royale de Guernsey que c'a été mal juge et bien appellé par le dit Vaudin des sentences de la Cour de l'Ile de Sercq en son acte en date du 23 Novembre 1968 que le lit comme suit:-

'IN THE COURT OF THE SENESCHAL OF SARK

The twenty third day of November, 1968 before William Baker, M.B.E., Seneschal

Upon hearing the Action of Adolphus Henry Vaudin of 'Maris-Stella'Les Hubits in the parish of Saint Martin in the Island of Guernsey, against Adolphus Hamon, of La Duvallerie, Little Sark, in the Island of Sark and Alan James Mesney andDorothy Lucien Mesney (nee Price) his Wife, both of Le Port a la Jument in the Island of Sark to see him present a petition to the Court praying the Court:-

REMONTRE

Que Je suis fils de Joseph Vaudin et petit fils de feu le Reverend Adolphus Vaudin fils legitime de feu Thomas Vaudin du Port à la Jument en cette qualité, je suis l'héritier légal a la Succession de Marie Elizabeth Vaudin ma cousine issue de Germain.

1. Que suivant la succession de Mademoiselle Marie Elizabeth Vaudin ma cousine issue de Germain qui décéda en 1938 à l'Ile de Sercq, la Succession de la Maison Ancestrale appelée Le Port à la Jument fut par manque derenseignments a mon sujet attribuée a few Monsieur John Hamon fils de Bernel Hamon.

2. Votre remontrant prie très humblement Votre Cour:-

(a) de m'entendre aux fins de déclarer que le titre de la propriété du Port à la Jument a été mal attribuée.

(b) de déclarer et ordonner que la vente de la propriété par Monsieur Adolphus Hamon est Nulle et de Nul effet.

(c) d'ordonner que le dit Adolphus Henry Vaudin a droit a la possession de la propriété que de fait lui appartient.

(d) de faire tel autre ordre ou de prende telles autres mesures que Votre Court dans sa sagesse trouvera juste et équitable.

Et Votre remontrant sera toujours tenue de prier.

Ce 23 Aout Mil Neuf Cent Soixante Huit.'

And upon hearing the Plaintiff and the Advocates for the defendants the Court adjudged that, by Virtue of Section 1 of the 'Loi relative à la Prescription Immobilière 1909' registered in the records of the said Island of Sark in the month of April, 1909, the action of the Plaintiff was prescribed by reason of the lapse of at least twenty years from the date on which the Plaintiff's cause of action arose, which the Court found to be the 19th day of September, 1938, the date of death of Mary Elizabeth Vaudin, whom all parties to the action accepted to be the rightful owner of the tenement known as 'Le Port a la Jument' in the Island of Sark.

Plaintiff gave Notice of Appeal.

Signed William Baker Seneschal

Signed Hillary Carre Greffier of Sark.'"

MR. ADOLPHUS HENRY VAUDIN (the Appellant): Well Sir, I am very grateful to you for allowing me to take my case personally and I pray that you will forgive me if I should repeat myself, or if I am going a bit off course.

Sir, the case which is before you today is the result of a combination of ignorance, mistake, bad faith, fiction and above all of deceptions caused by impediments to act at an earlier stage.

To start with, I submit that according to the Old Law of Normandie, which is still the law in Sark, there are four categories or kinds of prescriptions:-

No. 2

Royal Court of Guernsey (Ordinary Division)

Official Report of Proceedings

14th January 1969 (continued)

(i) 10-20 years;
(ii) 30 years;
(iii) 40 years; and
(iv) immemorial.

In 1852 a Projet de Loi was approved to amend the Prescription Immobilière period fixed by the Old Law of Normandie to read:-

> "Toutes choses Immobilières, et Actions réelles ou dependantes de la réalité, qui se prescribent maintenant par le laps de quarante ans seront à l'avenir prescrites par le laps de trente ans; et suffira la tenue de trente ans pour titre compétent en matiere héréditale".

This law was not registered in Sark at the time, i.e. in 1852. In 1909, the prescription period was again reduced from 30 years to 20 years. Again it was not registered on the records of Sark. I believe they have got a copy on file, but no registration was effected.

Even if in 1909 the law had been registered on the records of Sark, I submit it would have had no effect because the 1852 law had not been registered or even filed and one can't repair a door, if the door does not exist.

The people of Sark, starting from the Seneschal and the Greffier, were not aware of this 20 years prescription period.

I can only submit that the Seneschal in his Act of Court of the 23rd day of November, 1968, did not give the true facts when he said that the Projet de Loi had been registered on the records of Sark. I invite your attention, Sir, to the fact that no date is given by the Seneschal for the registration mentioned in his Act of Court.

The Order in Council, 1909, refers to Prescription pour titre Compétent en "Matière héréditale". This is applicable to hereditary matters. In Guernsey, properties are divisible among co-heirs and as long as the inheritance is not divided prescription does not run, but once the inheritance is divided, prescription runs up to the period of 20 years; before 1852 it was 40 years.

As can be seen there are two forms of hereditary inheritances:-

1. Divisible inheritances(as stated above, where from the time the inheritance is divided prescription starts to run and excludes any claim after the period of 20 years, formerly 40 years).

2. Undivisible inheritances (as is the case in Sark, where I submit to the Court that in accordance with the Charter of James the 1st., properties cannot be partitioned among co-heirs; the prescription period remains immemorial.)

Article DXXIX (529) de la Coutume de Normandie Titre Vingtieme des prescriptions, P.318, says, and I quote for reference:-

"Entre co-héritiers la prescription Quadragenaire n'a point de lieu avant le partage, et ne peuvent les Aines aussi peu que les puines se prevaloir de la dite prescription pour empêcher l'action de partage."

Therefore, I submit that once partage has taken place prescription starts to run. This is fully applicable to Guernsey, where properties are divisible among co-heirs, but not in Sark where by the Charter of James the 1st properties are undivisible.

Mr. Jean Hamon is father to Adolphus Hamon, so therefore we were co-heirs. There was another co-heir, my cousin, who is now in Dinard. We were three co-heirs to the property. The three co-heirs were Jean Hamon, myself and my cousin, so, therefore, among the three of us, one had priority over the others.

THE BAILIFF: Mr. Vaudin, were the three of you in the same degree?

MR. VAUDIN: The same degree, yes.

THE BAILIFF: The same degree?

MR. VAUDIN: The projet de loi referred to in The Order in Council 1909 Registered on the Records on the 23rd April, 1909, applies to "Choses Immobilieres". "Competent en matiere hereditale" which can only mean those properties which are divisible among co-heirs.

No. 2

Royal Court of Guernsey (Ordinary Division)

Official Report of Proceedings

14th January 1969 (continued)

The above mentioned facts would become irrelevant, when the claim of prescription of Mr. and Mrs. Mesney is studied more closely. Their prescription is not and cannot be one of "Matiere Héréditale", since they have not inherited but bought the property. To illustrate this, I quote the "Loi relative à la Prescription Immobilière," as set forth in the Order in Council, 1909:-

"Prescription a Partir
du 1er Avril
1909.

1. A Partir de 1er Avril 1909 toutes choses immobilières et actions réelles ou dependantes de la réalité, qui se prescrivent maintenant par le laps de trente ans seront prescrites par le laps de vingt ans; et suffira le tenue de vingt ans, bien entendu qu'elle soit de bonne foi, pour titre compétent en matiere héréditale."

This law shows that there are more than one form of prescription. Mr. and Mrs. Mesney's prescription being as claimed by their advocate, a 'prescription acquisitive', which period this law fixed at 20 years. Mr. and Mrs. Mesney have been in possession of the property since 1964.

La Coutume Reformee du Pays et Duche de Normandie par M. Josias Berault, says:-

"De Prescriptions (page 623) Possession Quadragenaire fondee sur Titre Vicieux ne Vaut. C'Est pourquoi en dit que la possession quadragenaire fondee sur titre vivieux ne vaut, et ne peut prescrire quand le possesseur produisant iceluy titre reconnait tacitement sa possession sur ce fondee";

and, at page 646:-

"Après partages faits un co-héritier peut prescrire un heritage omis aux lots.

"Entre coheritiers la prescription quadragenaire n'a point de lieu avant le partage; et ne peuvent les ainés aussi peu que les puines se prevaloir de la dite prescription pour empecher l'action de partage".

If it is proved that Mr. Jean Vaudin Hamon descended from the second son of Thomas Vaudin and Anne Mollet, then he was collaterally related to the fifth degree to Mary Elizabeth Vaudin. In Sark, as there is no partage, only one co-heir with necessary qualifications can inherit Realty.

Mr. Jean Vaudin Hamon's claim to the property should have been in all honesty and bonne foi considered with other collateral heirs to the succession and not otherwise. I was not aware of this family Ancestral property until I came to Guernsey in November, 1962.

If Mr. Adolphus Hamon's claim of descent is proved to be correct, then the late Mr. Jean Hamon and I were related at parity of degree, i.e. fifth degree, to Mary Elizabeth Vaudin through her father Thomas who was the brother of Jean and Adolphus Vaudin, but my father had a double link of parentage with Mary Elizabeth Vaudin: her mother was my father's "first cousin" once removed, or cousin to the sixth degree.

Mr. Hamon's line of ascent is intercepted by a female, while I am issued from a direct male line.

"Guillaume Terrien, Livre VI, at page 203 says:-

"Prescription n'empeche partage.

"Mais Combien que l'aine en eut joui par quarante ans, les puines neamoins peuvent demander leur part, comme dit la glose, pource que la possession qu'a l'aine est à la conservation du droit des puines aussi bien qu'à son nom, droit et titre. Ce que empeche le prescription."

Therefore, as we were related to the same degree, we were co-heirs to the succession, - and in view of this, I submit that the family council on which Mr. Hamon was a member should have notified me, so that any claim would have been considered along with Mr. Jean Hamon's claim; this was not done and, therefore, as this was not done through the mistake of the family council, I submit to you Sir, that prescription cannot be claimed to have run against me.

No. 2

Royal Court of Guernsey (Ordinary Division)

Official Report of Proceedings

14th January 1969 (continued)

If we were to invoke the English Limitation Act, 1939, Chapter 21 on Fraud and Mistake, we would see that the period of limitation "shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be".

ADVOCATE K. FROSSARD (for the respondent Adolphus Hamon): .. I do not want to interrupt .. is he alleging fraud? There is nothing that says so.

THE BAILIFF: I am waiting to see what comes out of it. (to Mr. Vaudin) What was that last reference, Mr. Vaudin?

MR. VAUDIN: My last reference was the English Limitation Act, 1939, Sir, which says the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or with reasonable diligence should have discovered it.

THE BAILIFF: Are you certain that exists as part of the law of Sark?

MR. VAUDIN: No Sir; this is to see what the English Modern Law says about it. Mr. Hamon and his son's lines are, as I say, by a female, while my line is the only direct male line.

In Sark, Partage among co-heirs is forbidden by the Charter of James the 1st and the Old Law of Normandie is still in force; law which rules out prescription quadragenaire between co-heirs before partage, so, therefore, as there has been no partage, Mr. Adolphus Hamon cannot claim prescription of the property. The Projet de Loi referred to in the Order in Council, 1909, Registered on the Records on the 23rd April, 1909, is not, I submit, applicable to the case now before Your Royal Court.

THE BAILIFF: Why not?

MR. VAUDIN: Because there is no partage, Sir. No property can be divided; therefore I submit as it cannot be divided, therefore this order in which they say:- "Et suffira le tenue de vingt ans ... pour titre compétent en matiere heréditale" does not apply to this particular case, because there there is no partage, and I submit it meant this was merely applicable to "matierès héreditales".

During the hearing of my case, Mr. and Mrs. Mesney claimed through their Advocate "Prescription Acquisitive". There are indeed several forms of prescriptions, but as Mr. and Mrs. Mesney's possession started in October, 1964, therefore they cannot, I submit, claim prescription under any form of prescription, and I would like to read what it says in the "Loi relative à la Prescription", Order in Council 1909 which I repeat:-

> "A Partir du ler Avril 1909 toutes choses immobilieres, et actions réelles ou dependantes de la realité, qui se prescrivent maintenant par le laps de trente ans seront prescrites par le laps de vingt ans; et suffira la tenue de vingt ans, bien entendu qu'elle soit de bonne foi, pour titre competent en matière hereditale".

Until February, 1963, I knew nothing about my close relationship with Mary Elizabeth Vaudin to whom the Ancestral property of the Vaudin family had descended.

I was 2 years and 9 months of age when my father died; 8 years old when my grandfather passed away and only a baby when my two uncles left Mauritius.

In 1954 I came on holiday for the first time to the Channel Islands. I went to Sark on a day trip and there I heard about Mr. Jean Vaudin Hamon. The name Vaudin invited me to visit him and I did introduce myself to him, to his son and to the Curator.

It will be noted that Mr. Jean Vaudin Hamon was a member of the family council who was responsible for the administration of the estates of Mary Elizabeth Vaudin. I am not aware by whom this family council was appointed.

THE BAILIFF: Who was in that family council?

MR. VAUDIN: Mr. Stephen Henry, Curator (Stephen Henry, manager of the bank over here was curator). Mr. Jean Hamon was a member and I think it was a Morley also on this family council.

THE BAILIFF: The "curatelle" must have come to an end when this lady died?

No. 2

Royal Court of Guernsey (Ordinary Division)

Official Report of Proceedings

14th January 1969 (continued)

MR. VAUDIN: On her death.

THE BAILIFF: They could not have done anything about administering her estate?

MR. VAUDIN: No. Up to her death.

THE BAILIFF: You see, if you are rightful heir to this property, or one of them, then your legal right arose on the death of this lady?

MR. VAUDIN: Yes, Sir, certainly, Sir. I claim that even if the Curator and Mr. Jean Vaudin Hamon were under the misconception until the date of my visit that no male descendant of my branch was alive, they should then have realised their mistake and put me "au courant" of the facts of the succession of Mary Elizabeth Vaudin. Furthermore, as executors of her estates, they were, I believe, under the duty to bring the facts to my knowledge. If this had been done at the time, I would have been able to justify my claim.

When Mary Elizabeth Vaudin died, she left a Will on the 11th July 1885, she made a Will which reads as follows (she was then about 27 or 28 years old):-

> "Je soussignée, Mary Elizabeth Vaudin, Fille de Thomas, native de l'Ile de Serk et presentement en cette ile de Guernsey, étant de bonne disposition d'esprit, ai trouvé a propos de faire ce mien Testament, pour donner à connaitre my dernière volonté, a l'égard des biens meubles (de quelque nature et en quelque pays qu'ils puissent être) qui m'appartiendront du jour de mon deces laquelle est comme suit, savoir ----

THE BAILIFF: This is the Will that relates to the "meubles", the personal estate only?

MR. VAUDIN: That relates to the personalty, Sir.

THE BAILIFF: We can't be concerned with that, can we?

MR. VAUDIN: No sir, I am just reading to you what comes after that. I am reading the Will to show you what happened after her death - how they disposed of this Will.

THE BAILIFF: But the disposal of the personal estate has got nothing whatsoever to do with the succession to the real estate, has it?

MR. VAUDIN: No Sir, I agree with you Sir, but I submit that this Will will show --

THE BAILIFF: Are you alleging bad faith?

MR. VAUDIN: I am alleging that there was no good faith through ignorance and lack of good faith.

THE BAILIFF: You are alleging bad faith?

MR. VAUDIN: That is what I am trying to prove - that there was bad faith somewhere.

THE BAILIFF: On whose part? You must allege it specifically.

MR. VAUDIN: On the part of those who were dealing with the "curatelle".

THE BAILIFF: You told me a moment ago you agree that the "curatelle" came to an end on the death of this lady?

MR. VAUDIN: It did - it went on till 1938.

THE BAILIFF: On the death of this lady, her real estate passed automatically to her lawful heir, whoever it was?

MR. VAUDIN: Yes.

THE BAILIFF: There is no need for a Will - there never is a Will in Sark, under Sark Law of Real Estate?

MR. VAUDIN: Not Real Estate.

THE BAILIFF: We are not concered with the Will of Personalty?

MR. VAUDIN: All right, Sir.

THE BAILIFF: Bad faith could not be introduced into this on the part of what had been the family council, because they ceased to function on her death?

MR. VAUDIN: Yes.

No. 2

Royal Court of Guernsey (Ordinary Division)

Official Report of Proceedings

14th January 1969 (continued)

THE BAILIFF: You cannot really allege bad faith, can you?

MR. VAUDIN: Yes, Sir, I just wanted to bring this to your notice to show you this Will was never executed in accordance with her wishes.

THE BAILIFF: Suppose you are right about that, it does not help in deciding your claim to her property, does it?

MR. VAUDIN: No sir.

THE BAILIFF: It can't.

MR. VAUDIN: Right, Sir. Well now, after her death, she had two or three properties. Dixcart was inherited by Mr. Pinell who was related to the tenth degree, and I submit that this property should have returned to the Seigneur.

Jean Vaudin Hamon attributed to himself Le Port a la Jument.

In February, 1963, I applied to the curator or guardian of Mary Elizabeth Vaudin for his assistance with a view to tracing my relationship with Mary Elizabeth, but he gave me no assistance whatsoever. In fact, he did put me off course altogether by saying that I should forget about the second marriage of my great grandfather. My grandfather married twice. Marriage from which I am issued and which later was proved to be perfectly in order. The marriage took place in Sark with a licence from the then Dean of Guernsey, the entry in the Sark records is signed by the Vicar who blessed the marriage. My great grandfather and great grandmother were both above the age of consent (which was then 20 years).

In the contract of the sale of Le Port, it is said that Mr. Adolphus Hamon's father was the "Cousin Germain" of Mary Elizabeth Vaudin. In fact he was "Cousin issu de Germain".

Domat, Les Lois civile, Liv.III page 225, Article 12 says:-

"Il faut mettre au nombre des possesseurs de mauvaise foi, non seulement des usurpateurs, mais aussi ceux qui prévoyant que le droit qu'ils prétendent avoir sera conteste et craignant qu'on ne les empêche d'entrer en

possession, prennent quelque occasion de s'y mettre fortuitement à l'insu de celui qui doit le troubler".

I submit to the Court that the mentioned Article applies in extenso to my case.

Mr. Adolphus Hamon knew that I was investigating the pros and cons of the succession. A couple of months after the death of his father, he sold the property. Here I challenge Mr. Hamon to say upon oath that he and his father were not aware that the latter was not the legal heir. Second, to say that his father did not tell him for reasons best known to himself not to sell Le Port a la Jument. In August, 1965, the Dame of Sark conveyed to me in a letter that she had heard of me at the time of the sale of Le Vieux Port.

My son, during a visit to Sark, had an argument with Mr. Adolphus Hamon, during which the latter said that he had missed an advantageous sale of --

ADVOCATE FROSSARD (for the respondent Adolphus Hamon): With respect, this is not admissible -

THE BAILIFF: A lot of it is not, Mr. Frossard. One has to be a little indulgent in these circumstances. It is best if we had the assistance of counsel, of course; Mr. Vaudin is doing his best to explain the whole of his case. I am afraid he is going rather wide of the mark, but I am prepared to be a little patient, and you can, too.

ADVOCATE FROSSARD: Indeed, yes Sir. I felt I had to take this point on behalf of my client. I have made it now - I will not make it again.

THE BAILIFF: Very well.

MR. VAUDIN: In view of the above facts, it is reasonable to presume that Mr. and Mrs. Mesney could not have ignored my presence and the possibility of a future challenge, since that was by then common knowledge in Sark. Therefore, it cannot be said that they had bought the property in all good faith and innocence.

I refer to the letter of the Dame of Sark, in which she said this:-

No. 2

Royal Court of Guernsey (Ordinary Division)

Official Report of Proceedings

14th January 1969 (continued)

"Dear Mr. Vaudin, I remember hearing of you at the time of the sale of Le Vieux Port. I have many old family trees of the Sark families worked out by my grandmother nearly 100 years ago. I would gladly let you examine them. I also have an old register of the various sales of properties by the 1st Seigneur to the men he brought from Jersey. In 1579 when Phillippe de Carteret initiated the first jurisdiction with 10 Jurats there was a Vaudin as one of these. In 1675, in the list of members of Chief Pleas a Vaudin is listed (with no initials unfortunately) as holder of 2 tenements. If you could spend a day in Sark, I would allow you to examine these quietly for some hours in my library."

Pothier in his Book Tome Huitième, page 140, Article 113, says:-

"Suivant les principes de notre droit francais, la bonne foi du possesseur dêvant durer pendant tout le temps de la possession pour la prescription; l'Heritier, qui est de mauvaise foi et qui à connaissance que l'Heritage n'appartenait pas au defunt, ne peut, en continuant de le possèder, l'acquerir par prescription sa possession etant une possession de mauvaise foi."

Article 114:-

"La possession de l'heritier n'étant que le continuation du celle du defunt elle à les memes qualités qu'aivait celle du defunt. C'est pourquoi, si la possession que le defunt avait d'un heritage, etait une possession injuste, qui fut sans titre ou de mauvaise foi quoique l'héritier soit de bonne foi et croit de bonne foi que l'héritage appartenant au defunt la possession qu'il continuera d'avoir de cet héritage sera censee être une possession injuste telle qu'était celle du defunt dont elle n'est que la continuation et il ne pourra l'acquerir par quelque long temps qu'il l'ait possedée."

Laurent Carey on Prescription, page 207, states how and when prescription does not run, whch is as follows:-

"Elle ne Court contre qui est empêche d'agir ou qui est ignorant de son droit au moyen de fiction ou de déception dont on aurait usé envers lui."

THE BAILIFF: Where was the deception in this case?

MR. VAUDIN: Yes, Sir, I am just coming to that. I was impeded to act for the following reasons:-

When I came to Guernsey in November, 1962, and became aware of my relationship to Mary Elizabeth Vaudin, I attempted to find the necessary documents, such as the birth certificate of my grandfather and the marriage certificate of his parents, by applying to the Vicar of Sark for them, but I was informed that the records for those years could not be traced.

In 1965, a year after the sale of Le Port, the missing register suddenly re-appeared. (The appellant hands a letter to the Bailiff).

THE BAILIFF: This is a letter; its relevance is a little doubtful. It is dated; it is dated 10 November 1960, signed by the Rev. Ellard-Handley addressed to Mr. Vaudin. (to the appellant) Do you wish to read it?

MR. VAUDIN: Yes, Sir, I am going to read it. I have two letters - one was a personal letter and this one was supposed to be an official letter in reply to my letter:-

"Thank you for your letter, dated 8th instant and received by me yesterday the 9th November.

The register you refer to was temporarily mislaid - possibly due to my making a 'search', putting it into a safe place, and so, as can so easily happen to any of us, having a lapse of memory and forgetting where that 'safe' place was!

It is some years since all this happened, and, as you say, it suddenly reappeared about the time of the flooding of my then study, and the change over of furniture and effects to another room, and the clearing out of my heavy bureau where all important documents of mine own are under lock and key, and the cupboards of which are spacious, and full of personal papers and documents.

No. 2

Royal Court of Guernsey (Ordinary Division)

Official Report of Proceedings

14th January 1969 (continued)

But I must point out that the temporary mislaying of the register in question cannot affect your case in any way. You say it confirmed why Mr. Stephen Henry could not produce the evidence when required. But I had no dealings with Mr. Stephen Henry - a person whom I imagine might well deal only through his advocate - and you will be able to contact his advocate in this connection ..."

THE BAILIFF: I was slightly ahead of you ... what is the point of this letter?

MR. VAUDIN: I am just coming to the point - in the paragraph before the last:-

"... My Warden, Mr. Adolphus Hamon, invariably reminds me - before I go away from the Island for a space - to ensure that the record books are locked in the Church Safe. In September I was away for three weeks, and these books were deposited by me therein. When I returned he told me that he had taken the books to the Greffier for some reason which I did not enquire into. The Greffier has not any direct access to the Church Safe, and there are only two keys: one of which is in my hands, and the other in the possession of Mr. Adolphus Hamon as Churchwarden."

THE BAILIFF: What is the point of that?

MR. VAUDIN: The documents which I was trying to find were apparently in the safe and Mr. Hamon knew I was looking for them.

ADVOCATE RANDELL (for the respondents Mesney and wife): The date of that letter, I believe you said, was 10th November, 1968?

THE BAILIFF: Yes.

ADVOCATE RANDELL: To what epoch does it refer?

MR. VAUDIN: It referred to the period I was looking for the documents - from 1963 - then again the documents in 1965 - at the end of 1965 - which suddenly reappeared. That is where I was impeded, because I could not descend on either the Court of Sark or this Court, without any documents. I did not know; I was a very worried man. Here I was in Guernsey - I could not prove where I was going. I

went to the Dame on my knees, begging her to help me. I told the Dame of my difficulties. I explained to the Dame my difficulties. She showed me the family tree and, of course, the family tree of Vaudin. I saw the first marriage. I saw one child from the name, one child of the first marriage, but my grandfather was not on. I was very worried. Therefore, I could not go and take any action, but in 1965 the Vicar informed me his ceiling had been flooded, and among the few pieces of the floor they found this small register in which my parents' birth certificates were. I was deceived by the curator who is a man who was a relation of the family. When I went to him and asked him to help me, to tell me what was my position in all this, he said "You should forget about all this - forget about the second marriage". He was putting me off the track.

In Tome 8, Article III, page 399, Pothier says:-

"Le Temps our la prescription d'une chose ne peut courir contre le propriétaire de cette chose tant qu'il se trouve dans l'impossibilité d'intenter son action pour la revendiquer, suivant cette maxime: Contra NON VALENTEM AGERE NULLA CURRIT PRESCRIPTIO."

That is my reason why I could not act, because I was not only deceived, but put off, by the curator who was the person who was dealing with all the property, the estates and all the affairs of Vaudin - secondly, I could not get documents. I went to the authorities, I wrote to the keeper of records, and this was until 1965. Suddenly they re-appeared, the small register walked into the Vicar's office. By then it was 1965, and from 1962 I had been trying my very best to get assistance, to get help to bring a case first to the Court of Sark, and secondly to this Royal Court asking for redress.

THE BAILIFF: I think you were in the Seneschal's Court in Sark. Did you give any evidence on this?

MR. VAUDIN: I did, Sir.

THE BAILIFF: It was evidence on oath?

MR. VAUDIN: Yes - I was in a blind alley, Sir. I mentioned it to the Seneschal.

THE BAILIFF: No evidence was given?

No. 2

Royal Court of Guernsey (Ordinary Division)

Official Report of Proceedings

14th January 1969 (continued)

MR. VAUDIN: No, I did not give any evidence - I have got the evidence here now. Excuse me, when I say "evidence", I have got documents.

THE BAILIFF: Perhaps that was my fault - I was using it in a technical sense - no evidence was given on oath, was it, before the Seneschal?

MR. VAUDIN: No Sir.

THE BAILIFF: So that, in effect, how did you conduct your case there? I have no record of the Sark proceedings?

MR. VAUDIN: Well, I explained to the Court of Sark all what took place - why I was impeded, and all the reasons why I could not take action when I came here to fight about it, and I could not prove my action.

THE BAILIFF: You were referring to Pothier?

MR. VAUDIN: Yes Sir. In Sark, of course, there was the question of representation - whether I was entitled to the property or not and this question came after.

Pothier, Tome 8, Fol. 404, Article 34, says this:-

"Par le droit romain, il suffisoit que le possesseur eut eu au commencement de sa possession la bonne foi qui est requise pour la prescription; la connaissance qui lui survenait depuis, que la chose ne lui appartenant pas, n'empechent pas que le temps de la prescription ne continuât de courir à son profit, et ne lui fit acquerir lors qui'il etait accompli.

Nous avons, dans notre droit francais, abandonne sur ce point le droit romain, et embrasse la disposition du droit Canonique, qui exige la bonne foi pendant tout le temps qui est requis pour la prescription.

Cette disposition du droit Canonique est très equitable. Par la connaissance, qui survient au possesseur, avant qu'il ait accompli le temps de la prescription, que la chose qu'il avait commencé de bonne foi à prescrire, ne lui appartient pas, il contracte l'obligation de la

rendre; laquelle obligation nait du précepte de la loi naturelle, qui defend de retenir le bien d'autrui. Cette obligation étant une fois contractée, dure toujours, jusqu'à ce qu'elle soit acquittée, et resiste à la prescription: elle passe aux héritiers de ce possesseur, et elle empêche pareillement que ses héritiers ne puissent prescrire".

Instead of giving back or even consulting me before the sale, Mr. Hamon hurriedly sold (two months after his father's death) the property.

Well, Sir, this is my case and I do not have anything further to add to what I said.

THE BAILIFF: When do you say, Mr. Vaudin, that prescription began to run in this case?

MR. VAUDIN: Prescription began to run the date I heard about it - the day I heard about it; - at least when I heard about it in 1963. Nobody brought it to my notice; I was not aware - I was then 12,000 miles away, not aware of anything at all.

THE BAILIFF: You are saying, are you not, that Mr. Adolphus Hamon is not the lawful heir?

MR. VAUDIN: That is what I am saying; this is my theory - that he was not lawful. We were co-heirs. Among the two of us one would be. I am from the direct male line and Mr. Hamon is from a line intercepted by a female.

THE BAILIFF: So that his claim would lie through a female line?

MR. VAUDIN: Through a female line. My claim is this:- that in direct succession from father son and daughter, in direct succession, it goes <u>infinitum</u> - but in collateral succession and principally in this type of succession where she had no brother, no sister, her uncles had passed away, the second uncle died, pre-deceased her - the issue of that uncle also pre-deceased her long before, 50 years before that. Now, Sir, therefore that issue of the second son was a girl and Mr. Hamon was issue from that girl. The coutume is very clear, in collateral line representation goes to issue of brothers and sisters to the seventh degree. So

No. 2

Royal Court of Guernsey (Ordinary Division)

Official Report of Proceedings

14th January 1969 (continued)

she had no brother or sister. We were collaterals. We had no representation because the law says representation goes to issue of brothers and sisters. We were not issued from brothers or sisters, we were related to her to the fifth degree, it is true, so, therefore, I submitted to the Court of Sark and I submit to this Court that we come to this succession on our own merits and the merit is to be found here. Mr. Hamon issued from a female not bearing the name of the family ... "La ou il n'y a pas de sang il n'y a pas d'héritage". Therefore, I myself came from the direct male line, and the merit must be certainly on my side - I have got the full blood of the family.

THE BAILIFF: You referred several times to the law of 1909, did you not?

MR. VAUDIN: Yes.

THE BAILIFF: Are you saying that that law does not apply in Sark?

MR. VAUDIN: Well, Sir, I only say the 1852 law was not registered, and the 1909 law also was not registered. It has been filed, yes. There is nothing registered on the records saying it was filed on <u>that</u> day and it would apply to Sark. Nothing at all.

THE BAILIFF: You have obviously looked at that law, have you not?

MR. VAUDIN: Yes Sir.

THE BAILIFF: Did you notice that it applies to the Bailiwick?

MR. VAUDIN: Oh, yes Sir, I agree with you. I am just making the point that the Seneschal himself, the Greffier and all the people of Sark - even those who have been born there, people that are so knowledgeable about all the custom of Sark; Mr. Stephen Henry, who was very expert on the customs of the constitution, advised people like Advocate Ridgway - he was collaborating with Mr. Ridgway and said "the law of Sark is 40 years"; that was in 1934 -- all the people of Sark were always under the impression that the law was 40 years. Even the Seneschal said so.

THE BAILIFF: I am concerned only with what is, in fact, the law - I can't deal with this case on the basis of impressions in the minds of anybody in Sark that it is so. Do you concede that the law of 1909 runs in Sark?

MR. VAUDIN: Yes, Sir. What I am trying to say is that the Seneschal in his Act of Court when he said "It was registered there", was not giving the true facts.

THE BAILIFF: Is there anything more you want to say?

MR. VAUDIN: We have got the succession, divisible and undivisible inheritances - where by law the heirs divide, share the properties. In Sark, it goes only to one person, and that person is always the eldest. If he renounces, then it goes to the others.

That is my case.

THE BAILIFF: Just let me get this quite right. You are claiming, are you not, that you and none other is the heir to this property?

MR. VAUDIN: That is what I submit.

THE BAILIFF: You are also saying that you did not know of your relationship?

MR. VAUDIN: I did not know, Sir.

THE BAILIFF: Until 19--?

MR. VAUDIN: Until 1962.

THE BAILIFF: Until 1962?

MR. VAUDIN: I came here in November 1962. I came here in 1962.

THE BAILIFF: You are saying you only knew of your interest in this property in 1962?

MR. VAUDIN: As a matter of fact in 1963, in February 1963.

THE BAILIFF: In February 1963, I see.

No. 2

Royal Court of Guernsey (Ordinary Division)

Official Report of Proceedings

14th January 1969 (continued)

ADVOCATE C.K. FROSSARD: I am appearing for Mr. Hamon in this case - my friend Mr. Randell is appearing for Mr. and Mrs. Mesney.

For convenience between ourselves and not least the convenience of the Court, in Sark, when we appeared, I took the arguments on representation, and my friend Mr. Randell took the arguments on prescription, and, therefore, to-day, as the appeal is on prescription alone, my friend Mr. Randell will be putting forward the arguments to you.

ADVOCATE D.W.M. RANDELL (for the respondents Alan James Mesney and wife): Sir, this is a matter which comes to you by way of appeal from the Sark Court.

Now the Sark Court in November dealt with Mr. Vaudin's petition at some length. The respondents were both represented in Court and, as Mr. Frossard has informed you, he dealt with the questions of title and whether Mr. Vaudin would be the person entitled to succeed, and I took the questions of prescription.

Now you will be well aware, Sir, and it has perhaps become clear from what even Mr. Vaudin says this morning, that we are concerned with two forms of prescription which might apply in this particular case.

When we were before the Sark Court, I dealt with the two aspects of prescription, that is, prescription extinctive and prescription acquisitive. Now, Sir, if we refer to the Act of Court of Sark which is the reason for today's appeal, we will see that the decision of the Court was in the following terms:-

> "Upon hearing the Plaintiff and the Advocates for the defendants the Court adjudged that, by virtue of Section 1 of the 'Loi relative à la Prescription Immobiliere, 1909' registered in the records of the said Island of Sark in the month of April, 1909, the action of the Plaintiff was prescribed by reason of the lapse of at least 20 years from the date on which the Plaintiff's cause of action arose, which the Court found to be the 19th day of September 1938..."

The Act continues.

Now, Sir, we are particularly concerned this morning, in view of that Act of Court, with prescription extinctive and not prescription acquisitive --

THE BAILIFF: Could I interrupt you for a moment? In the Act of Court the Seneschal says:-

> "The action of the Plaintiff was prescribed from the date on which the Plaintiff's cause of action arose by reason of the lapse of at least twenty years"

and he found his cause of action arose on the 19th September, 1938, the date of death of Mary Elizabeth Vaudin. That pre-supposes that he was accepted as the rightful heir?

ADVOCATE RANDELL: I would say not, Sir. The Court did not go as far as to decide on the question of title, representation or anything else. They merely - and I can give evidence to this effect - dealt with the question as to whether or not Mr. Vaudin was in time. They did not deal, for example, with the question of prescription acquisitive, nor did they, as far as I am aware, come to any conclusions as to who was rightful heir. What they did say is "the case arises because of the death of Mary Elizabeth Vaudin on the 19th September, 1938".

THE BAILIFF: What the Seneschal was saying was that his cause of action, whatever it was, arose on the date of death of Mary Vaudin, and no more?

ADVOCATE RANDELL: And no more.

I put it most strongly that the Court of the Seneschal of Sark did not decide whether or not Mr. Vaudin was rightful heir.

THE BAILIFF: This is one of my difficulties here. One has been driven really, to deal with this matter on the basis of a mathematical calculation - you fix a day and add 20 years or subtract 20 years and say: "That's that", without giving the appellant in this case an opportunity to establish his claim. I know prescription has got to be disposed of before the other defences,

No. 2

Royal Court of Guernsey (Ordinary Division)

Official Report of Proceedings

14th January 1969 (continued)

but I have no notice of any written defences put up in the Sark Court? Supposing that Mr. Vaudin is lawful heir, and the only lawful heir to this property, what then? On the principle accepted throughout case law "La mort saisit le vif", he became titular owner of this property on the 19th September 1938; how, then, could his right be prescribed? One does not want to see any manifest injustice done and again I find I am in difficulty as a Judge to deal with this, not in first instance on its merits, but purely and simply as an appeal against what the Seneschal decided?

ADVOCATE RANDELL: Well, Sir, the Seneschal did not decide that the property vested in Mr. Vaudin on the 19th September, 1938. With great respect, the question that I think you have to answer this morning is, was Mr. Vaudin's right to take any action in the matter prescribed at the time this matter was before the Court of Sark? You can decide that, obviously, in two ways:- one is, you can say "Yes, he was too late", in which case, depending on whether Mr. Vaudin is to appeal or not, there would be nothing further to do in the matter. If, however, you find in the opposite sense that, in fact, Mr. Vaudin was not too late, the parties will have to go back before the Sark Court for determination of the question of prescription acquisitive and the question of title - in fact in whom the property vested on the date of death of Miss Vaudin.

THE BAILIFF: You see, Mr. Vaudin has raised this question of good faith, has he not, which really is regarded, at least in the law of Normandy as distinct from the Roman Law as being paramount in a matter of possession, because you can't acquire with bad faith, however long you are in possession?

ADVOCATE RANDELL: I would agree with you, Sir.

THE BAILIFF: If Mr. Vaudin wanted to raise this question of bad faith in the Court of Sark, he could only do so as a matter of evidence, could he not? I understand no evidence at all was heard?

ADVOCATE RANDELL: No sir.

THE BAILIFF: I hope I am not being too severe ... it seems to me from what I have in this bare Act of Court of the Seneschal as if there was a mathematical calculation, and that added up to 20 or more years, and that was the end of the matter?

ADVOCATE RANDELL: Sir, there are two things I think perhaps I should mention to you - the first is that, in my submission, we are dealing today purely with prescription extinctive. While there are certain matters or certain events which can cause an interruption or suspension of prescription, bad faith in matters of prescription extinctive is not material; there are other cases, as I say, of interruptions, and I think, Sir, that it is fair to say that, in his opening address to the Seneschal, Mr. Vaudin said straight away at the outset that this was something proper and he was not alleging that there had been any bad faith by anybody. It was only when I had raised the question of prescription - particularly extinctive (to a lesser degree prescription acquisitive) that Mr. Vaudin made some mention of the difficulties he had in finding records and getting information, and so on. At the outset there was no allegation.

THE BAILIFF: If, for example, - and I am only posing the question in that way - if, for example, I upheld the decision of the Seneschal, is that an end of the whole matter?

ADVOCATE RANDELL: If you hold that, in fact, Mr. Vaudin was too late to bring these proceedings, my submission will be that that disposes of the proceedings, subject to any appeal which Mr. Vaudin might, of course, make - but if, in fact, you decide against prescription extinctive - in other words, that Mr. Vaudin is not too late - then, as I say, the matter must, I think, go back to the Sark Court for decision on the other points which were in issue at the time, again subject to appeal, of course.

THE BAILIFF: I am trying to avoid a situation where the appellant in these proceedings is put in a situation where he is completely finished, with no further access to any Court to establish his claim?

No. 2

Royal Court of Guernsey (Ordinary Division)

Official Report of Proceedings

14th January 1969 (continued)

ADVOCATE RANDELL: With great respect, Sir, while appreciating your sentiments in that matter, this is a matter of prescription extinctive, and this has to be decided by the Court. If the result of that is the end of the matter for Mr. Vaudin, that is something for which the law is to blame.

THE BAILIFF: How do you decide whether there is prescription extinctive here without evidence from Mr. Vaudin?

ADVOCATE RANDELL: Sir, if the Court feels that way, it would normally be entitled to admit evidence which was not available before - I do not think the Court would be entitled to admit evidence which was available in the other court, if such was not tendered by Mr. Vaudin.

THE BAILIFF: That is one of your difficulties, really - indeed it is also mine - it runs right through this case, does it not?

ADVOCATE RANDELL: Yes Sir - I think we can establish a certain number of factors - we can, for example, say that it is a matter of fact that Miss Vaudin died on the 19th day of September, 1938. Certain things flow from that:- one of them is, and only one of them, who was entitled to the property? Another one is, any action which anybody wishes to take, in my submission (and I will give you authority for it) must be done within 20 years of the 19th September 1938, and, in this case, positive action in Court was taken in 1968 and Mr. Vaudin seems to put some emphasis on this point - in fact no action was taken at all until after the 20 years had elapsed, because the sale did not take place until 1964; there was, until that time, good title, either by prescription or because the property was, to use Mr. Vaudin's phrase, attributed to Jean Vaudin Hamon, Mr. Adolphus Hamon's father; and other facts flow from the fact that she died in 1938. Anything that should have been done should have been done by the 19th of September, 1958.

THE BAILIFF: You are saying that prescription began on the 19th September, 1938?

ADVOCATE RANDELL: Yes Sir. There is authority. Mr. Vaudin mentioned this to you earlier. He mentioned the Limitation Act of 1939 in England, and there is authority in Halsbury, which says that where you are claiming land on the death of a person, the time starts to run from the date of death of that person; this is not necessarily part of our law - it is authority which I have been able to find, and I would suggest, Sir, that it is equally as strong as the persuasion which Mr. Vaudin tried to produce to you in relation to certain other factors relating to limitation.

THE BAILIFF: Supposing Mr. Vaudin had been found to be lawful heir, if that issue had been tried in Sark, and he had been found to be sole lawful heir ousting Mr. Hamon, would he then be debarred from taking any steps to establish it?

ADVOCATE RANDELL: Yes he would; it is our contention that we have acquired title by prescription acquisitive.

THE BAILIFF: Was the question of prescription acquisitive dealt with by the Seneschal?

ADVOCATE RANDELL: No Sir; he purely dealt with the question of prescription extinctive, and that, I suggest, is precisely what he has recorded in his Act of Court.

THE BAILIFF: Well, I don't know to what extent you want to develop your argument, Mr. Randell. I do not want to stop you and I will be grateful for any assistance you can give to the Court. You have heard of the points taken by Mr. Vaudin in making his appeal, and the authorities that he relies on. I suppose you want to deal with those?

ADVOCATE RANDELL: Well Sir, what I intended to do was to make perhaps a fairly brief resumé of the law in relation to prescription, and deal more specifically with the points Mr. Vaudin raised at the end of that.

THE BAILIFF: Yes indeed. Would this be a convenient moment to adjourn? I do not want to interrupt your main argument.

No. 2

Royal Court of Guernsey (Ordinary Division)

Official Report of Proceedings

14th January 1969 (continued)

ADVOCATE RANDELL: Yes Sir, I think probably it would be more satisfactory than to break off halfway through.

THE BAILIFF: Very well, I will adjourn until 2.30.

(Adjourned until 2.30 p.m.)

(2.30 p.m.)

ADVOCATE RANDELL: Mr. Bailiff, when we adjourned this morning, I was about to review the law which, I submit, exists in relation to prescription extinctive which applies to this type of matter, not only here in Guernsey, but also in Sark, because the relevant laws which relate to the relevant Orders in Council are Bailiwick laws, and the customary law which existed before that, in my submission, applies to Sark as it does to Guernsey.

THE BAILIFF: Mr. Randell, I take it you will deal with the points perhaps more fully than we were able to do in passing this morning, as to the date when prescription began? There is a distinction in saying that the cause of action arises on the date of death of a person - the alternative argument, I suppose, is that prescription could begin to run only when the person involved knows of his right of action?

ADVOCATE RANDELL: Indeed, Sir.

THE BAILIFF: Suppose the plaintiff in this case had been on the other side of the world and had not come, as he says, to Guernsey in 1962, and had never heard of the death of this lady and had not known of his relationship to her - is the argument that prescription should arise only when he is aware of his legal right? I do not want you to interject that now in your argument - when it is most convenient to you.

ADVOCATE RANDELL: I had intended to deal with that point, Sir - perhaps I could refer to it now. I may have to deal with it, possibly, in a little bit more detail later. The submission will be that prescription cannot start to run until there would be a cause of action. That is referred to, and I will deal with the matter in more detail, in Planiol and in Pothier, and, indeed in English statutory provisions.

Now I will also lead from there to the submission that the cause of action in this particular instance arises as at the date of death of Mary Elizabeth Vaudin, on the 19th September, 1938. I will try to show you that that is, in fact, the time when the cause of action arose, and that that could only be suspended or interrupted by certain things which are not present in this case.

THE BAILIFF: Which are they?

ADVOCATE RANDELL: They would be things like minority - if somebody was under 'curatelle' - I think, possibly, fraud: if there were fraud emanating from what I would like to term the defendant. But I would suggest that it is not interrupted or suspended by a fortuitous thing like lack of knowledge, or difficulty in finding a document, or something of that nature. Those factors would not, in my submission (and, indeed in the submission, I think, of my friend Mr. Frossard) have any effect of interrupting prescription. It may be unfortunate, but the law has been established over many centuries to avoid these legal conflicts arising many years after the event which gave rise to them has taken place. The old authorities refer to questions of people forgetting after many years - documents being lost - evidence being lost - and so on, and it is quite clearly established, in my submission, that prescription starts to run (albeit there may be cases of hardship) when once you can establish that the cause of action arose, and this can only be interrupted or suspended by those special cases, none of which are present here.

THE BAILIFF: I suppose that, in Sark, it could not run against a wife, could it?

ADVOCATE RANDELL: There is some authority in the older authorities about a wife - in fact, I think Laurent Carey mentions it. I have not dealt with this aspect because, of course, we are not at the moment dealing with a wife.

THE BAILIFF: She would be under the dominion of her husband?

ADVOCATE RANDELL: On page 207 of Laurent Carey:-
"Elle court contre la femme durant le mariage, laquelle, au refus du mari, se peut faire autoriser par justice à intenter ses actions" ..

No. 2

Royal Court of Guernsey (Ordinary Division)

Official Report of Proceedings

14th January 1969 (continued)

so that, even in the case of a married woman, it is not conclusive that prescription does not run against her.

If, Sir, I might, first of all, refer to the law of 1909, which is in Vol.IV, page 283, (the middle of the page) of the Orders in Council:-

> "Now, Therefore, His Royal Highness the Prince of Wales being authorized thereto by writing under His Majesty's Sign Manual, has taken the said Report into consideration and doth, by and with the advice of His Majesty's Privy Council, on behalf of His Majesty approve of and ratify the said 'Projet de Loi,', and, on His Majesty's Behalf, order, as it is hereby ordered, that, as from the Registration of this Order, the same shall have the force of Law within the Bailiwick of Guernsey --"

It continues:-

> -- "And His Royal Highness, being authorized as aforesaid, doth, by and with the like advice, on His Majesty's behalf, hereby further direct that this Order, and the said 'Projet de Loi' (a copy whereof is hereunto annexed) be entered upon the Register of the Island of Guernsey and observed accordingly."

Now, Sir, His Royal Highness on His Majesty's behalf in that particular instance merely orders that the Order in Council should be registered in the Island of Guernsey, but it is, of course, a Bailiwick.

This Order in Council, from information which is available to us and to Mr. Vaudin, was, in fact, sent to Sark. It is true that there appears to be no Act of the Sark Court authorising its registration, but it is lodged there among the records and the Orders in Council, numbers of which have been so dealt with in the Sark records.

I would submit in very strong terms, Sir, that the fact that the Order in Council is or is not registered, certainly in Sark or in Alderney, does not affect its validity, and I would submit that as in this case as indeed was directed, the Order in Council, when once registered in Guernsey, is effective throughout the Bailiwick, if it is said to have the force of law throughout the Bailiwick.

This is borne out in a great number of instances, and, in fact, in the majority of instances there is no direction that any particular Bailiwick Order in Council should be registered in Sark and in Alderney; the only one which I am aware of is, I think, the one dealing with the Alderney and Sark Shipping, which would only affect the two islands, and was specifically directed to be registered there.

The ordinary Bailiwick Order in Council is never specifically directed to be registered in the other Islands.

THE BAILIFF: Transmission from the Royal Court here of a Bailiwick measure is really a matter of information, rather than essentially to give it force of law?

ADVOCATE RANDELL: I would agree, Sir. That, in fact, is our submission. It is the current practice to order, as no doubt you are well aware, transmission to Alderney and Sark, as you say, for information, but this has been done for some time (I shall be dealing later on with the earlier Orders in Council). On the one of 1852 in fact the Act in our records was a direction that the Order in Council be transmitted to the Judge of the Court of Alderney and also to the Seneschal of the Island of Sark ... I might perhaps take that point now, rather than deal with the preamble to both laws separately ... the 1852 Order in Council says:-

> "" ... that the same shall have full force of Law within the Bailiwick of Her Majesty's Island of Guernsey, and be observed accordingly."

That is the one to which I referred - the Greffier has the book, if it is required, in which there was an "acte" directing it to be transmitted.

I submit that both these Orders in Council apply in full, certainly to Sark, and, indeed, to Alderney. The fact that somebody in Sark may or may not have been aware of it, frankly is, in our submission, quite immaterial.

Now, Sir, dealing with the 1909 Law, at paragraph 1 - and I think Mr. Vaudin has already quoted this to you, in fact on more than one occasion and, at

No. 2

Royal Court of Guernsey (Ordinary Division)

Official Report of Proceedings

14th January 1969 (continued)

the risk of wasting the Court's time, I would like to refresh your memory - and this provides:-

> "As from the 1st April 1909 all immobiliary actions and real actions or dependant on realty which were then prescribed by 30 years should in the future be dealt with by a lapse of 20 years.".

It goes on to deal with the question of the holding for 20 years of good title by a person - I would not at this stage deal with that aspect of the matter because, as I said this morning, my submission is (I think there can be no doubt about this) that we are here particularly dealing with prescription extinctive.

So it is clear that, as from April of 1909, those matters which had formerly been prescribed by 30 years, were henceforth prescribed by 20 years. This takes us back to the previous Order in Council - the one of 1852 to which I have already referred - which says again almost in similar words -

THE BAILIFF: Which Volume is that?

ADVOCATE RANDELL: Volume I, at pages 208 and 209 of the Orders in Council, "Loi relative a la Prescription Immobiliere of 1852" where again, by Article 1, we get almost the same wording with the variation of the periods, and that says that:-

> "... matters of this type, namely, actions relating to realty which were then prescribed by 40 years should in the future be prescribed by the lapse of 30 years.".

So that these two Orders in Council bring those things which were originally 40 years down to 20 years.

Now Sir, to show you that these matters were originally prescribed by 40 years, I would like to refer you, first of all, to Laurent Carey, and that is at page 207, dealing with "Prescriptions" - in the third paragraph:-

> "Le dit temps légitime pour fonder la prescription est le terme paisible ou possession par quarante jours" -- this, I suggest, should be "quarante ans", not "jours" --

"--- ce qui vaut de titre compétent en toute justice, soi haute ou basse, en toutes matières héréditales et actions réelles ou dépendantes de réalité"

Almost the same words. Then he speaks of "prescription acquisitive" which we are not directly concerned with here --

"Prescription ou la tenue paisible par quarante ans suffit à chacun pour titre compétent en toute justice de quelconque chose que ce soit".

And - if I might refer to that, because I will have to refer to it again in dealing with Mr. Vaudin's submissions, there is again, towards the bottom, in the last paragraph but one dealing with prescriptions:-

"Elle ne court contre qui est empêche d'agir ou qui est ignorant de son droit au moyen de fiction ou de déception dont on aurait use envers lui."

Now my interpretation of that is that prescription does not run against anybody who is unable to act - that would be because they were of unsound mind, or a minor, and so on, or who is ignorant of his right.

THE BAILIFF: "Not aware" of his right?

ADVOCATE RANDELL: Yes, Sir, I beg your pardon, Sir, - who is not aware of his right because of some fiction or deception which has been used against him. I suggest that fiction or deception can only emanate from the opposite party - from the defendant.

Then, on page 209, Sir, the centre of the last paragraph of the page -

THE BAILIFF: Going back to that particular paragraph, Mr. Randell, you have noticed that importance was attached by the appellant to the fact that he had been "put off" - I think that is the best way one can describe it; there was really a suggestion that his enquiries as regards his relationship, for example, to Mary Vaudin, rather led him to believe (at least at that initial stage) that he was not related or was not interested as an heir?

No. 2

Royal Court of Guernsey (Ordinary Division)

Official Report of Proceedings

14th January 1969 (continued)

ADVOCATE RANDELL: From what I know of the matter, and from what he said in Court, I don't think that he was "put off", to use that expression, by Jean Vaudin Hamon, who was in possession, and, indeed, we claim, the rightful owner of the property, nor indeed, by his son Adolphus Hamon, the respondent this morning. He made certain vague allegations, rather cloak and dagger stuff, "that someone would not answer my question". You quite rightly mentioned that the "curatelle" came to an end on the death of this lady and perhaps there was something wrong with the personal estate. He had some curious letters from the Vicar of Sark, and so on. There was nothing which I understood to be (either here or at the previous hearing) directly related to Jean Vaudin Hamon, who was in possession.

Mr. Vaudin has told you he retired and came back to Guernsey in 1962 and he visited Sark in 1963. I am not trying to adduce evidence here, but I believe that, in fact, he visited the Hamon family in Sark in 1964 (in fact he said so himself), quite on a friendly basis, and I do not think there is any shred of truth in the suggestion that any "putting off", to use your expression, came from the Hamons, and I would submit in the strongest terms that, if he is going to plead fraud, deception or fiction, or anything of that nature against me, then that must be related directly to his original defendant and not someone else. He might meet a policeman in the street - the policeman might say"I would not bother about it, old man". That cannot be attributed in any way to the Hamons.

THE BAILIFF: Again, I am speaking without any record of the proceedings - I was wondering whether that was something the Seneschal ought to have looked at?

ADVOCATE RANDELL: No Sir, because, according to my recollection of this (and obviously I stand to be corrected - I think it is my friend's recollection as well) right from the outset, Mr. Vaudin said he was not alleging any bad faith. It was only after I had raised the question of prescription that, again in the Court of Sark, he made vague suggestions that he had had difficulty in finding records. I think he said that he had been to the Dame - she was not able to give him

the information he wanted - it took him a long time to collect various information, and so on - but he has never directly said "The Hamons have deceived me in this". He has never suggested it.

THE BAILIFF: It is not alleged in the pleadings, anyway?

ADVOCATE RANDELL: No, and, of course, such a claim, particularly fraud, would have to be not only specially pleaded - it would have to be proved strictly, and not by some vague suggestions, as we have had this morning.

Now, Sir, that, I suggest, is some indication that in these matters of realty the period was 40 years - that is Laurent Carey. Then we have Le Marchant dealing with the Approbation des Lois and Coustumier de Normandie, and he deals, of course with the Commentary of Terrien. If you look at Volume One of Le Marchant, at page 391, the bottom of the page, Sir, he says:-

> "Nous n'usons du vingt-neufiesme chapitre des Prescriptions, exceptée la prescription d'an et jour, quant à recevoir les procez de Clameur de Haro et autres y contenue du dit an et jour, excepté aussy la prescription de trente ans en meuble et déception, et la prescription de quarante ans, desquelles trois prescriptions nous usons entierement."

He says there quite clearly that the Chapter of Terrien (which I will refer to in a moment) is used entirely here. And, on the next page, Sir, at page 393, he says:-

> "Par l'Article dernier et la note, possession quadragenaire vaut titre, sauf toutes fois es cas cy dessus exceptés, aussy le terme de trente ans prescript tous titre et actions mobiliaires et personnelles, mais il n'y faut oublier cette regle ..."

and he goes on.

So I would submit that Le Marchant says (and he was writing, of course, in 1826 which was some considerable time after Terrien but some 30 years prior to the 1852 Order in Council) quite cleary: "We use that Chapter of Terrien". Terrien deals with it - he deals with both the acquisitive and extinctive

No. 2

Royal Court of Guernsey (Ordinary Division)

Official Report of Proceedings

14th January 1969 (continued)

prescriptions virtually in the same chapter, or in the same article. This is in Book VIII, Chapter XXIX of Terrien at page 337. I have prepared a very rough translation - this is the paragraph at the bottom of page 337, in my edition and he is quoting from the "Loys Hutin en la charte aux Normans". Somebody has, at some stage in the history of this Volume, inked in the year "1313". I can't quote that as authority - it would appear that somebody has done research into this matter of what Terrien was referring to.

THE BAILIFF? 1313?

ADVOCATE RANDELL: Yes, Sir, the "Loys Hutin en la charte aux Normans".

THE BAILIFF: Terrien was 1515?

ADVOCATE RANDELL: Terrien was 1654, Sir - M.DC. LIIII, and this, as I say, is a very literal translation. He says:-

> "Prescription or the holding for 40 years is sufficient henceforth to everyone in Normandy for a valid title in all Courts high or low or for any other thing that this may be ..."

THE BAILIFF: "For anything whatsoever"?

ADVOCATE RANDELL: "For anything whatsoever" - that is dealing more with acquisitive prescription, but he goes on:-

> "And is to anyone in the Duchy of Normandy whatever his station may be any of the above-mentioned things which he has possessed peacefully for 40 years and if he has not been challenged in any Court he shall not be challenged".

This deals mainly with acquisitive prescription, but it is interesting if he has been in possession, he may not be challenged after 40 years, and it is indicated there that it is not necessary for the defendant to prove his own title.

Then, Sir, over the page, at the top of the page:-

> "And he who would wish to do the contrary shall not be heard or received in any way notwithstanding law or custom or ordinance

to the contrary and this we wish to be observed notwithstanding contrary usage".

That, I suggest, bears much more directly on the question of prescription extinctive, because it says that anybody who wants to do the contrary shall not be heard, so that there they are saying "Your right to be heard shall be barred by the lapse of 40 years, so I do submit in fact that this is quite clearly the type of case which under the old coutumier was dealt with by a 40 years' lapse. This was reduced by the Bailiwick Order in Council of 1852 to 30 years, and by that of 1909 to 20 years. This, I think, must be clear.

Now, Sir, we have heard some reference this morning from Mr. Vaudin to the question of whether there is a partage or whether there is not, and so on, but I think that possibly the only exception to this with which we are concerned (ignoring for the moment the question of prescription not running against the Crown, and so on) is that possibly there might not be prescription between co-heirs - "co-héritiers". There is a maxim so far as I am aware "nul prescription entre co-héritiers". We are not dealing with "co-héritiers". Mr. Vaudin, I think, agreed this morning that there can only be one owner in Sark - this is clear from the Charter to which he himself referred - and he said there can only be one owner.

THE BAILIFF: What would you do with a twin?

ADVOCATE RANDELL: With a twin, one is indeed older than the other - that which was born first from the mother's womb. I am not a medical man and I have no knowledge of any precedent where two children emerged from the mother's womb at the same time; therefore, one must be older than the other, and the elder, of course, would be the heir. The maxim does not apply here because there are no "co-heritiers" in this particular matter. There is only one, and, therefore, prescription applies.

THE BAILIFF: Is it not important to discover which is the true heir?

ADVOCATE RANDELL: Well Sir, with great respect, it has been the practice in this Court for many centuries, so I am aware, to deal with the question of prescription first. It might well be, from various

No. 2

Royal Court of Guernsey (Ordinary Division)

Official Report of Proceedings

14th January 1969 (continued)

other points of view - it might be from Mr. Vaudin's point of view - desirable to deal with the position as to who is the true heir, or who is entitled to the property. It might be in his interest; it might not be in Mr. Hamon's interest - it might not be in my clients' interest, Mr. and Mrs. Mesney. But the law says "We will deal with prescription first".

If, in fact this Court, as it is its duty this afternoon, deals with the question of prescription, certain things can flow from that. Either this is the end of the matter, because, having decided in favour of my clients and Mr. Frossard's client and against Mr. Vaudin, he may have the right of appeal; he may wish to appeal, and that may be upset - but that may be the end of the matter, if he decides to do nothing more. Vis-à-vis my clients, if, in fact, you were to decide in favour of Mr. Vaudin today,it would certainly not be the end of the matter. In my submission, one would be forced to go back to Sark to deal with the other aspects of the thing, which I can perhaps shorten into this:- prescription acquisitive, which was not pronounced on by the Seneschal of Sark; the question of representation --

THE BAILIFF: He does not say in his order that he has not dealt with it at all?

ADVOCATE RANDELL: He does not, but he does not say either that he has not dealt with the question of representation, or whether there is somebody else entitled to the property.

THE BAILIFF: No.

ADVOCATE RANDELL: He merely says - perhaps I can parphrase it - "We are rejecting this because Mr. Vaudin is too late". That is the sum and substance of this Act of Court.

THE BAILIFF: Where is it laid down that prescription must be disposed of before all else?

ADVOCATE RANDELL: I am not certain, Sir. I think Terrien has some reference to this.

THE BAILIFF: I think that has been the practice, certainly.

ADVOCATE RANDELL: It certainly has been the practice. I am trying to think what the expression is - there is, indeed, a French expression .. if you will bear with me for a moment .. there is some reference to it in Terrien, which I will try and find for you.

THE BAILIFF: You can pursue your argument, if you wish, and come back to this later?

ADVOCATE RANDELL: Sir, that is the position. I submit, and I think Mr. Frossard agrees with me, that, in fact, prescription begins to run from the date on which the cause of action arises.

Now here I submit that the cause of action arose on the date of death of Mary Elizabeth Vaudin. As I mentioned this morning, there is some reference to it in the English Statute Law. Halsbury, the 3rd Edition, Sir, Volume 24, at page 236, at the bottom of the narrative part of the page, paragraph 441:-

> "When former owner dead. When a person brings an action to recover any land of a deceased person, whether under a will or on intestacy, and the deceased person was on the date of his death in possession of the land, or --"

the next words, are not, I think, material --

> ".. the right of action is deemed to have accrued on the date of his death".

We find this is the modern trend of the English law, but we have also in Planiol (I believe you have the only available copy of Planiol; if I might borrow it for a moment, Sir. Copy handed to counsel)
Planiol, Droit Civil, Volume II, at page 215, dealing with the "Point de depart de la prescription extinctive." --

> "La prescription extinctive commence à courir aussitot que l'action est ourverte, ou, comme le disait Pothier, 'du jour que le creancier a pu intenter sa demande."

He goes on to say:- "It could not, of course, open earlier".

No. 2

Royal Court of Guernsey (Ordinary Division)

Official Report of Proceedings

14th January 1969 (continued)

Now, Sir, this is, I suggest precisely the same thing, because Mr. Vaudin could not have had any cause of action before the date of death of Miss Vaudin in 1939, but if he had wanted to do something about it, he could have done it at any time since that date; leaving aside questions of suspension or interruption of prescription, that is the date on which he could have first taken some action to gain possession, ownership, control, what have you, of this property:- that is the day on which "il a pu intenter son action".

THE BAILIFF: Is that particular paragraph of Planiol dealing with the "action réelle"?

ADVOCATE RANDELL: No Sir - it is dealing with the principle of prescription extinctive. I think there is no distinction between the date of accrual of right of action, whether it be in "meubles" or "immeubles".

THE BAILIFF: It says here:- "La prescription extinctive commence à courir aussitôt que l'action est ouverte, ou, comme le disait Pothier, 'du jour que le créancier a pu intenter sa demande'" - this is an "action mobilière" unless he is using the word "creancier" in a very special sense?

ADVOCATE RANDELL: If I may point out, with respect - I think that most of the older authorities used to refer to the term "créancier" as we would refer to the term "plaintiff". It occurs quite frequently throughout the leading authorities, where they are spoken of as "le créancier ..." If that be so, I submit that there is no distinction between the date of accrual in a real action or personal action - I have yet to be shown that there is some difference - the principle is exactly the same. When does the cause of action arise? There is no reason why it should differ in either case - it is when there is the chance to bring an action. There are varying aspects of it:- it might happen that the date of the accrual of a cause of action could be postponed for some reason in a personal action; for example, if I lend you money which you are due to repay to me in two years' time, obviously the time does not start to run from the date I lend you the money; it dates from the time when you are due to pay it back - that

is the date of accrual of action, but no right of action arose before that date, because I could not sue you for it back, because it was agreed you would not pay me for two years.

I think there is no distinction between the date of accrual in a personal action or real action, and, going back on this particular point, I have a particular note here, when Mr. Vaudin was addressing the Court - and I think you interposed a question - I have a note that he agreed that his legal right accrued from the date of death of Miss Vaudin. I made a note as he answered your question.

THE BAILIFF: I was asking him whether he claimed to be sole heir, and, if so, did not his right of action begin with (was it his expression?) "la mort saisit le vif"?

ADVOCATE RANDELL: Indeed, that is precisely our point. In the Court below, Mr. Vaudin appears to have attached some importance to the fact that he was unable to find in any records at all, particularly in the Sark records, any document which had been registered at the Greffe saying that the property belonged to Jean Vaudin Hamon, and I myself used that expression in answering his pleadings, "La mort saisit le vif" - it is on the death of Miss Vaudin that something happens; what happens next is the automatic vesting of the property. If Mr. Vaudin feels that he should have this property, he should take some action from the day on which he pretends or supposes or claims that the property vested in him, or was wrongly vested in somebody else. That is this 20 year period.

He was able to select his form of action, which was by way of petition before the Sark Court, asking for the sale by Mr. Hamon to my clients to be set aside and asking that the property should be attributed to him and that they had possession of a property which, in fact, belonged to him, and to make such order as seemed just. He might have had a variety of actions:- he might have had an action directed against the Mesneys in possession, saying: "I am the owner" - and seeking to have them evicted from the premises. He did not have that action against the Mesneys; at the time when they went into possession as owners the 20 years had already run, but he could have had that action against Jean Vaudin Hamon, who succeeded to the property - and, we submit, correctly succeeded to

No. 2

Royal Court of Guernsey (Ordinary Division)

Official Report of Proceedings

14th January 1969 (continued)

the property, in 1938. That was his course of action. He proposes to do it this way - he has started an action in the Sark Court in the last year; it is still an action for his property - therefore, it is an action of the type which would be prescribed by the 20 year rule. I suggest that that is quite clear.

I have not referred you in my authorities to Pothier, Sir - in point of fact it was merely the reference in Planiol which, in fact, produced the quotation from Pothier -

THE BAILIFF: It was that particular passage which appeared to rather emphasise prescription extinctive in relation to the "action mobilière", but I think it is well covered in the other authorities?

ADVOCATE RANDELL: Yes, Sir. I think, in view of that, there are no further authorities to refer to ...

That, I think, deals with the legal position and the fact that prescription applies to this matter.

To deal perhaps with some of the points that Mr. Vaudin has raised. I think I have already mentioned the fact that here, the property must, on the death of the owner, vest in another sole person, so that there cannot be any co-heirs and that, therefore, prescription would run from the date of death of that person; if there had been a number of persons who could have jointly inherited, then the position might be different and there might not have been prescription; but here the maxim "nul prescription entre co-héritiers" does not apply.

Mr. Vaudin said this morning that, in fact there were three co-heirs according to degree. This cannot be so. By Charter there can only be one heir.

I think he suggested that Mr. and Mrs. Mesney were not entitled to plead prescription. I am not quite sure that I understood his reason for it - suffice it to say that the Mesneys are not and did not seek, in the Court of Sark, to say that they have held the property for 20 years and, therefore, they were entitled to it, but they are entitled to say:- "Our title is based on somebody

who has had possession - and correctly - for 20 years". As they are respondents to the original petition and respondents to this appeal they are entitled to put forward any defence which would defeat the appellant's case. In this case, they are entitled to plead prescription, even though they have not held the property for 20 years and they are entitled to say:- "If Mr. Vaudin wanted to do something about it, he should have done it within 20 years". I suggest there cannot be any argument about that. Mr. Vaudin mentioned the fact that they have only owned it since 1964 - that, in my submission, is not material at all.

I think I referred earlier to the fact that the family council(counseil de famille), "curatelle" or executor of the Will of Personalty, have, in fact, nothing to do with this at all. As you so rightly observed this morning, Sir, the "curatelle" comes to an end at the date of death of a person, and anything which the curator might have done before that time is not material to these proceedings; indeed, anything which he did after that has no weight at all - he has no power to act. Similarly, the executor dealing with the personal estate; that is completely separate. It may be (and I have no knowledge of this) that the Will was carried out in accordance with the testatrix' wishes - it may be it was not. That is not very material to these proceedings.

THE BAILIFF: Suppose that the Seneschal found that the appellant in these proceedings was lawful heir to the exclusion of Mr. Adolphus Hamon?

ADVOCATE RANDELL: Yes Sir?

THE BAILIFF: What then?

ADVOCATE RANDELL: Well Sir, among other things it would have been submitted by Mr. Hamon and by the Mesneys that, in fact, Mr. Hamon had acquired title by prescription, which it is quite clear from the authorities it is possible to do. Even speaking of the authorities as I quoted them this afternoon: for example, I quoted from Terrien - he deals basically with prescription acquisitive, - but all the old authorities speak of prescription acquisitive and extinctive, and, indeed, it is the same in English law today - you may, in fact, lose a right of way if you fail to use it in England. Both

No. 2

Royal Court of Guernsey (Ordinary Division)

Official Report of Proceedings

14th January 1969 (continued)

countries run side by side, in England and in France, and I submit that, in Guernsey law (and I do not wish to prejudge the issue) it is quite clear from the old authorities. I must admit we are not dealing with prescription acquisitive this afternoon, but by the old authorities it is possible to acquire title to realty by prescription - whether you can acquire some right to do something in someone else's realty is certainly less clear; but all the old authorities, and, indeed the Order in Council itself of 1909 and that of 1852, speak about acquiring good title after 20 and 30 years, and, if that were not intended to be so, those words are completely redundant in the Order in Council relating to prescription. They must have some meaning.

Supposing that the Seneschal - and we submit he was right to deal with prescription, because it has from time immemorial been dealt with first - had gone on and said: "I think the title to this property was wrong; in fact, on the death of Mary Elizabeth Vaudin, it should have gone to Mr. Vaudin, the appellant". I do not think that would have been the end of the matter; I think we would still have been entitled to an answer on prescription acquisitive. I don't think it would have assisted anybody very much - we would still have had to come before this Court on even one, or on two questions of prescription.

With great respect, Sir, I am not suggesting that you are trying to do this, but I do not think it is possible to shut ones eyes to the question of prescription and say: "I wonder what the position would have been if prescription had not been pleaded?" It is part of our law, and it has got to be seized like the nettle in the thicket; it may have unfortunate results for some people.

THE BAILIFF: A person could acquire good title to property without necessarily claiming that he is the heir? A complete stranger could by squatting for 20 years acquire good title?

ADVOCATE RANDELL: I think that is quite possibly so and very likely under Guernsey law - certainly under English law one has heard of "Squatter's rights", "Squatter's title", not only in the press, but in legal authorities. I think a complete outsider could. What I say, believing

it to be fully true, but with some reluctance, according to my information, when Mary Elizabeth Vaudin died in 1938. this matter was not dealt with by Jean Vaudin Hamon going in and saying "This is my property: I have inherited this." As I understand it, the matter was referred to practitioners in Guernsey, advocates, in fact. I think the late Advocate Ridgway and the late Advocate H.H. Randell were involved in this, and it was as a result of their advice and opinions and so on, that, in fact, Jean Vaudin Hamon came eventually to be regarded as owner. Having investigated the matter and applied the law to it, they came to the conclusion that he was the person in whom it vested on Miss Vaudin's death. This is not something that was done "cloak and dagger", or, as I was rather led to believe by what Mr. Vaudin said, somebody going quietly in a corner and saying: "Let us forget about those people abroad - you have it Jean - it is a good thing." This matter was dealt with in a proper professional manner.

THE BAILIFF: It would not be the first time that an heir has, quite unknown to anybody, been seeking to build up a family tree on the death of a person?

ADVOCATE RANDELL: That is possible. I would say, even if that be so, prescription does run, because he has got to come into it within the 20 years.

In this particular instance, Miss Vaudin died in 1938; I understand then that Mr. Vaudin tells us he was abroad; he did not come back to Guernsey until 1950, or something like that, when he went to Sark. He retired, I think, in 1962 and came to Guernsey in 1963; supposing he had not come back until 1988, 50 years after the death of Miss Vaudin. This is the reason for the law as to prescription; it would not be right if he came back after 50 years, when the property might have changed hands half a dozen times or more, and said "This is my property"; supposing he had remained abroad, and his grandson had come here after the turn of the century, it obviously would not be right for the grandson to come in 2013 and say "There was a mistake made back in 1938. I am the rightful owner". It is against public order that an interest should be disturbed after this time. People forget, people have died, records are lost, papers are lost. It is quite clear

No. 2

Royal Court of Guernsey (Ordinary Division)

Official Report of Proceedings

14th January 1969 (continued)

in my mind that the position would be completely untenable, and the law, in its wisdom, decided that the period should not be 50, years, 100 years - it decided it should be 20 years, and unless Mr. Vaudin can show positively that he was incapable of acting; under guardianship; or that he was a minor; or that he has been deceived by a fraud emanating from Jean Vaudin Hamon or his heir, then he is barred from doing anything more about the matter, and the only thing this Court can do is to decide in favour of the respondents, and say that Mr. Vaudin is too late in bringing these proceedings, and, therefore, his plea must fail.

THE BAILIFF: Are you pursuing the point that prescription has to be dealt with first?

ADVOCATE C.K. FROSSARD: Sir I have been doing a little research while my friend, Mr. Randell, was speaking, and I have only found one or two things. It is always said "You must always plead prescription first".

THE BAILIFF: Pleaded specifically?

ADVOCATE FROSSARD: It is always put at the head of the "exception". It is an "exception de fonds". The only reference I can find in Terrien is at page 334.

THE BAILIFF: Page 334?

ADVOCATE FROSSARD: "De prescriptions & exceptions", Chapter XXIX. And Laurent Carey at page 211. Perhaps I can assist you - Terrien first, Sir.

THE BAILIFF: Page 334?

ADVOCATE FROSSARD: 334. It reads - have you got it in front of you, Sir?

> "Il y a deux manieres d'exceptions ou defences. Les unes sont dilatoires, les autres peremptoires. Les Dilatoires sont fins de non recevoir, ou de non proceder; lesquelles sont temporelles, & se doivent proposer devant la contestation; & d'icelles, les unes sont declinatoires de jugement: comme incompetence de Juge, ou litispendence; les autres sont dilatoires

du payement, comme quand en demande devant le terms. Les Exceptions peremptoires sont perpetuelles, pource que tousjours ont lieu, et resistent au demandeur, & periment sa demande comme allegation de payement, & autres. Lesquelles se doivent proposer après la cause contestée, si elles ne sont telles qu'elles empechant l'entree du procez".

I was wondering whether "après la cause contestée" means when all the pleadings are taken:- if that should be "l'entrée du prosez" which would be what we are doing today?

THE BAILIFF: Suppose you had several grounds, including prescription? This does not say prescription must necessarily come at the head of that list - it might be a matter of convenience to get it out of the way and to deal with it rather than go on to the contestation proper, hear evidence and pleadings, and, at the end of it, decide that the action is prescribed?

ADVOCATE FROSSARD: Yes, that is precisely what one is suggesting here, that prescription should be taken first. I think clearly it should be taken before one goes through questions of representation and the other points that arise.

THE BAILIFF: Or before a "pretension"?

ADVOCATE FROSSARD: Before a pretension.

THE BAILIFF: But I would like to be quite satisfied in my mind that the Seneschal was right in just selecting one defence and deal with that, and dispose of the whole case on that basis?

ADVOCATE FROSSARD: Yes Sir, I see your point. I think prescription has got to be taken first. It is also in Gallienne, Clause II, Sir. Have you Gallienne?

THE BAILIFF: At what page?

ADVOCATE FROSSARD: Page 4, Sir, the second paragraph:-

"Les exceptions sont péremptoires, déclinatoires et dilatoires.

No. 2

Royal Court of Guernsey (Ordinary Division)

Official Report of Proceedings 14th January 1969 (continued)

14th January 1969 (continued)

Les exceptions péremptoires, ou fins de non recevoir, qui concernent la forme de l'ajournement, doivent être proposée <u>in limine litis</u> ...

THE BAILIFF: Yes.

ADVOCATE FROSSARD: " .. et se proposent avant ou après la contestation en cause ... Ces exceptions sont un moyen d'anéantir la demande, sans examiner si elle est bien ou mal fondée; telle est la compensation, le paiement, la prescription. Après avoir entre dans les mérites de l'action, le défendeur n'est plus à temps d'attaquer les vices de forme; par le fair de plaider au fonds, toutes les nullites étant couvertes."

THE BAILIFF: It is clear from that that you must take a plea of prescription extinctive before all else?

ADVOCATE FROSSARD: They have got to be proposed first.

THE BAILIFF: Yes.

ADVOCATE FROSSARD: One has always understood that they go on top of the pleadings, and I think they must be dealt with by the Court first, because, if accepted, they do put an end to the proceedings.

THE BAILIFF: That would be true of prescription acquisitive also?

ADVOCATE FROSSARD: Indeed, it would.

THE BAILIFF: Is it right that a plaintiff in the Seneschal's Court should be denied an answer, or the defendant, for that matter? He who sets it up?

ADVOCATE FROSSARD: Well, Sir, on the question of whether it is right for either plaintiff or defendant, it is unnecessary to decide that, if the action itself is "mal-formée" because it is out of time. The same thing could happen in a personal action, could it not? Take a running-down case:- one could plead prescription first of all if the summons was issued, say, three weeks over the year and a day; that would clearly be taken first; that would be prescription

extinctive - there might be questions of law involved in the case as well; the court would not deal with them - it would deal only with prescription extinctive to see whether a cause of action had arisen.

THE BAILIFF: Yes.

ADVOCATE FROSSARD: And it would deal in the same way with a "Peremption d'instance". It is laid down by ordinance that "actes" last a certain time - duree des actes vers saisie: 5 years; and vers arret, I think, is two years now. Supposing a party had a vers arret and left it for two years and did not proceed to execute it and then sought to hand it to the Sheriff; if the Sheriff did execute it by mistake the defendant could, first of all, take "Peremption d'instance"; that disposes of the action entirely, and I would submit that it is right and proper, because there is a maxim:- "The Court always seeks to bring legal procedure to an end"; there must be finality, and I would submit that it must be taken first.

THE BAILIFF: (to Mr. Vaudin) Do you wish to say anything further?

MR. VAUDIN: On the maxim "la mort saisit le vif", I might say I became owner since my cousin died - I did not know of my claim because then I was not aware about my constitutional right, and, therefore, when the Court of Sark ruled on prescription against me, that was far from the end of the matter, and I was estopped from bringing any evidence to show indeed I was the owner of it. How can you establish a claim of prescription against me, since I claim I was owner from 1930? Therefore, there can't be prescription. They were only in possession since 1964.

THE BAILIFF: That would be as far as the Mesneys are concerned. So far as the vendor is concerned, Mr. Adolphus Hamon, his case is, is it not, that he was in possession since 1938?

MR. VAUDIN: After the death of Mary Elizabeth Vaudin, I became owner. I was not aware of it - I was 12,000 miles away. I was owner of that already.

THE BAILIFF: That turns precisely on who is more nearly related to this lady?

No. 2

Royal Court of Guernsey (Ordinary Division)

Official Report of Proceedings

14th January 1969 (continued)

MR. VAUDIN: That is what I am coming to, Sir. That is why, when I went to the Court of Sark, I asked the Court of Sark whether I am nearer to her by birth, because I come from the direct male line. I know I was nearer. That is what I was asking the Seneschal, and I was ruled out.

THE BAILIFF: Ruled out in what sense?

MR. VAUDIN: I was told prescription had taken place because I did not bring an action before 20 years, which I would have done if I had been aware. I did not know - I was not aware of it. I became aware in February, 1963, and as soon as I started to get my documents to prove what I was claiming, I was barred everywhere; I could not get them from the keeper of records.

THE BAILIFF: Is there anything more you wish to say?

MR. VAUDIN: No sir.

THE BAILIFF: This is a matter which I would like to consider at leisure, and I would like also to give a written judgment, rather than merely announce now what the decision of this Court is, and I can give that next Tuesday morning, after the sitting of the Ordinary Court.

(Adjourned until next Tuesday).

Judgment

TUESDAY, JANUARY 21st., 1969.

21st January 1969

APPEAL

ADOLPHUS HENRY VAUDIN — Appellant

- v -

ADOLPHUS HAMON,
ALAN JAMES MESNEY and
DOROTHY LUCIEN (nee Price)
(his wife) — Respondents

JUDGMENT

THE BAILIFF: This appeal arises out of an action brought in the Court of the Seneschal of Sark on the 23rd day of August 1968 whereby the appellant by way of Petition prayed that he being the son of

Joseph Vaudin and grandson of the Reverend Adolphus Vaudin, deceased, himself the legitimate son of Thomas Vaudin, deceased, of Port a la Jument, Sark, and thus heir at law of Marie Elizabeth Vaudin his first cousin; claimed (I quote)

"1. Que suivant la succession de Mademoiselle Marie Elizabeth Vaudin, Ma Cousine issue de Germain qui décéda en 1938 à l'Ile de Serq, la succession de la Maison Ancestrale appelee Le Port à la Jument fut par manque de renseignements à mon sujet attribuée à feu Monsieur John Hamon fils de Bernel Hamon", and further prayed as follows:-

"2. Votre remontrant prie très humblement Votre Cour :-

(a) de m'entendre aufins de déclarer que le titre de la proprieté du Port à la Jument a été mal attribuée.

(b) de declarer et ordonner que la vente de la propriété par Monsieur Adolphus Hamon est Nulle et de Nul effet;

(c) d'ordonner que le dit Adolphus Henry Vaudin à droit à la possession de la propriété qui de fait lui appartient;

(d) de faire tel autre ordre ou de prendre telles autres mesures que Votre Cour dans sa Sagesse trouvera juste et équitable.

Et Votre remontrant sera toujours tenue de prier.

Ce 23 Août Mil Neuf Cent Soixante Huit."

The case was heard by way of argument only, no evidence oral or documentary being tendered or sought, before the Seneschal, on the 23rd November 1968.

The judgment of the Court was recorded in English as follows:-

"And upon hearing the Plaintiff and the Advocates for the Defendants the Court adjudged that, by Virtue of Section 1 of the 'loi relative à la Prescription immobilière 1909' registered in the records of the said Island of Sark in the month of April, 1909, the action of the Plaintiff was

No. 2

Royal Court of Guernsey (Ordinary Division)

Judgment

21st January 1969 (continued)

prescribed by reason of the lapse of at least twenty years from the date on which the Plaintiff's cause of action arose, which the Court found to be on the 19th day of September, 1938, the date of death of Mary Elizabeth Vaudin, whom all parties to the action accepted to be the rightful owner of the tenement known as 'Le Port à la Jument' in the Island of Sark.

Apart from this formal judgment, apparently no report of the proceedings was made and no explanatory note from the Seneschal is available; also no written defences had been entered.

Appellant appeared in person and the respondents were represented respectively by Mr. Frossard and Mr. Randell, Advocates of the Guernsey Bar.

The case proceeded on the basis that the defendants in that Court having indicated that their defence was a plea that the action was prescribed it was not necessary to do more than decide

(a) what law applied;

(b) when prescription began to run; and

(c) whether the plaintiff had brought any and if so what action "en temps utile" to interrupt prescription.

It does appear that the first respondent, Adolphus John Hamon, had purported to convey the real estate of Marie Elizabeth Vaudin to the second and third respondents (the Mesneys) by deed dated the 24th October 1964, for £10,000 sterling; reciting his title in the following terms: "ET LE DIT Transport tels qu'ils se pourportent avec issues et entrées, fossés et reliefs, murailles, libertés, franchises et servitudes, tout et autant comme en peut competer et appartenir au dit vendeur auquel les dites premisses de cet acquet échurent comme seul fils et héritier de feu Monsieur John Vaudin Hamon lequel était héritier de feue Demoiselle Mary Elizabeth Vaudin, sa cousine Germaine, laquelle était fille et seule héritière de feu Monsieur Thomas Vaudin qui était lui-même fils ainé et héritier principal de feu Monsieur Thomas Vaudin ....."

Now it is if not the law then certainly a long established practice in the courts of this Bailiwick that where Prescription is set up as a defence or one of several defences to an action, that question should be settled first and certainly before "contestation de cause".

It seems therefore, from the brief record of the proceedings, that no more was done in the Court of the Seneschal than to determine somewhat arbitrarily the date on which the Plaintiff's cause of action arose and thereafter by simple mathematical calculation to dispose of the action by arriving at a date 20 years thereafter before which the Plaintiff had not asserted any claim to the estate or taken any action to evict a usurper.

So far as I am aware it was not challenged in the Court below that by Sark Law the appellant was the lawful heir of Marie Elizabeth Vaudin albeit the first respondent, at least by the title he claimed to pass to the second and third respondents, set himself up also as the lawful heir. Nor was it established precisely when his father John Vaudin Hamon took possession or that he held it peaceably, in good faith and without interruption until his death in August 1964, and so had acquired by prescription, if not otherwise, a valid title which passed to the first respondent.

It is common ground that by the law of Sark real estate (except Rentes) is not partable and descends in the male line to the exclusion of the female line. Thus there is no eldership and no "partage" between sons or sons and daughters, even by representation.

It seems therefore, in this instance, with the Plaintiff and the first defendant each claiming to be the lawful heir - and mark you, the sole heir, - to the real estate of Marie Elizabeth Vaudin, the Court should thus have determined that matter, for the first respondent could only claim that status by representation and it would seem, on the face of it, that he arrived there via the female line. As his claim rested on representation it was surely important to ascertain whether his father, on the death of Marie Elizabeth Vaudin stood in line nearer to her than the Plaintiff, now the Appellant, in these proceedings. The Plaintiff was entitled to know for that is what he pleaded, and the defendant should know also for that is what he asserted in his conveyance to the Mesneys and surely that is what they accepted in good faith in taking the conveyance to them of the

No. 2

Royal Court of Guernsey (Ordinary Division)

Judgment

21st January 1969 (continued)

Vaudin ancestral home. In my view that was important because if the Appellant had been found not to be the lawful heir then that was an end to the matter, quite apart from any question of prescription, and the first respondent might have had a valid title which he could have passed to the Mesneys.

If the Appellant had been found to be the lawful heir then how could he be ousted except by his own volition - e.g. sale or gift or by his omission to assert his title and so prevent the acquisition of a prescriptive title.

I am left therefore to assume which I should not be expected to do that the Appellant was found to be the lawful heir and that, from the judgment of the Court of the Seneschal, time began to run from the death of Mary Elizabeth Vaudin in September, 1938.

What then comes of the claim of Adolphus John Hamon to be the rightful heir to Mary Elizabeth Vaudin is not for me to settle nor indeed whether the Mesneys have acquired a good title.

What was most important to know is when precisely John Vaudin Hamon took possession if in fact he did, for that is when the cause of action arose. That surely is when someone began to lose or to acquire a prescriptive title.

Now the law of prescription in Sark is that which is derived not from the Roman law but the customary law of Normandy and is reported on as early as 1654 in Terrien much of whose writing was accepted as being also our law by Le Marchant in 1826. So far as real estate was concerned and "actions immobilières ou héréditales" the period was 40 years or "Prescription Quadrangénaire". This was reduced successively to 30 years and finally by Order in Council of 1909 to twenty years. Article 1 of that law says:

> "A partir du ler. avril 1909 toutes choses immobilières, et actions réelles ou dépendantes de la réalité, qui se prescrivent maintenant par le laps de trente ans seront prescrites par le laps de vingt ans; et suffira la tenue de vingt ans, bien entendu qu'elle soit de bonne foi, pour titre compétent en matière héréditale."

That, in my view, is the law of Sark and has been so since 1909. It is the law that applies in this case, and since the case rested on the question and solely on the question of prescription I should say that in my view the decision of the Court of the Seneschal was wrong in establishing that the Plaintiff's cause of action arose on the death of Mary Elizabeth Vaudin (on the 19th September 1938) without establishing also that the Plaintiff in that action was the lawful heir. And it was wrong in deciding without hearing more, that the Defendants were entitled to judgment merely on a mathematical calculation and without being satisfied that in law the first Defendant had lawfully inherited this property by valid prescriptive title through his father or that he held it by representation of his father as the lawful heir.

The Court of the Seneschal thus failed to establish, as the basis of its decision, the essential facts which warranted the application of the law in the sense indicated in its judgment. I am told now that Prescription was pleaded, i.e. "Prescription extinctive" and "Prescription acquisitive".

Prescription is defined by Pothier, "Traité de la Prescription qui résulte de la Possession" (Tome VIII - Article 1) as "Le droit qui nous fait acquérir le domaine de propriete d'une chose, par la possession paisible et non-interrompue que nous en avons eue pendant le temps réglé par la loi". He goes on in Chapitre II II (p.401) to say that the possession "doit être une possession civile et de bonne foie, qui procède d'un juste titre, qui ait été publique, paisible, et non-interrompue". None of that appears at least from the record to have been before the Court of the Seneschal.

The judgment against which this appeal is instituted appears to have been based rather on assumption than on proven fact.

There is evidently therefore an unexplained gap between the date of the death of Mary Elizabeth Vaudin in 1938 and the death of John Vaudin Hamon in 1964 in which the Court of the Seneschal should have satisfied itself that John Vaudin Hamon was the lawful heir or if not, that in good faith he believed himself so to be; that he entered into possession on a date at least 20 years previous to the date of his death; that after his entry into possession he maintained it without lawful interruption and in continuing good faith.

No.2

Royal Court of Guernsey (Ordinary Division)

Judgment

21st January 1969 (continued)

As I understand it the Court of the Seneschal dealt only "tout court" with the plea of the defendants that the right of the Appellant was "prescrite". That Court paid no attention (as appears from its record) to the essentials in law that have to be met before a defendant can claim a prescriptive title. The Court, for example, purported to deal only with the defence of prescription extinctive but prescription when pleaded in these circumstances is both "extinctive" and "acquisitive" and I see no reason why the parties are not entitled to a decision on each. It should be remembered, however, that an accepted authority Gallienne (1845) wrote about Prescription:

> "On est bientôt convaincu que la prescription était nécessaire pour assurer la stabilité des propriétés, et ne pas laisser les personnes exposee perpetuellement aux inconvénients qui pourraient résulter de la perte des titres qui prouvent la possession" ..... "La prescription est considérée comme tenant à l'ordre public".

It is understandable that a person such as the Appellant should feel a sense of grievance and wrong if when having established his lineage at least to his satisfaction he should be deprived of the inheritance merely because he was too late in claiming it. I cannot go into the merits of that for I am called upon to do no more than adjudicate upon the decision of the Court of the Seneschal of the 23rd November 1968.

In my view therefore it is not possible to ascertain the date when the cause of action arose without first ascertaining that the Plaintiff in the action had a right to assert and there is nothing before me to show that that received the attention of the Court of the Seneschal or if it did, what was decided about it.

Consequently I allow this appeal.

With regard to the question of costs I think it would be wrong to involve the second and third respondents in costs at least at this stage and so I award the costs of this appeal in favour of the appellant and against the first respondent.

Certified true copy

R.H. VIDELO
Registrar.

NO. 3

No. 3

ACT OF THE ROYAL COURT OF GUERNSEY ON APPEAL FROM THE COURT OF THE SENESCHAL OF SARK

Act of the Royal Court of Guernsey

A La Court Royale de l'Isle de Guernesey

21st January 1969

Le 21 Janvier, 1969, par devant Messire William Arnold, Chevalier, C.B.E., C. St. J., Baillif.

Sur l'action de Monsieur ADOLPHUS HENRY VAUDIN de Maris-Stella, Les Hubits, St. Martin en L'Ile de Guernsey, contre Monsieur ADOLPHUS HAMON, Monsieur ALAN JAMES MESNEY et Mme. DOROTHY LUCIEN PRICE épouse du dit Monsieur ALAN JAMES MESNEY tous trois de L'Ile de Sercq à voir dire et juger, par la Cour Royale de Guernsey que c'à été mal jugé et bien appelé par le dit Vaudin des sentences de la Cour de L'Ile de Sercq en son acte en date du 23 Novembre, 1968 qui se lit comme suit:-

In the Court of the Seneschal of Sark.

The twenty-third day of November, 1968, before William Baker M.B.E., Seneschal.

Upon hearing the action of ADOLPHUS HENRY VAUDIN of "Maris-Stella", Les Hubits in the parish of Saint Martin, in the Island of Guernsey against ADOLPHUS HAMON of La Duvallerie, Little Sark in the Island of Sark and ALAN JAMES MESNEY and DOROTHY LUCIEN MESNEY (née Price) his Wife, both of Le Port à la Jument in the Island of Sark to see him present a petition to the Court praying the Court:

REMONTRE:-

Que Je suis fils de JOSEPH VAUDIN et petit fils de feu le REVEREND ADOLPHUS VAUDIN fils légitime de feu THOMAS VAUDIN du Port à la Jument en cette qualité, je suis l'héritier légal à la Succession de MARIE ELIZABETH VAUDIN Ma Cousine issue de Germain.

1. Que suivant la succession de Mademoiselle Marie Elizabeth Vaudin Ma Cousine issue de Germain qui décéda en 1938 à l'Ile de Sercq, la succession de la Maison Ancestrale appelée Le Port à la Jument fut par manque de renseignements à mon sujet attribuée à feu Monsieur JOHN HAMON fils de BERNEL HAMON.

2. Votre Remontrant prie très humblement Votre Cour:-

No. 3

Act of the Royal Court of Guernsey

21st January 1969 (continued)

(a) de m'entendre aux fins de déclarer que le titre de la propriété du Port à la Jument a été mal attribuée;

(b) de déclarer et ordonner que la vente de la propriété par Monsieur ADOLPHUS HAMON est Nulle et de Nul effet;

(c) d'ordonner que le dit ADOLPHUS HENRY VAUDIN a droit à la possession de la propriété qui de fait lui appartient;

(d) de faire tel autre ordre ou de prendre telles autres mesures que Votre Cour dans sa Sagesse trouvera juste et équitable.

Et Votre remontrant sera toujours tenue de prier.

Ce 23 Aout Mil Neuf Cent Soixante Huit.

And upon hearing the Plaintiff and the Advocates for the defendants the Court adjudged that, by virtue of Section I of the "Loi relative à la Prescription immobilière 1909" registered in the records of the said Island of Sark in the month of April, 1909, the action of the Plaintiff was prescribed by reason of the lapse of at least twenty years from the date on which the Plaintiff's cause of action arose, which the Court found to be on the 19th day of September, 1938, the date of death of MARY ELIZABETH VAUDIN, whom all parties to the action accepted to be the rightful owner of the tenement known as "Le Port a la Jument" in the Island of Sark.

Plaintiff gave Notice of Appeal.

Signed: William Baker
Senescnal

Signed: Hilary Carre
Greffier of Sark".

La Cour, après avoir oui le dit acteur et les advocats des dits défendeurs à longue et mure délibération en tout ce qu'ils ont voulu dire et alléguer pour les mérites de la cause, a par jugement dit que c'a été mal jugé et bien appelé par le dit Vaudin. Et est le dit Adolphus Hamon aux frais.

R.H. VIDELO
Greffier de la Reine.

Certified true copy
R.H. VIDELO
Registrar.

NO. 4

No. 4

NOTICE OF APPEAL OF ADOLPHUS JOHN HAMON TO THE GUERNSEY COURT OF APPEAL

Guernsey Court of Appeal

IN THE COURT OF APPEAL (CIVIL DIVISION) GUERNSEY
ON APPEAL FROM THE ROYAL COURT SITTING AS AN ORDINARY COURT

Notice of Appeal of A.J. Hamon

B E T W E E N : ADOLPHUS HENRY VAUDIN Appellant

14th February 1969

- and -

ADOLPHUS JOHN HAMON and
ALAN JAMES MESNEY and
DOROTHY LUCIEN MESNEY
(née Price) his wife Respondents

To: ADOLPHUS HENRY VAUDIN, ALAN JAMES MESNEY and DOROTHY LUCIEN MESNEY.

TAKE NOTICE that the above-named Respondent Adolphus John Hamon, having obtained leave of the Presiding Judge, intends to appeal from the whole of the judgment given by the Royal Court sitting as an Ordinary Court on the 21st day of January, 1969 when it allowed the appeal by the Appellant from the judgment of the Court of the Seneschal of Sark given on the 23rd day of November, 1968, when the said Court of the Seneschal of Sark adjudged that by virtue of Section 1 of the "Loi relative à la Prescription Immobilière 1909" registered on the records of the said Island of Sark in the month of April 1909 the action of the Appellant was prescribed by reason of the lapse of at least twenty years from the date on which the Appellant's cause of action arose, which the Court found to be on the 19th day of September, 1938, the date of death of Mary Elizabeth Vaudin, whom all parties to the action accepted to be the rightful owner of the tenement known as "La Port à la Jument" in the Island of Sark. And proposes to ask the Court of Appeal for an Order:

That the said judgment of the Ordinary Court be set aside and that the Court should order that the Appellant's right to claim the real property the subject of his petition, is prescribed

AND FURTHER TAKE NOTICE that the grounds of the appeal are as follows:

The Ordinary Court was in error in deciding,

No. 4

Guernsey Court of Appeal

Notice of Appeal of A.J. Hamon

14th February 1969 (continued)

1. that the Court of the Seneschal of Sark should examine all points at issue between the parties (au fond) before applying Section 1 of the "Loi relative à lá Prescription Immobilière 1909".

2. that the Court of the Seneschal of Sark was in error in holding that the action of the Appellant was prescribed by reason of the lapse of at least twenty years from the date on which the Appellant's cause of action arose

AND FURTHER that the Ordinary Court was in error in that it failed to distinguish the differences between prescription acquisitive and prescription extinctive

DATED the 14th day of February 1969

Signed C.K. Frossard

Advocate for the Respondent
Adolphus John Hamon

No. 5

NO. 5

Notice of Appeal of A.J. Mesney and D.L. Mesney (his wife)

14th February 1969

NOTICE OF APPEAL OF ALAN JAMES MESNEY AND DOROTHY LUCIEN MESNEY (NÉE PRICE) HIS WIFE TO THE GUERNSEY COURT OF APPEAL

IN THE COURT OF APPEAL (CIVIL DIVISION) GUERNSEY ON APPEAL FROM THE ROYAL COURT SITTING AS AN ORDINARY COURT

B E T W E E N : ADOLPHUS HENRY VAUDIN Appellant

- and -

ADOLPHUS JOHN HAMON and
ALAN JAMES NESNEY and
DOROTHY LUCIEN MESNEY
(nee Price) his Wife Respondents

To ADOLPHUS HENRY VAUDIN and ADOLPHUS JOHN HAMON

TAKE NOTICE that the above named Respondents Alan James Mesney and Dorothy Lucien Mesney (nee Price) his wife having obtained leave of the

No. 5

Guernsey Court of Appeal

Notice of Appeal of A.J. Mesney and D.L. Mesney (his wife)

14th February 1969 (continued)

Presiding Judge intend to appeal from the whole of the judgment given by the Royal Court sitting as an Ordinary Court on the 21st day of January 1969 when it allowed the appeal by the Appellant from the judgment of the Court of the Seneschal of Sark given on the 23rd day of November 1968 when the said Court of the Seneschal of Sark adjudged that by virtue of Section 1 of the "Loi relative à la Prescription Immobilière 1909" registered on the records of the said Island of Sark in the month of April 1909 the action of the Appellant was prescribed by reason of the lapse of at least twenty years from the date on which the Appellant's cause of action arose, which the Court found to be on the 19th day of September 1938 the date of death of Mary Elizabeth Vaudin, whom all parties to the action accepted to be the rightful owner of the tenement known as "La Port à la Jument" in the Island of Sark. And propose to ask the Court of Appeal for an Order:

That the said judgment of the Ordinary Court be set aside and that the Court should order that the Appellant's right to claim the real property, the subject of his petition, is prescribed.

AND FURTHER TAKE NOTICE that the grounds of the appeal are as follows:

The Ordinary Court was in error in deciding,

1. that the Court of the Seneschal of Sark should examine all points at issue between the parties au fond) before applying Section 1 of the "Loi relative à la Prescription Immobilière 1909".

2. that the Court of the Seneschal of Sark was in error in holding that the action of the Appellant was prescribed by reason of the lapse of at least twenty years from the date on which the Appellant's cause of action arose.

AND FURTHER that the Ordinary Court was in error in that it failed to distinguish the differences between prescription acquisitive and prescription extinctive.

Dated the 14th day of February 1969.

D.W.M. RANDELL
Advocate for the Respondents Alan James Mesney and Dorothy Lucien Mesney, née Price, his wife.

Certified true copy

R.H. VIDELO
Registrar.

No. 6

Guernsey Court of Appeal

Statements of Contentions by the Appellants

Undated

NO. 6

STATEMENTS OF CONTENTIONS TO BE URGED AND AUTHORITIES TO BE CITED BY THE APPELLANTS

IN THE COURT OF APPEAL (CIVIL DIVISION)
GUERNSEY

ON APPEAL FROM THE ROYAL COURT SITTING AS AN ORDINARY COURT

B E T W E E N : ADOLPHUS JOHN HAMON and ALAN JAMES MESNEY and DOROTHY LUCIEN MESNEY (née Price) his wife Appellants

- and -

ADOLPHUS HENRY VAUDIN Respondent

STATEMENTS OF CONTENTIONS TO BE URGED AND AUTHORITIES TO BE CITED BY THE APPELLANTS

1. IT will be contended that the learned Bailiff misdirected himself in holding that the Court of the Seneschal of Sark should examine all points at issue between the parties before applying Section 1 of the Loi relative à la Prescription Immobilière 1909. Because up to 19th September 1938 the date of death of Mary Elizabeth Vaudin all parties to the action as set out in the judgment of the Court of the Seneschal accepted that up to that date Mary Elizabeth Vaudin was the rightful owner of the tenement known as le Port à la Jument in the Island of Sark, and the Respondent's cause of action would arise from that date.

2. IT will be contended that the learned Bailiff misdirected himself in holding that the Court of the Seneschal of Sark should examine all points at issue between the parties before holding that the defence of prescription applied because under the law of Sark the defence of prescription being an "exception peremptoire", peremptory bar, must be pleaded and decided at the commencement of an action before the merits of the case are considered.

In his commentary on the Laws and Customs of Normandy, Terrien at p.334 writes that exceptions need not necessarily be pleaded first except those such as prescription which if successful prevent the case being heard.

Laurent Carey, an author on Guernsey Law at p.207 states that prescription is an "exception peremptoire." Appendix B.

Gallienne, a learned author on procedure in the Courts of Guernsey, writing in 1845, states at p.4 that "exceptions peremptoires" must be set out "in limine litis" and that after the merits of an action have been considered "a fond" any such "exceptions peremptoires" can no longer be sustained." Appendix C.

3. THESE authorities support the submissions made on behalf of the Appellants before the Royal Court that the Court of the Seneschal of Sark was correct in holding that the action of the Respondent failed as under the Loi relative à la Prescription Immobilière registered on 23rd April, 1909 all actions relating to real property are prescribed by twenty years. Appendix D.

APPENDIX A

TERRIEN - COMMENTAIRES DU DROIT CIVIL

BOOK VIII. Chapter xxix p.334

There are two kinds of "exceptions" or defences. Some are dilatory others peremptory ...

Peremptory exceptions are perpetual because they can always arise. They are against the Plaintiff and bar his claim such as an allegation of payment and others. These exceptions are pleaded after issue is joined unless they are of such a nature as to prevent the start of proceedings. They can also be called "fin de non recevoir;" such as prescription, oath, judgment and accord and satisfaction; quae vocatur exceptionis litis finitae.

APPENDIX B

LAURENT CAREY - ESSAI SUR LES INSTITUTIONS LOIS ET COUTUMES DE L'ILE DE GUERNESEY

Prescription which is one of the best peremptory bars, is an exemption or discharge from paying what is due. This the debtor acquires through the negligence of the creditor who has neglected to demand payment of his debt in the time and in the manner required by law.

No. 6

Guernsey Court of Appeal

Statements of Contentions by the Appellants

Undated (continued)

APPENDIX C

GALLIENNE - TRAITÉ DE LA RENONCIATION PAR LOI OUTRÉE ET DE LA GARANTIE

Exceptions are peremptory (perime to destroy) avoiding (declinare to avoid) and dilatory (differre dilateure) to put back

Peremptory exceptions or pleas in bar which concern the form of the action or statement of claim should be pleaded in "limine litis": they cannot prejudice the defendant in his pleadings on pleas in bar of law which go to the root of the matter and are pleaded before or after issue is joined "in quecenque parte litis". These exceptions are a means of nullifying the claim without examining whether it is a valid claim or not; such as satisfaction, payment, or prescription.

Having entered into the merits of the claim, the defendant can no longer challenge defects in the statement of claim. By the fact of pleading on the merits, all nullities are waived.

APPENDIX D

LOI RELATIVE À LA PRESCRIPTION IMMOBILIÈRE

Section 1. With effect from 1st April 1909 all realty and real actions or those relating to realty which are now prescribed by thirty years shall be prescribed by a lapse of twenty years, and possession for twenty years shall give good title in matters of realty provided such possession is in good faith.

Certified true copy

R.H. VIDELO

Registrar.

NO. 7

No. 7

STATEMENTS OF CONTENTIONS TO BE URGED AND AUTHORITIES TO BE CITED BY THE RESPONDENT

Guernsey Court of Appeal

IN THE COURT OF APPEAL (CIVIL DIVISION) GUERNSEY

Statements of Contentions by the Respondent

ON APPEAL FROM THE ROYAL COURT SITTING AS AN ORDINARY COURT

11th July 1969

B E T W E E N : ADOLPHUS JOHN HAMON and ALAN JAMES MESNEY and DOROTHY LUCIEN MESNEY (née Price) his wife — Appellants

- and -

ADOLPHUS HENRY VAUDIN — Respondent

STATEMENTS OF CONTENTIONS TO BE URGED AND AUTHORITIES TO BE CITED BY THE RESPONDENT

1. It will be contended that the learned Bailiff was correct in holding that the Court of the Seneschal of Sark was wrong in that it failed to examine the relevant points in issue between the parties before applying Section 1 of the Loi Relative à la Prescription Immobilière 1909 and declaring that the Respondent was out of time in bringing his action. Upon the death of Mary Elizabeth Vaudin the respondent had vested in him immediately the ownership of the tenement known as Le Port à la Jument, both in his special capacity as "aisne" under the law of Sark (Appendix A.), and under the rule "le mort saisit le vif son heir le plus proche" (Appendix B.) As such the Respondent was entitled to possession of the property as of right, and neither his right of ownership, nor his right of action to defend his title can be lost by prescription unless the appellants are able to show that they have acquired better title by prescription (Appendix C.)

2. It will further be contended that even assuming that the Respondent's right to defend his title arose at a given moment in time, (which is denied) either at the date of the death of Mary Elizabeth Vaudin, or at the date of Jean Hamon entering into possession, the learned Bailiff was right in holding that the prescription period after which that right would be extinguished could not be calculated on the basis of

No. 7

Guernsey Court of Appeal

Statements of Contentions by the Respondent

11th July 1969 (continued)

an automatic and purely mathematical computation. Whether prescription was acquisitive or extinctive, the period of twenty years prescribed by the Loi Relative a la Prescription Immobiliere of 1909 will only run subject to certain conditions, one of which is that the party raising the defence of prescription must be of good faith. Moreover the Laws of 1909 and 1852 relating to "prescription immobiliere" merely reduced the duration, but not the essential nature of the old forty year prescription period under the custom of Normandy (Appendix D.) Laurent Carey states that the prescription period of forty years will not run against a person who is prevented from acting ("empêche d'agir") or who has been kept in ignorance of his right of action by means of misrepresentation or deception (Appendix E.) Pothier expresses the opinion that the prescription period will not run against a person who is absent, or who for any good reason is prevented from bringing his action (Appendix F.)

3. These authorities support the submissions made on behalf of the Respondent before the Royal Court that the learned Bailiff was correct in holding that the whole question of the Respondent's title to the disputed property and the Appellants' good faith should first have been examined by the Court of the Seneschal of Sark before determining whether the defence of prescription "acquisitive" or "extinctive" might successfully be raised by the Appellants.

Adolphus Henry Vaudin

11th July 1969

APPENDIX A

LETTRES PATENTES DU ROI JACQUES I
ENREGISTRÉES LE 12 AOUT 1612

Toute terre ténement ou héritage situés dans la dite Ile de Serk doivent échoir et succeder et à l'avenir descendront et iront entièrement et directement au fils aine et à ses herities ainsi que le reste de la Seigneurie du dit Philippe de Carteret dans la dite Ile de Serk

11th July, 1969

APPENDIX B

LAURENT CAREY - ESSAI SUR LES INSTITUTIONS LOIS ET COUTUMES DE L'ILE DE GUERNESEY

Le mort saisit le vif; c'est une maxime de la coutume qui veut dire que la possession du mourant est continuée à son héritier sans aucune solennité ni declaration de justice, en telle sorte que la succession ne demeure vacante un seul moment, et que l'héritier peut user de Clameur de Haro pour retenir la possession de l'hérédité.

11th July, 1969

APPENDIX C

POTHIER - TRAITÉ DU DROIT DE PROPRIETÉ

276. Enfin nous perdons sans notre consentement, et meme à notre insu, le domaine de propriété d'une chose qui nous appartient, lorsque celui qui la possede vient à l'acquérir par droit de prescription. Aussitot que ce possesseur a, par lui on par ses auteurs, accompli le temps de la possession requis pour la prescription, la Loi qui a établi la prescription, nous prive de plein droit du domaine de propriété que nous avions de cette chose, et le transfere à ce possesseur.

277. Au reste, nous ne perdons pas le domaine de propriété d'une chose, pour cela seul que nous en avons perdue la possession, et quoique nous ignorions absolument ce qu'elle est devenue.

11th July, 1969

APPENDIX D

LOI RELATIVE A LA PRESCRIPTION IMMOBILIERE - PREAMBULE

1. By the ancient law of Normandy which was still in force in 1851 within the Bailiwick of Your Majesty's island of Guernsey, the period required for prescription in matters concerning realty was forty years.

No. 7

Guernsey Court of Appeal

Statements of Contentions by the Respondent

11th July 1969 (continued)

2. That the said period of forty years was reduced to thirty years by a Law entitled "De la prescription immobiliere" sanctioned by Her late Majesty in Council on the 5th day of March 1852, registered on the records of that island on the 15th day of March 1852 (Rec. Ord. en Counseil Vol.IV,282).

Section 1. With effect from 1st April 1909 all realty and real actions or those relating to realty which are now prescribed by thirty years shall be prescribed by a lapse of twenty years, and possession for twenty years shall give good title in matters of realty provided such possession is in good faith.

11th July, 1969

APPENDIX E

LAURENT CAREY - ESSAI SUR LES INSTITUTIONS LOIS ET COUTUMES DE L'ILE DE GUERNESEY

Prescription ou la tenue paisible par quarante ans suffit à chacun pour titre compétant en toute justice de quelconque chose que ce soit.

Elle ne court contre qui est empêche d'agir, ou qui est ignorant de son droit au moyen de fiction ou de deception dont on aurait use envers lui.

11th July, 1969

APPENDIX F

POTHIER - TRAITE DE LA PRESCRIPTION

Le temps pour la prescription d'une chose ne peut courir contre le propriétaire de cette chose, tant qu'il se trouve dans l'impossibilité d' inter son action pour la revendiquer, suivant cette maxime: Contra non valentem agere nulla currit prescriptio. (22)

Il suit aussi de la, que le temps de la prescription ne court pas contre le propriétaire pendant qu'il est absent pour le service de l'Etat, s il n'y a personne qui soit chargé ses affaires.

Quand même ce ne serait pas pour le service de

l'Etat que le proprietaire eût été absent, mais pour quelque autre juste cause qui l'eut obligé de partir sans avoir le loisir de charger quelqu'un de ses affaires; ou si la personne qu'il en avait chargé en partant, a cesse par mort ou autrement d'en avoir soin, le temps de la prescription ne doit pas courir contre lui: Quam (praescriptionem) contra absentes vel Reipublicae causa, vel maxime fortuito casu nequaquam valere decernimus.

No. 7

Guernsey Court of Appeal

Statements of Contentions by the Respondent

11th July 1969 (continued)

10 Il en est de même généralement de toutes les autres justes causes d'empêchement qui empechent le proprietaire d'intenter son action; le temps de la prescription ne court pas tant que l'empêchement subsists. (23)

11th July, 1969

Certified true copies

R.H. VIDELO

Registrar

NO. 8

No. 8

20 OFFICIAL REPORT OF PROCEEDINGS IN THE GUERNSEY COURT OF APPEAL (CIVIL DIVISION) INCLUDING JUDGMENT

Guernsey Court of Appeal (Civil Division)

COURT OF APPEAL (CIVIL DIVISION) GUERNSEY

THURSDAY, NOVEMBER 13th 1969 and
WEDNESDAY, MARCH 11th 1970.

Official Report of Proceedings

BEFORE: Sir Robert Le Masurier, D.S.C., Bailiff of Jersey.

13th November 1969

Mr. J.G. Le Quesne, Q.C.

Mr. P.H.R. Bristow, Q.C.

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

ADOLPHUS JOHN HAMON First Appellant

- and -

ALAN JAMES MESNEY and DOROTHY LUCIEN MESNEY (nee Price) his wife Second Appellants

- v -

ADOLPHUS HENRY VAUDIN Respondent

Advocates D.W.M. Randell, C.K. Frossard and E.J.T. Lenfestey appeared for the first and second Appellants.

The Respondent appeared in person.

(Official Report of the Proceedings)

IN THE COURT OF APPEAL (CIVIL DIVISION) GUERNSEY

ON APPEAL FROM THE ROYAL COURT SITTING AS AN ORDINARY COURT

THURSDAY NOVEMBER 13th 1969.

In the matter of the Appeal from the judgment of the Royal Court sitting as an Ordinary Court delivered on the 21st January, 1969 -

B E T W E E N : ADOLPHUS JOHN HAMON and ALAN JAMES MESNEY and DOROTHY LUCIEN MESNEY Appellants

- and -

ADOLPHUS HENRY VAUDIN Respondent

ADVOCATE D.W.M. RANDELL: Mr. President and Gentlemen - I appear in this matter on behalf of the appellants, Alan James Mesney and his wife, Dorothy Lucien Mesney. My friend Mr. Frossard appears for the appellant Adolphus John Hamon - and I understand that Mr. Vaudin, the respondent, will, in fact, be conducting his own case.

Sir, this matter arises originally from a petition to the Court of the Island of Sark by the

present respondent in connection with the succession to a property in Sark arising out of the death in 1938 of Mary Elizabeth Vaudin.

No. 8
Guernsey Court of Appeal (Civil Division)
Official Report of Proceedings
13th November 1969 (continued)

The petition to the Sark Court was adjourned so that copies could be served upon the other interested parties who are today the appellants, and at the Court of Sark, I appeared on behalf of Mr. and Mrs. Mesney and then also my friend Mr. Frossard appeared for Mr. Hamon. It was convenient at that time that I dealt with matters relating to prescription and my friend Mr. Frosssard dealt then with matters of title, succession and so on.

The Court in Sark was asked, and, indeed did pronounce on the question of prescription as to whether or not the then petitioner was in time to bring the matter before the Court. The Court of Sark, you will have seen in the various documents which have been passed to you, held that Miss Mary Elizabeth Vaudin having died in 1938 and these proceedings having been brought in 1968, that the petitioner was disentitled to get relief from the Court. This was the subject of an appeal before the Ordinary Court in which the learned Bailiff of Guernsey sat, and again, for convenience, and for the assistance of the Court, I on that occasion dealt with matters of prescription and my friend Mr. Frossard concurred in the various submissions that I made. With the Court's permission this morning it is proposed to adopt the same principle here - that I, who have been concerned with prescription will be making the various contentions and submissions to you, and I understand that my friend Mr. Frossard will support and, indeed perhaps emphasise such of the points as I propose to make before you.

Sir, as I have indicated, this matter comes originally from the Sark Court and we are now appealing against the judgment of the Bailiff of January of this year, when he found that then he had not to deal purely with the question of prescription and matters allied thereto but should have gone into the very essence of the matter - as we call it here in Guernsey <u>au fonds</u> - to go into the merits of the cause.

Now, Sir, we are appealing against that, and you will have had in your statements of our case the various contentions which we put forward. I

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

think it might be convenient to the Court, in order to get the position clear, if I read those contentions - and this is what we say:-

1. It is contended that the learned Bailiff misdirected himself in holding that the Court of the Seneschal of Sark should examine all points at issue between the parties before applying Section 1 of the Loi relative a la Prescription Immobiliere 1909. Because up to 19th September 1938 the date of death of Mary Elizabeth Vaudin all parties to the action as set out in the judgment of the Court of the Seneschal accepted that up to that date Mary Elizabeth Vaudin was the rightful owner of the tenement known as le Port a la Jument in the Island of Sark, and the Respondent's cause of action would arise from that date.

2. It is contended that the learned Bailiff misdirected himself in holding that the Court of the Seneschal of Sark should examine all points at issue between the parties before holding that the defence of prescription applied because under the law of Sark the defence of prescription being an "exception peremptoire", peremptory bar, must be pleaded and decided at the commencement of an action before the merits of the case are considered.

We will inform you that in his commentary on the Laws and Customs of Normandy, Terrien (who is the accepted authority for Guernsey customary law) at p.334 writes that exceptions need not necessarily be pleaded first except those such as prescription which if successful prevent the case being heard, and we also have given you in the document the translation of that quotation.

Again Laurent Carey an author on Guernsey Law at p.207 states that prescription is an "exception peremptoire".

Again Gallienne, a learned author on procedure in the Courts of Guernsey, writing in 1845 states at p.4 that "exceptions peremptoires" must be set out "in limine litis" and that after the merits of an action have been considered "a fond" any such "exceptions peremptoires" can no longer be sustained.

We submit and contend that as these are "exceptions peremptoires" they must be dealt with first and by the analogy where Gallienne says they can no longer be sustained after you have gone into the matter au fonds then you must have a decision on those "exceptions" before going into the merits of the case.

3. We submit these authorities support the submissions made on behalf of the Appellants before the Royal Court that the Court of the Seneschal of Sark was correct in holding that the action of the Respondent failed as under the Loi relative à la Prescription Immobilière registered on 23rd April 1909 all actions relating to real property are prescribed by twenty years.

Sir, I think perhaps that has given you some indication of the history of this matter and the view which we are putting before you this morning.

Now we submitted right at the start that this morning we are not concerned with who was, in fact, the lawful owner on the death of Mary Elizabeth Vaudin. We are not concerned this morning as to whether Adolphus Hamon through his father, or, indeed, the Mesneys, have acquired title by prescription. What we submit we are concerned with is whether Mr. Vaudin, the respondent this morning who started his action in August and September of last year by a petition before the Court of Sark, was out of time; out of time in trying to assert his right by reason of prescription.

You will doubtless know, and we can give you authorities on this, that there are, in our law, two forms of prescription:- there is "prescription extinctive" which extinguishes a man's right, and there is "prescription acquisitive" which is a right or a process by which someone can acquire something. We suggest that here the matter which you have got to deal with is very akin to that of "prescription extinctive" because we say that if a man lets the passage of time go by for so long as is laid down in the law, he cannot then be heard to do something about it. We would suggest to you that it is not, in fact, necessary for you to come to the conclusion that Mr. Vaudin, the respondent, has necessarily lost all rights of title - we suggest to you that he is too late to do anything about asserting his title.

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

I think perhaps, at this stage, it might be as well if I referred you to the Laws on Prescription. It is, I think, accepted that, in the old law in Sark the period of prescription in matters relating to realty was 40 years; it certainly was in Guernsey and I think there is no real dispute about that today. If I could refer you, Sir, to Volume I of the printed Orders in Council - we have, at page 207 the preamble to the Order in Council, which contains the following words:-

> "Her Majesty having taken the said Report and Projet de Loi into consideration was pleased, by and with the advice of Her Privy Council, to approve thereof and to order, as it is hereby ordered, that the said Project de Loy shall have full force of Law within the Bailiwick of Her Majesty's Island of Guernsey, and be observed accordingly".

It is a Bailiwick law which we submit applies equally to Sark as to Guernsey.

Now the first article of that Law is in the following terms:-

> "Toutes chose immobilières, et actions réelles ou dependantes de la réalite, qui si prescrivent maintenant par le laps de quarante ans, seront à l'avenir prescrites par le laps de trente ans; et suffira la tenue de trente ans pour titre compétent en matiere héréditale."

The translation of that, if I may give it perhaps for the sake of convenience is that -

> "All immobiliary matters (or matters relating to realty)which at the moment are prescribed by a lapse of 40 years shall in the future be prescribed by a lapse of 30 years and that the holding for 30 years shall suffice for a good title in matters relating to realty".

and <u>this</u> is contained in Volume IV -

MR. J.G. LE QUESNE: That was 1850?

ADVOCATE RANDELL: Indeed, Sir, the date of that was-

MR. P.H.R. BRISTOW: 1852?

ADVOCATE RANDELL: It was registered on the records of this Island on the 22nd May, 1852.

Now in 1909, and this is Volume IV of the printed Orders in Council at page 281 and the law was registered on the records of this Island on the 23rd April 1909 in the preamble the words are:-

> "... on behalf of His Majesty approve of and ratify the said "Projet de Loi", and, on His Majesty's behalf, order, as it is hereby ordered, that, as from the Registration of this Order, the same shall have the force of Law within the Bailiwick of Guernsey".

Article 1 of the law, which is on page 284 is almost in identical terms, except that the period is reduced to 20 years. The wording is:-

> "Loi relative à la Prescription Immobilière.
>
> 1. A partir du 1er avril 1909 toutes chose immobilières, et actions réelles ou dépendantes de la realité, que se prescrivent maintenant par le laps de trente ans seront prescrites par le laps de vingt ans; et suffira la tenue de vingt ans, bien entendu qu'elle soit de bonne foi, pour titre compétent en matière héréditale."

In other words, practically the same wording reducing the period to twenty years.

Now it is contended that the learned Bailiff was wrong in holding that, in order to ascertain whether or not Mr. Vaudin was or was not in time, it was necessary to ascertain whether or not he was entitled to the property, or to further ascertain, other than as had already been decided by the Court of Sark, the date on which his cause of action arose.

I think it is clear from the original petition of the respondent that he refers to the succession to this property in view of the death of Mary Elizabeth Vaudin, and she, it is quite clear, died in 1938. That can only be the root and start of his action, his petition, to the Court or anything else he started:- that date is the fixed starting point.

MR. J.G. LE QUESNE: It is wrong to hold, in order to ascertain whether the respondent is in time that it is necessary to ascertain whether he is rightful heir - is that what you say?

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

ADVOCATE RANDELL: Yes Sir.

MR. LE QUESNE: You also say it is wrong to hold, in order to ascertain whether he is in time, that it is necessary to discover when his cause of action arose?

ADVOCATE RANDELL: No Sir - have I said that?

MR. LE QUESNE: I am not sure that you did - I wanted to be sure of what you did say.

ADVOCATE RANDELL: No Sir, what I intended to say, if I may put it this way, was that the learned Bailiff as I understood him to say in his judgment, was not satisfied that the then plaintiff's cause of action arose on the date of death of Mary Elizabeth Vaudin in 1938. Now our contention is that this thing speaks for itself, because Vaudin in his original petition to the Sark Court stated that this matter arose out of the death of Mary Elizabeth Vaudin, and, therefore, that is a fixed starting point, so that it was not necessary, we maintain, for the Bailiff to say that this matter does not appear to have been gone into very fully and definitely decided that that was the date on which the cause of action arose. I perhaps should here again make this point, that we seek to distinguish the question of "prescription extinctive" and the factor as to whether or not a person is in time to come to the Court for relief, Sir. We maintain that prescription having been pleaded, it is on the basis that if you have not done something in relation to the realty within 20 years of the cause of action arising, you are then too late to come for relief.

MR. LE QUESNE: The argument is, is it, that the Bailiff was not satisfied when the cause of action arose, but he ought to have held that the first point for the start of any period of prescription was the date of death of the lady in 1938?

ADVOCATE RANDELL: Yes Sir - I was just trying to say ... if I could find the reference in the Bailiff's judgment to that .. yes, Sir, .. page 33, the second paragraph, starting:-

"That, in my view, is the law of Sark and has been so since 1909. It is the law that applies in this case, and since the case rested on the question and solely on the question of prescription I should say that in my view the decision of the Court of the Seneschal was wrong in establishing that the Plaintiff's cause of action arose on the death of Mary Elizabeth Vaudin (on the 19th September 1938) without establishing also that the Plaintiff in that action was the lawful heir..."

That was the reference to which I was referring in relation to the learned Bailiff's judgment.

We also contend that the learned Bailiff was incorrect in holding that it was not merely a "mathematical calculation". We maintain when dealing with matters of prescription, you are forced to a mathematical calculation and conclusion and, in this case, that calculation should date, as I have said, from the date of death of the lady Mary Elizabeth Vaudin.

I think I have perhaps referred to this in my opening remarks - it is also contended that the Bailiff was wrong in stating that the parties were entitled to a decision on each of "extinctive" and "acquisitive" prescription. These are two entirely separate forms. The right of a defendant may have become extinguished but it may have become extinguished without that right having been acquired by the opposite party, or, indeed possibly by anybody. There are circumstances which I can envisage where someone might have a right extinguished by an escheat. I say it is not necessary, if a right is extinguished, that it should be invested in somebody else by an acquisitive right of prescription. The two, we suggest, are entirely different, and it was not necessary, we maintain, for the Court either at Sark, or for the learned Bailiff when the matter was before him, to say that the Mesneys or Hamons before them have acquired a good title. All we are concerned with is, were these proceedings commenced too late?

We would refer you perhaps to the historical origins of prescription. We maintain, and there is authority for this, that the reason why prescription arose is largely a matter of public order, but it is also a matter, if you like, of convenience on every-day affairs, because two factors arise: one is that

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

after a long period, witnesses die, perhaps disappear, titles become lost; it is difficult after a long period to ascertain the true facts. It is also in the nature of public order that someone who has been validly in possession of something for a considerable number of years should not be challenged in that possession after a long period. One can envisage cases where for various reasons somebody might be in possession for, say 50 years, and it would be against public order at that stage to come round and disturb that person in possession; but it is basically because, in the old law, it was wrong after so many years to put the defendant in great difficulty in establishing his title after a period.

If, in other words, you went to the Court and you did not deal with the question of the lapse of time, the period of prescription during which proceedings must be brought, and left that undecided, and you went to perhaps enormous trouble and enormous expense and research and difficulties to find lost documents and lost witnesses, you would go to the full length of that hearing, and all this time is consumed and expense involved, when the matter could be dealt with "tout cour" as the Bailiff used the expression by deciding whether or not the plaintiff was too late.

In this particular instance, one comes to this conclusion: what would be the position? We suggest that there can be no doubt that the plaintiff's right of action, if he has one, dates from the death in 1938. Now he came to the Court initially in 1968. What would be the position if this good lady had died in 1908 and he came back in 1968, would the court then again require the parties to go into the matter au fonds? And so on. If one makes it 1908, why not 1878, 90 years later? Supposing that Mr. Vaudin had not come to the Court in 1968 - supposing he had stayed abroad as I believe it was (in Mauritius) for another 20 years and came in 1988; or, if he had died in Mauritius at that time his son came ten years later? When he came to the Channel Islands would it be right that this matter should again be re-opened in 1998 arising out of the death of someone in 1938? Surely that must be wrong, and we are submitting as strongly as we can that the first point to be taken is the question of the time. You don't go into the merits when you are dealing with this - you merely examine the facts and see whether this prescription of twenty years

should run and has run, in which case the plaintiff should have his action rejected.

As I have said, this defence is an "exception peremptoire" and such a defence or "fins de non recevoir" as it is called must be pleaded at the very outset of the case. It must be pleaded, and, we maintain, decided by the Court before going into any of the other defences, such as what we call in Guernsey "pretentions" and "neances" - allegations by the defendant or denials by the defendant. It must be done straight away and without pleading au fonds.

There are various authorities to support this view, and one is to be found in Gallienne in his Traité de la Renonciation par Loi Outrée, and this was printed in 1845 and is a well-known accepted commentary on the procedure in the court here in Guernsey; and at page 4 we find the following reference which is the first paragraph commencing on that page:-

> "Les Exceptions sont péremptoires (Perimere, détruire) declinatoires (Declinare, éviter), et dilatoires (differre, dilatum, différer).
>
> Les exceptions péremptoires, ou fins de non recevoir, qui concernent la forme de l'ajournement, doivent être proposées in limine litis; elles ne peuvent préjudicier le defendeur, dans sa proposition d'exceptions péremptoires de droit, qui regardent le fond, et se proposent avant out après la contestation en cause. Ces exceptions sont un moyen d'anéantir la demande, sans examiner si elle est bien ou mal fondée."

MR. P.H.R. BRISTOW: When he speaks to us about pleadings, is he referring to oral pleadings or written pleadings?

ADVOCATE RANDELL: The procedure in this Court for many years, Sir, has been for written pleadings, and I think here Gallienne is undoubtedly speaking of written pleadings; - and he goes on to give examples of these; "... telle est la compensation, le paiement, la prescription"...

MR. J.G. LE QUESNE: It is hard to understand; - when he says this exception has got to be pleaded in limine litis he means it has got to be not only pleaded, but also decided in litis?

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

ADVOCATE RANDELL: He says, if I can translate from the French ... "these exceptions are a means of wiping out (d'aneantir) - wiping out or destroying the demand without examining whether it is well or badly founded".

I suggest the only interpretation of that is that it must be dealt with right at the outset and that the court must decide on that issue before going into the merits.

MR. P.H.R. BRISTOW: Supposing that is right, are we to envisage that this is the equivalent of an objection on a point of law in the English procedure tried as a preliminary issue on the facts as set out in the pleadings?

ADVOCATE RANDELL: I would say yes, Sir. We are somewhat unfortunate in this - that this matter originally arose in the Court of Sark. It was done, as I have said, by way of petition to the Court of Sark. It was not summoned in the form of an ordinary action and there were indeed arguments with the President of the Sark Court rather than any written pleadings. The parties either themselves (as in the case of Mr. Vaudin) put their cases or in the case of the appellants today were represented by counsel who all addressed the Court. There were, at that stage no written pleadings and, indeed, no evidence. Had the matter come on for hearing originally in Guernsey, the matter would have been dealt with in a different manner. The procedure here is that the plaintiff starts his action by having a summons served on the defendant by the Court Sergeant. The matter is then tabled on the appropriate date, and, at that date, if there is no appearance or no representation made by the defendant, judgment in the ordinary way could be given by default. If, however, the defendant wishes to dispute the proceedings or defend them, then he asks that the matter be placed on the Role des Causes a Plaider - this is the list of defended actions. Periodically the list of actions which appear on the Role des Causes a Plaider is published in the court lobby and the matter again has to be summoned before the Court. If the matter is still to be defended at that time, the defendant has to produce to the Court, and file with the Court, his written defences.

MR.P.H.R. BRISTOW: What I had in mind was that you have got to deal with the question of prescription on some basis of fact beyond simply counting up the number of years. For example, suppose that, in order to establish prescription, somebody has got to show that throughout the period there has been bonne foi, how does the Court approach that problem taking it as a preliminary one? Does it have to act on the basis that written pleadings are actually an outline of it, or what? How does it work if you take it as a preliminary point?

ADVOCATE RANDELL: I think possibly I am a little bit in difficulty here, Sir, because this particular defence is rarely pleaded in this Court - with reservation, if that was so and there were facts on which the prescription depended and the court could not ascertain those as there was no agreement between the parties as to the facts, I think the Court would have to prescribe witnesses to be heard on all the particular points which were in issue.

MR. BRISTOW: The Court would have to make some examination of the facts relating to this particular what one might call "plea in bar"- this particular preliminary point, even though it did not have to go into the merits au fonds?

ADVOCATE RANDELL: Yes Sir, I think that is right, except where, on the basis of the pleadings the facts speak for themselves, such as we maintain applies in this case here today, because, as he said in his original petition then, the plaintiff or the petitioner based it all on the death of Mary Elizabeth Vaudin.

Now going back to the point which your learned confrere took earlier, we suggest that it is not necessary for the Court, indeed for the learned Bailiff, to have said that it is necessary to go into this and establish when the right of action arose. We maintain that it can only be from that date, and therefore a mathematical calculation from this date gives one answer -

MR. BRISTOW: In order to establish this defence, no other investigation of fact is necessary at all?

ADVOCATE RANDELL: We would say that is so. There are certain factors which I was going to deal

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

with in full in my summing up, with the effect of interrupting or stopping prescription, such as fraud. If fraud were alleged, then I think that the Court would have to go into the facts and examine as to whether there had been fraud, but we are not happily troubled with that aspect of it this morning, because (again I was going to refer to that in full) our law is quite clear that if, in fact, fraud is alleged, then it must be specifically pleaded, and there is not one suggestion in the original petition of fraud or malice or deception or any of the other things.

MR. BRISTOW: Again this is where the Court is in difficulty because of the absence of written pleadings in the ordinary form; in the Sark Court was there a written answer?

ADVOCATE RANDELL: No Sir.

MR. BRISTOW: No written reply?

ADVOCATE RANDELL: No Sir because if one is thinking of it from the pleading point of view, the pattern you would expect would be the petition, the written answer raising prescription, and, if the petitioner wanted to make a case against prescription, that could be done by way of reply; indeed, that would be done if it were here by the existing procedure as I know it, and, in fact, my colleagues know it. In Sark, matters are not dealt with on the question of written pleadings - they are dealt with <u>seance tenante</u> by the parties appearing in person and making such representations and tendering such evidence as they deem necessary.

MR. BRISTOW: In order to see what the pleading side of the matter is, you have really got to look and see what happened before the Sark Court, and you can't tell by just looking at the documents?

ADVOCATE RANDELL: No, that is true, Sir. If I might here say that, when the matter was before the Sark Court, I indicated earlier that my friend Mr. Frossard dealt with matters of title and succession, and so on. We did maintain a joint and broad based defence to the whole matter. Included among this was the question of this

particular prescription, as to whether the plaintiff was in time. My friend Mr. Frossard dealt at great length with the laws of succession and title, but we asked the Court to deal particularly with the question of time, prescription, as to whether the plaintiff was in time to come before the Court. The Court of Sark dealt, I think, solely with that point.

MR. J.G. LE QUESNE: That is what you asked the Court to do? Did Mr. Vaudin agree with that?

ADVOCATE RANDELL: No, he did not, Sir, but the Court having heard all that was to be said on either side, has, in fact, decided that that was the proper course to take, firstly to decide on prescription and secondly, to decide it in favour of your clients. To that extent, perhaps I might mention this in passing, the learned Bailiff in his judgment has indicated that it appeared to him that it was accepted by everybody that the respondent (the then plaintiff) was, in fact, rightful owner of the property; this, of course was not the case at all - there is nothing in the record of the Sark Court to say that that was so; so it was not so, but this was very strongly and forcibly stressed by my friend at the hearing in the Sark Court, who dealt with the old authorities, Terrien and so on. I feel perhaps I might be entitled to bring the notice of the Court to that, because it is something which we did not have the opportunity of addressing the Bailiff on, and, in fact, was never agreed or conceded by my friend.

To go back to this question of dealing with this particular point first, there is authority - I have quoted to you Gallienne, and he quite clearly says that you must deal with this point before going into the merits of the cause.

Now since the various papers were lodged in this case, further information has come to light - I trust that I will be able to refer to the case of Priaulx v. Westminster Bank Limited which was held in this Court. The decision was given on the 9th July, 1951 - there is, in fact, no reference to this (I must make that clear) in our statement to the Court.

THE PRESIDENT: What is the name of the appellant?

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

ADVOCATE RANDELL: Priaulx.

MR. P.H.R. BRISTOW: That was a decision of the Royal Court?

ADVOCATE RANDELL: That was a decision of the Ordinary Division of the Royal Court, yes, and it is reported in the Book of Amiraute, page 604. This was a case where the defendants had entered a defence (exception) of prescription; they had also entered two "pretensions" or allegations; they had also entered two "neances" or denials. Now, Sir, it is quite clear from the record of the Court that, on that occasion, the Court dealt as a preliminary point with the question of prescription, which it upheld and admitted, and it did not go into the other defences which were raised by the defendants at the time. It was dealt with purely on the basis of prescription - this particular point which we are dealing with this morning.

THE PRESIDENT: What was the nature of the plaintiff's case?

ADVOCATE RANDELL: In that case it was alleged that over a period of years, 1922 to 1927, the Bank had, in fact, made errors in his statement of account - they had debited him with cheques which he said he never signed and issued, and the matter was before the Court in 1951, and the Court quite clearly ruled that as he had left this from 1929 to 1951, it was too late to do anything about it.

MR. J.G. LE QUESNE: Did the Court deal with the prescription point first?

ADVOCATE RANDELL: Yes, and, indeed, only with that point.

MR. LE QUESNE: Did they deal with this point first because they thought they were bound to do so or because they thought in that case it was the convenient thing to do?

ADVOCATE RANDELL: Sir, I must not put words into the mouth of the Court ...

MR. LE QUESNE: That does not appear from the report?

ADVOCATE RANDELL: It does not appear from the report. I would have said because that was the established practice which had been done for many years. Indeed, the learned Bailiff referred to this - I was going to call your attention to this at page 31, Sir - the last two paragraphs in the transcript; the learned Bailiff says:-

> "Now it is if not the law then certainly a long established practice in the courts of this Bailiwick that where Prescription is set up as a defence or one of several defences to an action, that question should be settled first and certainly before 'contestation de cause'".

In other words, before entering into the merits of the thing. That was said by the learned Bailiff - but nevertheless, he did say that, in these circumstances, he thought it would be better to go into the merits, as you will have seen from his judgment.

MR. P.H.R. BRISTOW: In the Priaulx case, presumably the Court was dealing with it on written pleadings?

ADVOCATE RANDELL: Yes Sir.

MR. BRISTOW: And no question, for example, of lack of "bonne foi" was raised by way of reply in answer to the case of prescription?

ADVOCATE RANDELL: That is correct.

MR. BRISTOW: So that on the face of the written pleadings the Court would have been in a position to say: "Well, we can deal with this simply by doing a bit of arithmetic and without having to go into any facts at all"?

ADVOCATE RANDELL: That was so in that case, yes Sir.

MR. BRISTOW: And it would be clear, would it not, that the only type of prescription you would be dealing with was the "extinctive".

ADVOCATE RANDELL: Yes, Sir. Sir, there is further -

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

(At this point the respondent, Mr. Vaudin, rises to address the Court).

THE PRESIDENT: You will have your opportunity later, Mr. Vaudin, to reply ...

ADVOCATE RANDELL: Further authority for our proposition on that particular point occurs in Terrien; it is, in my edition, page 334 - Book VIII, Chptr. xxix; here he is dealing with "exceptions peremptoires" -

> "Les Exceptions peremptoires sont perpetuelles, pource que tousjours ont lieu, et resistent au demandeur, & periment sa demande comme allegation de payment, & autres. Lesquelles se doivent proposer après la cause contestée, si elles ne sont telles qu'elles empechent l'entree du procez; qu'on peut auffi nommer fins de non recevoir; comme sont prescription, serment, sentence, & transaction; quae vocatur exception is litis finitae",

which we have indeed suggested. A translation to that is as follows - it is in Appendix A, Sir.

> "There are two kinds of 'exceptions' or defences. Some are dilatory others peremptory ...
>
> Peremptory exceptions are perpetual because they can always arise" ...

MR. J.G. LE QUESNE: What does that mean, Mr. Randell?

ADVOCATE RANDELL: Sir, I think what he means by "perpetual" is that they can at any time be put in by the defendant; they do not cease to have effect after the passage of years. They are always available to the defendant. He is distinguishing there between those which are "temporelles" and those which are "Perpetuelles ...whether he makes the distinction absolutely clear ... the actual Chapter starts:-

> "Il y a deux manieres d'exceptions ou defences. Les unes sont dilatoires, les

> autres peremptoires. Les dilatoires sont fins de non recevoir, ou de non proceder: lesquelles sont temporelles, & se doyuent proposer devant la contestation; & d'icelles, les unes sont declinatoires de jugement: comme incompetence de Juge, ou litispendence: les autres sont dilatoires du payement, comme quand on demande devant le terme".

MR. LE QUESNE: Is not what he is saying a little different from Gallienne? As I understood from your reading, he was saying that dilatoires exceptions were to be brought "devant la contestation", and, in the passage which you actually quoted, does it not say "perpetual exceptions" must be taken "après la cause contestee"?

ADVOCATE RANDELL: Yes, I think in this instance he says "Lesquelles se doyvent proposer aprés La cause contestee, si elles ne sont telles qu'elles empechent l'entree du procez" - unless they are such which would stop the proceedings.

MR. J.G. LE QUESNE: Yes, I see.

ADVOCATE RANDELL: I do not think that there is really any conflict there with Gallienne, Sir. There is indeed a further reference in Laurent Carey, who was also a commentator on Guernsey procedure and so on. It is in his "Essai sur les Institutions Lois et Coutumes de L'Ile de Guernesey", and at page 207, at the top of the page, dealing with the paragraph entitled "Des Prescription":-

> "Prescription qui est une des meilleures fins péremptoires, est une exemption ou décharge de payer ce qui est dû, laquelle le detteur acquiert par la négligence du créditeur qui a négligé de demander sa dette dans le temps et de la manière ordonnée par les lois."

I mention that because it is one of the authorities which do have some bearing on this and, in fact, was quoted to the learned Bailiff at the last hearing, but I quote that really to show that there is this question, that it is a defence if you can show that the plaintiff has

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

neglected to do what is necessary within the time required by the law.

MR. P.H.R. BRISTOW: That, again, of course, in the Laurent Carey quotation would relate solely to "prescription extinctive", would it not?

ADVOCATE RANDELL: Yes Sir.

MR. BRISTOW: There is no question of acquiring title - it merely deprives the creditor of his remedy?

ADVOCATE RANDELL: The creditor, that is so, Sir; that, as you so rightly say, deals particularly with the question of "prescription extinctive"

MR. BRISTOW: Does the question of "prescription acquisitive" arise at all unless one is dealing with what title is created?

ADVOCATE RANDELL: I think not as although they are founded on the same premise, the same period of time, they are, in fact, quite separate and distinct. I would submit and I would repeat, I think all one has got to deal with here is whether or not the plaintiff was in time. One has not got to decide whether somebody else has acquired a title, better title or any title at all - it is purely a question of "is the plaintiff in time?". Questions of title, succession to property, questions of whether the persons who have been dispossessed have been so for more than 20 years; whether this is "de bonne foi" and peacefully and so on; whether there has been any action by the plaintiff to interrupt that peaceful possession - I do not think that those points apply at all in this matter which you have before you this morning.

MR. BRISTOW: You would submit where one has to deal with questions of title to land, "prescription extinctive" may solve the problem completely without the Court having to consider whether the defendant has acquired title by "prescription acquisitive" at all?

ADVOCATE RANDELL: Yes Sir I would submit that is so. This is one of the preliminary points, in my view, which can decide the matter between the parties; it may not decide ancilliary matters as to who has got good title or better title but

it is a preliminary point which can put to an end the whole of the matter between the parties before the Courts.

MR. BRISTOW: If this is right, in what circumstances would the defendant need to rely on "prescription acquisitive" at all?

ADVOCATE RANDELL: It could be in a number - the first is one which comes to me almost straight away - it is whether he, in fact, has acquired a good title; that may sound too simple but it may be that somebody else is claiming the property (not necessarily the plaintiff) who is out of time; it may be there is some other dispute, and so on. You may get questions of prescription acquisitive arising if a man has without let or hindrance enjoyed a right of way to which he, in fact, had no original title, for 20 years and so on. I do not think the question of "prescription acquisitive" has any bearing on this particular point which I submit is before the Court now.

I do not think it is necessary to say the Hamons and thus the Mesneys have acquired good title which has extinguished Vaudin. We are merely saying he has brought these proceedings too late. I do not know if I have answered the point ...

MR. J.G. LE QUESNE: The usual thing for a defendant to rely on would be to bring a counter-claim, Mr. Randell - not only resist the plaintiff's claim, but counter-claiming to establish his own title?

ADVOCATE RANDELL: Yes Sir - in fact that was one of the limbs of the defence which was propounded before the Court of Sark.

MR. LE QUESNE: You did put that?

ADVOCATE RANDELL: Yes, Sir, we made as I said earlier a very broad based defence to it. One aspect was that he was too late; the others were that our client had acquired good title, and another was that he was incorrect in law. In any case, he was not entitled to the property and that it was our clients' through the Hamons - they were entitled to it - or, indeed, it could be somebody

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

else. It was as broad based as that. It was used in the Court of Sark as a counter-claim that he was entitled to the property.

Perhaps I might deal in some measure with some of the contentions put forward by the respondent this morning that you have before you.

We agree that there is no doubt that "la mort saisit le vif". You get an application of that in England where on the death of the Sovereign it is said "The King is dead, your Majesty". It is instantaneous - and that is so, but we can't agree that the plaintiff was entitled to the property on the death of Mary Elizabeth Vaudin. It was one of the first points in dispute. It will be necessary, subject to the outcome of these proceedings, to go back to the Sark Court eventually if we did not succeed today, to determine this and other points. We cannot see because merely he says he was owner on the death of Mary Elizabeth Vaudin in 1938 that he cannot be said to be too late to come to Court. The argument in our view is that even if he were (which is disputed) the rightful owner on the death of Mary Elizabeth Vaudin and has done nothing about it for over 20 years the fact that he inherited it on that day does <u>not</u> prevent the defence of prescription being raised.

We are not saying before you today and we adduce no argument before you today that we have ourselves acquired a prescriptive title, because we do not consider that that is in point. We are merely deciding on the time factor; what is being said and is being contended, is that the defence of prescription must be settled first. We are contending that even if the property did devolve upon the respondent on the death, he cannot now be heard to come to the Court after considerably more than 20 years and for the first time assert his rights to the property.

It is not, in my view, necessary for the Court this morning to decide whether Vaudin, or Mr. Hamon, or the Mesneys, have good title - we are merely concerned with the time factor.

Dealing with the second contention, one has to examine, in my view, the plaintiff's original statement of claim. What was he trying to do? He was saying that he ought to have received the

property on the death of Mary Elizabeth Vaudin. This, as I indicated earlier, is his starting-point, and, therefore, any calculation based on prescription must arise from that date as it was indeed found by the Court of Sark to be the 19th September, 1938. In spite of the learned Bailiff's remarks, we submit that one is therefore led to the calculation that, if the plaintiff has taken no action to assert his rights by the 19th of September, 1958, so far as the 20 year period is concerned he is barred by prescription. In this case he has never, either in his pleadings, or, indeed, in his addresses to either of the courts below, asserted that he took some action to do so before 1958 - because, of course, so far as can be ascertained, he did not, in fact, do so. No action was taken until the summer of last year. He has referred in his authorities to Laurent Carey, and he speaks of these various phrases ... "empeche d'agir". We suggest that means that the person must be under some legal disability, such as being a minor, being under guardianship or receivership. There is no suggestion of that in his petition, and there is this expression, again on page 207:-

> "Elle ne court contre qui est empêché d'agir ou qui est ignorant de son droit au moyen de fiction ou de déception dont on aurait usé envers lui".

If we deal with the question of "au moyen de fiction ou de deception" we maintain that here, Laurent Carey is speaking about fraud. There is no doubt that, in this island and in Sark - and I do suggest universally - fraud has to be specially pleaded. There is no mention of fraud in his original action. There is some authority for that argument in Volume I of the Orders in Council -

MR. P.H.R. BRISTOW: Before you get to that - again because of the procedure in the Sark Court, thinking of this purely in terms of pleading at the moment, there was no opportunity to plead fraud was there?

ADVOCATE RANDELL: Well Sir, I would maintain, and my colleague will also maintain, if he in fact contends that there was fraud in the matter, that should have been spoken of immediately in his original petition.

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

MR. BRISTOW: Thinking of the normal pleading pattern, would it not take this form? - he would say "I am there - I am entitled to possession". The defendant says "Prescription", and fraud would be pleaded by way of reply to the defence of prescription, would it not, if one was following the ordinary written pleading patterns in this Court, in the Royal Court in Guernsey, or, indeed, in the Courts in England and anywhere else in the world?

ADVOCATE RANDELL: Sir, I would, in fact, have gone further than that and said that it should be alleged originally in his statement of claim.

MR. BRISTOW: Be that as it may, were there any suggestions made before the Sark Court in the arguments that there was anything amounting to deception, or anything like that?

ADVOCATE RANDELL: My recollection of this - and, of course, there is no written transcript of that, Sir - and I stand here possibly to be corrected - I think my colleague will support my evidence - is that at the stage of the hearing before the Sark Court, the plaintiff said that he had had some difficulty in establishing his relationship to the deceased, and so on and so forth, but he had written to the Dame of Sark asking for her assistance and so on; there was no suggestion then that he had been deceived by the defendant or anybody had done any act, in his original address to the Sark Court which had prevented him from finding out. There was some reference to that, as you may have seen when the matter came before the Bailiff. In this connection, I think that it is permissible to me to mention the fact that none of these aspects of the matter of the failure of the family council which, you will have noticed, acted in these matters, are referred to at all by the Bailiff, so I can only assume from that that in fact he found they were not relevant; if he had considered them relevant, I have no doubt he would have referred to them and doubtless put some emphasis on them and gone to some length to say he thought the matter ought to be gone into more fully in the Sark Court and if he had those matters in his mind which came up, not at the original hearing but subsequently, I can't understand why he dismissed them from his mind and omitted them from his judgment.

But to go back to the original point, our contention is that there was no serious allegation in Vaudin's address to the Court of Sark that he had been deceived or cheated or fraudulently kept out of the property.

MR. BRISTOW: Bearing on "bonne foi"?

ADVOCATE RANDELL: Yes, Sir; he did say he had difficulties in establishing his claim, that was all. I do not know whether you would want to refer to it in Volume I of the printed Orders in Council in the Loi relative aux Preuves, which was registered here on the 8th July 1865, at Article 37.

MR. J.G. LE QUESNE: Which page?

ADVOCATE RANDELL: 429, Sir:-

> "La bonne foi est toujours présumée, et c'est à celui qui allègue la fraude à en faire la preuve, bien entendu que pour que cette preuve soit recevable, il faut que l'allégation de fraude soit formulée en termes exprès."

That, I submit, is the position here. If, in fact, he was going to allege some form of fraud, deception, deceit, this should have been right at the beginning in his petition. There is, of course, none in the petition.

Sir, those are the points and contentions which we ask you to take into consideration. I have no doubt my friend will tell you that he will support these contentions, and possibly he may like the opportunity of emphasising or stressing some point which perhaps, I have not dealt with sufficiently for the assistance of the Court.

MR. J.G. LE QUESNE: First as regards the question of procedure - whether the element of prescription has got to be dealt with in advance of consideration of the merits - I recognise what is said in the authorities, I am not very much captured myself by the idea of making the procedure of this Court as such an immutable rule of law. Would it be sufficient for your purpose if the position were that it was a matter for the Court to decide in its discretion in each case in which

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

prescription is pleaded whether it is to be dealt with at the outset, or whether it is to be left until later? If that were right, would it be possible to say in this case the Seneschal in his discretion did decide to deal with prescription as a preliminary point, and there is no ground for saying he exercised his discretion wrongly? Is that sufficient for your purpose?

ADVOCATE RANDELL: Yes, I think it would be, Sir. In spite of considerable research by myself and my colleague, we have been unable to find anything more definite than the authority which I have quoted to you this morning which says that the Court must decide on this precise point before anything else. We suggest that the authorities are no doubt in our favour - I can speak as to that - but there is nothing, in fact, in the research which we have done to conclude that there has been anything which would conflict with the view which you have expressed, that the Court may well have a discretion in the matter.

MR. LE QUESNE: Another point I wanted to ask was about your contention that the period of twenty years must run from the death of Miss Vaudin in 1938.

ADVOCATE RANDELL: Yes Sir?

MR. LE QUESNE: I find that a little hard to understand. May I put to you a hypothetical case. Suppose a man dies leaving a house, and after his death the property stands vacant - it is not claimed by anyone - and 30 years later a man comes along, the property still being vacant, and starts an action for a declaration of his title to it. You say he is barred by prescription?

ADVOCATE RANDELL: I am wondering, with great respect, whether, in fact, your question goes far enough; in the ordinary way it would not be necessary for him to get a declaratory action - it is something which we are not familiar with here. As to his title to the property, presumably he would only bring it on the basis that somebody else had usurped him?

MR. LE QUESNE: Let us suppose the property stands

vacant after his death for 25 years and then an interloper goes in, then somebody comes along five years later, 30 years after the death, and says, "I am the rightful heir to this house" and starts an action to turn the squatter out, is he barred by prescription?

ADVOCATE RANDELL: I think that there, Sir, the position is a little bit different, because he has, in fact, been the owner for 25 years and nobody else has been owner or in possession or anything else. He cannot then be said to be divested of rights which are greater than those of the squatter.

MR. LE QUESNE: I should have thought you see myself that the period of prescription would begin to run not from the date of death, from the time the rightful heir's right of action arose. That, I would have thought, was the date at which somebody else started to exercise or claim rights over the property?

ADVOCATE RANDELL: Sir, I think my answer to that must be that, if, in fact, he inherited from the date, he must do something to assert his rights within that time. The law has stated he becomes owner on <u>that</u> day; if he has done nothing for 25 years, as you suggest, irrespective of whether anybody else has obtained title I think that he has done nothing to assert <u>his</u>, and, in those circumstances, I think it is possible the prescription could run against him.

MR. LE QUESNE: Even though the property had simply been standing vacant?

ADVOCATE RANDELL: Yes, Sir, I think this is a possibility.

MR. LE QUESNE: You say, do you, that it is not simply a matter of his neglecting to enforce his right of action - you say extinctive prescription is based upon his failure to do anything to assert his own title. If so, the position in matters of real property is different from the position in other types of action?

ADVOCATE RANDELL: Yes, Sir, that could probably be so, Sir, but I think here, if I might with great respect suggest it, your hypothetical question is

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

confusing the issue. We are suggesting this morning, not that the respondent has lost title to the property, because he has done nothing; we say that now, when he comes to the Court to do something, he is too late to do so, which I would distinguish from the two things --

MR. LE QUESNE: Yes, but supposing the view you were putting today, supposing for a moment that is wrong. Suppose that the period of prescription runs from the time when somebody else started to assert rights over the property, is there anything before us to say when that happened?

ADVOCATE RANDELL: No, Sir, only to the extent that, in the original petition, he says --

MR. LE QUESNE: It is the first prayer of the petition, is it not?

ADVOCATE RANDELL: He refers, Sir, to the property being "mal attribuée".

MR. LE QUESNE: Yes.

ADVOCATE RANDELL: At that date.

MR. LE QUESNE: That is the only material before us, is it not, to show that anything happened in 1938 - indeed, I think the only material before us to indicate at all when anybody first began to exercise rights over the property after Miss Vaudin's death?

ADVOCATE RANDELL: Yes Sir. He, in fact, says - I quote from the petition:-

> "Following the succession of Mary Elizabeth Vaudin who died in 1938 the property because of lack of enquiry as to his existence was attributed to the late John Hamon".

Then he goes on in the prayer of his petition to ask the Court to declare that the property has been "wrongly attributed". One can only say "wrongly attributed" as from the death of Mary Elizabeth Vaudin, to which he refers there in paragraph 1 and which is the essence of the thing. He says: "In 1938, because of lack of enquiries about my whereabouts, the thing was

wrongly attributed to somebody else". It can only be related to that date.

MR. LE QUESNE: If I could put something extra onto what I was saying before: ... when the old writers talk about "extinctive prescription", it seems to me that what is being "extinguished" by prescription is the right of action; is that right or wrong?

ADVOCATE RANDELL: I would say yes, Sir.

MR. LE QUESNE: If so, does it not necessarily follow that it is from the accrual of the right of action that the period must begin to run?

ADVOCATE RANDELL: Yes Sir.

MR. LE QUESNE: In that case, do you say that merely by succeeding to property which remains vacant because nobody claims any right over it, a man acquires a right of action?

ADVOCATE RANDELL: Yes, Sir, if he comes to the court and says that he wants a declaratory judgment, or wants to oust somebody else in occupation.

MR. LE QUESNE: Oust somebody else, certainly; suppose there is nobody else to oust?

ADVOCATE RANDELL: That does present something of a problem.

MR. P.H.R. BRISTOW: He could not come to court at all and need not come to court at all, unless there is a defendant?

ADVOCATE RANDELL: No, Sir.

MR. BRISTOW: When you are thinking in terms of a right of action, you are not thinking "at large" -- you are thinking in terms of "a right of action against X"?

ADVOCATE RANDELL: In this case, against "John Hamon because the property was wrongly attributed to John Hamon on the death of Miss Elizabeth Vaudin".

THE PRESIDENT: Have you been able to find any authority at all which would clearly show that

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

the Common Law of Sark (which I take to be the Common Law of Guernsey) had considered the question of "extinctive prescription" in relation to real actions at all? Does it not all stem from the maxim "possession quadregenaire pour titre"?

ADVOCATE RANDELL: Yes, Sir.

THE PRESIDENT: Could you find anything to suggest that it was considered in the light of the Statute of Limitation? I have always understood the doctrine of limitation evolved from the Roman doctrine of "usucapion".

ADVOCATE RANDELL: Yes.

THE PRESIDENT: I don't know of any old authority which would clearly establish that a distinction was drawn between these two conceptions. I think I am right in saying that, if you look at the French Civil Code, this is dealt with in two articles, one that deals with acquiring title by possession, and another that deals with extinguishing a right of action. Does not Pothier, in fact, deal with both, but attributes a different reason to each of them, the extinguishing prescription being developed from the dislike of a negligent creditor to punish him for his own negligence by telling him he is out of time. Do you know of any old authority which would show that there was recognition of these two, as I say, different conceptions of prescription?

ADVOCATE RANDELL: No, Sir, we have been unable to find any.

THE PRESIDENT: You have, of course, referred to two Orders in Council. In relation to one of them - the early one in the nineteenth century - there is no reference to "good faith"?

ADVOCATE RANDELL: Indeed, Sir, no. I think one can distinguish this, Sir, in both Orders in Council; they say "that, in future those actions which would be prescribed by a certain period would be prescribed by a lesser period", but it is only, in my submission when we are dealing with "prescription acquisitive" that there is reference to "bonne foi". Both first sentences are almost the same, and, in the later one, - in

1909 - it continues:-

"... et suffira la tenue de vingt ans, bien entendu qu'elle soit de bonne foi, pour titre compétent en matière héréditale".

It is in that one where you get those extra words: "bien entendu qu'elle soit de bonne foi" dealing with acquisitive prescription as opposed to the "extinctive", and that, I think, is the distinction between the two laws.

MR. J.G. LE QUESNE: The Common Law of Sark is not different from the Common Law of Guernsey, Mr. Randell?

ADVOCATE RANDELL: No Sir - I would say the Common Law of Sark and the Common Law of Guernsey were the same - the old authorities, Terrien, and so on, would be equally applicable to Sark and to Guernsey. Sark has undergone less change in its Common Law by statute and so on, than has Guernsey Law, but I would suggest that both stem from the same identical source.

THE PRESIDENT: Would you regard Basnage as an authority on the laws of Guernsey?

ADVOCATE RANDELL: Basnage is quoted from time to time in Guernsey and is quoted here as a persuasive authority and has not received the approbation that Terrien has. In fact, Le Marchant deals with the various passages in Terrien and he tells us, having written in 1826 (I think it is) all those portions of Terrien which have been considered for many years to be appropriate and binding in the law of Guernsey. Basnage has not received the same treatment. It is from time to time quoted, sir, but with less weight - purely as a persuasive authority; but Terrien, I would suggest, is the law of Guernsey.

MR. P.H.R. BRISTOW: Would you regard it as having any significance at all in relation to this problem, that the English Limitation Act has always drawn a distinction between the effect of the limitation period in relation to land and other things; in relation to other things it is only your remedy that is barred - in relation to land, you are divested of your title?

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

ADVOCATE RANDELL: As far as I understand it to be the position, I do not think there is any distinction so far as we have been able to find, in the law of Sark or the law of Guernsey. I was aware, in fact, as you say, that both remedy and right are barred in relation to land in England. Here I do not think there is any distinction which we have found in the authorities. I understand the position in England is regulated by statute.

MR. BRISTOW: Certainly.

ADVOCATE C.K. FROSSARD: I do not propose to address the Court on the arguments which have been put forward by my learned friend, but perhaps I might say, to help Mr. Justice Bristow who was asking questions about written pleadings, that the position in Guernsey is that every summons, which is a complete statement of claim, sets out everything the plaintiff is alleging when that is tabled before going on the Pleading List, and then, when it comes up "á tour" the cause is read and written defences are submitted by the defendant. They include everything - various forms of "exceptions" - "exceptions de fonds" - pleas in bar on a legal point; "exceptions de forme" which really try to seek further information from the statement of claim - it is another method of obtaining further and better particulars. At the bottom of the defences you get "neances" which are denials, and "prétentions" which are allegations made by the defendant.

MR. P.H.R. BRISTOW: Allegations amounting to what we would call confession and avoidance?

ADVOCATE FROSSARD: Confession and avoidance.

MR. BRISTOW: Allegations also amounting to objections on a point of law?

ADVOCATE FROSSARD: Objections on a point of law would not be "prétentions"; they would be "exceptions de fonds". There are no further written pleadings at all.

MR. BRISTOW: There is no "reply"?

ADVOCATE FROSSARD: There used to be; in fact you read in Le Marchant that there can be "Propos;

duplique and replique". They are never used. It raises the question, how could a defendant bring it forward, or how could Mr. Vaudin do so in a plea of prescription? There would be no method of bringing it forward. He would have to allege fraud to begin with. There is no method of written pleading that I know of replying in writing except "duplique and replique and propos", which are lost in the mists of antiquity.

MR. BRISTOW: Once you have raised the issue of prescription by way of defence, if the plaintiff wants to say "fraud", what he has to do is to do it by way of confession and avoidance to the plea of prescription by saying: "Certainly the time has run on the face of it, but the court must not treat the time as having run, because it has run because of the defendant's fraud". This he can't say until the plea of prescription is raised against him? This seems to create a certain amount of difficulty?

ADVOCATE FROSSARD: In his original statement of claim he would have to say that his action has been prevented from occurring due to fraud.

MR. J.G. LE QUESNE: Supposing he said in his statement of claim:- "The defendant has been in possession ten years. I want him turned out." Defendant says in his defence: "Oh, no, I have not been in possession ten years, I have been in possession thirty years". Supposing what the plaintiff wanted to say was that he had been fraudulently led by the defendant to suppose that he had only been there ten years, what is his opportunity to say it?

ADVOCATE FROSSARD: I think he had to say it in his original statement of claim.

MR. LE QUESNE: Supposing he had no idea until after pleading that there was any question of thirty years' possession?

ADVOCATE FROSSARD: I take the point, Sir, but unfortunately I can't answer it.

There is one other matter which I might be able to help Mr. Bristow on, indeed, it helps on one or two questions - can you take prescription first -

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

can you take an objection on a point of law first? The normal position is that one does take an objection on a point of law first - indeed, one has been brought up in the tradition that you must plead prescription first. Immediately the thing has gone on the "Rôle des causes à plaider", you say:- "It goes 'inscrite', but I am going to plead prescription". Normally, when it goes on the "Rôle", if there are no points of law to be taken, then the "appointement" is "Temoins ordonne" (witnesses to be heard). If there is a point of law which can be taken to begin with, this is argued on the spot or in a matter of days or weeks. There are occasions when a point of law can only be decided on fact, and there is then an "appointement" which, to my recollection, reads somewhat like this - I am reading it in French - I have written it down in French:-

> "Et seront les temoins de part et autre ouie. La Cour se reservant aux parties le droit de plaider toutes questions de droit après l'audition des temoins."

It could be .. I have never known it done regarding prescription, which is always taken first, clearly must be taken on a point of law .. that there are occasions when you can't decide a point of law until you have heard witnesses.

MR. A.H. VAUDIN (the Respondent) : Mr. President and Gentlemen, I would like to say that I have to conduct the case personally - it is impossible for me to get any legal assistance. I beg the Court for its indulgence if I make mistakes - I have no legal training - I put myself at the mercy of the court. I am going to read my case. I wonder if the Court would allow me to hand to the Court copies, so that the Court will be able to follow my case?

THE PRESIDENT: Certainly, Mr. Vaudin. (Copies of the Respondent's speech are handed to the Court).

MR. VAUDIN: To begin with, I submit with great respect that the "Loi relative à la Prescription Immobiliere, 1909" which amended the 1852 law, contains not only a new condition, but it embraces 2 different kinds of Immobiliere, namely:

1. IMMEUBLES FICTIFS, comme sont les rentes and

other things which are best described in Principes Generaux du Droit Civil et Coutumier de Normandie by Maitre Charles Routier in 1748.

2. IMMEUBLES REELS ET CORPORELS, comme Terres, Vignes, Prés et Maisons. Les Immeubles Réels et Corporels comprennent les Propres, les acquets et conquets.

a) LES IMMEUBLES PROPRES sont les Immeubles qui nous sont échus par succession.

b) LES IMMEUBLES ACQUETS OU CONQUETS sont les Immeubles qui nous adviennent par Conation ou Acquisition.

The first part of the Law which reads:

"à partir du 1er Avril 1909. Toutes choses Immobilieres, et actions réelles ou dependantes de la realite qui se prescrivent maintenant par le lapse de 30 ans seront prescrites par le lapse de 20 ans" is applicable to Immuebles fictifs and Immeubles acquets or conquets.

The second part of the Law which reads:-

"Et suffira la tenue de 20 ans, bien entendu qu'elle soit de 'bonne foi' pour TITRE Compétent en matiere héréditale" is applicable to IMMEUBLES PROPRES i.e. les Immeubles qui nous sont échus par succession.

Maitre CHARLES ROUTIER in "Principes Generaux DU DROIT CIVIL ET COUTUMIER DE LA PROVINCE DE NORMANDIE, page 47 says:

"Les biens Immeubles, ou censés Immeubles ont suite par hypotheque, et ils sont propres ou acquets".

LES ACQUETS, OU CONQUETS, sont les Immeubles, qui nous adviennent par Donation ou Acquisition.

Les propres sont les Immeubles qui nous sont échus par succession.

If it could be argued "with or without success" that because "Immeubles fictifs Immeubles Acquets

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

or Conquets fall under the first part of the "Loi relative Immobiliere 1909" "BONNE FOI" is not necessary pour TITRE COMPETENT, the same thing cannot be said for "Immeubles Propres" or to that effect for anything else related to "Matiere héréditale" because the law says:

> "Et suffira la tenue de 20 ans, et bien entendu qu'elle soit de BONNE FOI pour Matiere héréditale"

In view of this, I pray the Court will support my contention to the effect that for Matiere Hereditale "BONNE FOI" must be proved.

My action being an "Action Réelle Immobiliere Héréditale" cannot be prescribed.

(PRINCIPES GENERAUX DU DROIT CIVIL ET COUTUMIER DE NORMANDIE Page 366

> "L'action Reelle Immobiliere Hereditale est celle par laquelle le proprietaire d'un heritage la revendique des mains des possesseurs")

by time only. The person prescribing must show proof of his good faith during the whole period of twenty years. This is just what the Senschal did not exact from the appellants when judging the case.

The proof of bonne foi is absolutely necessary pour TITRE competent en matiere hereditale and the onus of proof is on the person prescribing.

Pothier tome 1X Traite de Droit De Domaine De Propriete, de la Possession et de la Prescription qui resulte de la Possession dit à ce sujet a la page 402 Art. 1V.

> "C'est à la verité, au possesseur à justifier du contrat ou autre acte qu'il pretend etre le juste Titre d'ou procede sa possession"

and in the same book he also says:-

> "C'est au possesseur qui oppose la prescription qui resulte de la possession trentenaire, a faire preuve de cette possession, suivant la regle du droit".

It was for that very reason, i.e. proof of good faith that many Coutumes rejected the 20 years period - for instance the Coutume d'Orleans and the Coutume De La Province de Normandie. Par Maitre Pesnelle page 674 "Nous rejettons la prescription de 10 ans entre presents et 20 ans entre absents, pour "Obvier Aux Contestations que Causent la preuve de la Bonne Foi et la qualité du Titre qu'exige cette prescription".

G. Baudrey - Lacantinerie - Doyen et Professeur de DROIT CIVIL à la FACULTE DE DROIT DE BORDEAUX and Albert Tissier, - Professeur Agrege a la FACULTE DE DROIT DE DIJON say in their TRAITE THEORIQUE ET PRATIQUE DE DROIT CIVIL DE LA PRESCRIPTION

> "La verité est qu'il n'y a pas de distinction à faire entre le droit de propriété et l'action en revendication; la prescription n'est possible contre l'un et l'autre que si un tiers a possédé pendant le temps requis et dans les conditions volues par la loi (1) Autrement on arriverait, à l'aide de la prescription extinctive de l'action en revendication, à proteger un possesseur qui ne reunirait pas les conditions exposées plus haut, qui possèderait a titre precaire, ou dont la possession aurait été discontinue; à moins qu'en ne préfère, en pareil cas, attribuer à L'Etat les immuebles dont la propriété n'a pas été perdue par leur proprietaire, ni acquise par d'autre. Dans tous les cas, il y aurait de grandes injustices. La prescription imaginée pour consolider la propriété aboutirait à des effets absolument opposes à ceux qu'on en attend.

The case of the appellants rests on a restrictive and in my submission an erroneous interpretation of the S.1 of the "Loi relative à la Prescription Immobilière" of 1909. They are in effect claiming that the Bailiff ought to have done what expressly he declined to do on the appeal which I lodged before him in this action, namely to follow the Court of the Seneschal of Sark: "in seeking to determine somewhat arbitrarily the date on which my cause of action arose, and thereafter by simple mathematical calculation to dispose of the action by arriving at a date 20 years thereafter, before which I had not asserted any claim to the Estate, or taken any action to evict a usurper."

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

It is my submission that questions relating to the defence of prescription cannot either by the custom or by the Statutes of these Islands in general and of Sark in particular, be determined by any purely automatic "mathematical computation".

The Guernsey "Loi relative à la Prescription Immobilière of 1909, insofar as it is in any way applicable to any claim under Sark Law, which by its very nature is an exceptional one, is certainly no stricter than the English Limitation Act of 1939. Even under the English Statutes, the limitation period for actions relating to land is subject to postponement on the grounds of fraudulent concealment or mistake (S.26 (a) and (b)).

In presenting my case it will be my submission that the Appellants are mistaken in claiming, as they do in their first contention, that my cause of action arises in fact at the date of death of Marie Elizabeth Vaudin on the 19th September 1938.-

The appellants second contention that an "exception peremptoire" must be pleaded and decided at the commencement of an action, before the merits of the case are considered, is not in issue. Indeed the learned Bailiff of Guernsey in his judgment of the 21st January, 1969 specifically affirmed that: "It is, if not the law, then certainly a long established practice in the Courts of this Bailiwick, that where prescription is set up as a defence or one of several defences to an action, that question should be settled first and certainly before "contestation de cause". This mentioned practice, I submit, can only take place when either ordinary, i.e. acquisitive OR extinctive prescription appears promptly and beyond argument.

TERRIEN at page 376 on Jugement de Non recevoir says:-

> Ce qui se fait d'autant qu'il n'apport promptement des dits fins de non-recevoir

which implies that the "Exception Peremptoire" must be visible without the shadow of a doubt. In this case the alleged prescription has got to be proved before my demand could be rejected.

My contention is that the Court of the Seneschal gave insufficient attention to the essentials in law that have to be met before a defence of prescription be it "acquisitive" or "extinctive" - can successfully be

raised to an action. I also submit that after having arbitrarily, and I contend, wrongly, fixed the date on which my cause of action arose at the date of death of Mary Elizabeth VAUDIN in 1938, the same Court held that the mere passing of twenty years from that time without my having asserted any claim automatically extinguished my right of action.

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

The Appellants third contention that all actions relating to real property are in any event prescribed by twenty years is, as I shall endeavour to show, based on a misinterpretation of Section 1 of the "Loi relative à la Prescription Immobilière of 1909", and that certain perquisites must exist before the prescription period can run.

It is my first contention that, both under the Custom of Normandy, and more particularly under the rules prevailing on the Island of Sark, I am still and have at all material times since the death of Elizabeth Mary VAUDIN in 1938, been the lawful owner of "Le Port à la Jument". It is my further contention that, given the nature of my action, I cannot be time barred in the exercise of such action, unless a prescriptive title is set up against me.

There can be no doubt on the facts of this case that I have better title to my ancestral home of Le Port à la Jument than the Appellant Mr. HAMON and his present successors in title. At the time of bringing my action before the Court of the Seneschal of Sark I was in a position to prove my title. In view of the very special rules relating to the ownership of land and to real actions both in Norman Law, and in the Sark Patente of 1612, I contend that the Seneschal's Court was wrong in ruling that I was time barred from arguing this point before them. I also submit that the present contentions of the Appellants, namely that the investigation of my title was of no relevance in determining the preliminary issue of "prescription extinctive", was wrong.

In other words the Seneschal was mistaken in not ruling that the onus of proof lay on the Appellants, and not on me to show that my action was barred under the "Loi relative à la Prescription Immobilière" of 1909. To raise the defence of "prescription extinctive", they must prove "prescription acquisitive".

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

The custom of Sark endorses the rule of Normandy law, "Le Mort saisit le vif" on which I contend I am able to rely. Laurent Carey defines the rule in the following terms: "Le mort saisit le vif; c'est une maxime de la coutume qui veut dire que la possession du mourant est continuée à son heritier sans aucune solemnité ni déclaration de justice, en telle sorte que la succession ne demeure vacante un seul moment." (Laurent Carey Inst. Guern. 143).

Pothier comments on this rule in the following terms:

> "Le sens de la règle 'Le mort saisit le vif' est - "le mort, c'est a dire celui que la succession "duquel ils s'agit, des l'instant meme de sa mort "naturelle ou civile, qui est le dernier instant "de sa vie, saisit, c'est à dire est censè mettre "en possession de tous ses droits et biens le vif, "son hoir plus proche."

Terrien is even more explicit in stating that:

> "Possession du mourant est continuée à son "heritier ... La maxime "Le mort saisit le vif" a "lieu en tout heritier tant 'active' que 'passive'". (Terrien Comm. 265).

In view of these authorities, and in view of the fact that the learned Bailiff accepted that I was the lawful heir of Elizabeth VAUDIN, the droit d'ainesse and the ownership of "Le Port à la Jument" vested in me. Once this is established (and it is my submission that the Court of the Seneschal ought to have investigated my claim) how could I lose the title of the property?

A right of ownership cannot, in my submission be extinguished by prescription on the grounds of non-user, neither can an owner in possession lose his right to assert his right of ownership.

I beg leave from the Court to quote an extract from "TRAITE THEORIQUE ET PRATIQUE DU DROIT CIVIL"

"DE LA PRESCRIPTION"

> Par G. BAUDRY - LACANTINERIE Doyen et Proffesseur de DROIT CIVIL à LA FACULTE DE DROIT DE BORDEAUX and ALBERT TISSIER Professeur AGREGE DE LA FACULTE DE DROIT DE DIJON.

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

592. Les droits rèels ne sont par tous susceptibles de s'éteindre par la seule inaction de leur titulaire; l'usufruit, les servitudes, l'hypothìque s'éteignent par la prescription (art. 617,706,2180). Mais le droit de propriété ne peut se perdre par le non-usage; la prescription acquise par une autre personne peut seule entrainer la perte de la propriété. Cette solution résulte d'ailleurs de l'art. 544C. civ.: le propriétaire a le droit d'user et d'abuser; il a le droit de ne pas user; les facultés qui se rattachent à l'exercise du droit de propriété ne peuvent s'éteindre par ce seul fait qu'elles n'ont pas été exercées (art. 2232). Dans tout les cas ou la prescription acquisitive n'a pu s'accomplir, le droit du propriètaire ne s'est pas éteint.

Si le droit n'a été acquis par personne, on ne saurait: comprendre que l'action soit perdue, indépendamment du droit lui méme. L'action en revendication ne s'éteint pas par le non-usage ou le non-exercice; le seul fait de ne pas posséder ne donne pas ouverture à l'action en revendication, tant que la possession exercee par un tiers n'apporte pas une atteinte au droit due propriétaire; l'action en revendication ne fait donc pas l'object d'une prescription séparée, car elle ne fait pas l'objet d'un droit, distinct du droit de propriété qu'elle sanctionne et protège; elle n'est autre chose que le droit poursuivi en justice, le droit exercé judicairement.

La vérité est qu'il n'y a pas de distinction à faire entre le droit de propriété et l'action en revendication; la prescription n'est possible contre l'un et l'autre que si un tiers a possédé pendant le temps requis et dans les conditions voulues par la loi (1) Autrement on arriverait, à l'aide de la prescription extinctive de l'action en revendication, à protéger un possesseur qui ne réunirait pas les conditions exposées plus haut, qui possèderait à

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

titre précaire, ou dont la possession aurait été discontinue; a moins qu'on ne préfère, en pareil cas, attribuer à l'Etat les immeubles dont la propriété n'a pas été perdue par leur propriétaire, ni acquise par d'autre. Dans tous les cas, il y aurait de grandes injustices. La prescription imaginée pour consolider la propriété aboutirait à des effets absolument opposés à ceux qu'on en attend".

As to the question as to whether non-user extinguishes a right, Pothier writes:

"Enfin nous perdons sans notre consentement et "même à notre insu le domaine de propriété "d'une chose qui nous appartient lorsque celui- "qui la possède vient à l'acquerir par droit de "prescription. Aussitot que ce possesseur a "par lui ou par des auteurs, accompli le temps "de la possession requis pour la prescription "la loi qui a etablie la prescription ou prive "de plein droit du domaine de propriété que nous "avions de cette chose et le transfer à ce "possesseur. Au reste nous ne perdons pas le "domaine de propriété d'une chose pour cela seul "que ou nous avons perdu la possession, et "quoique nous ignorions absolument ce qu'elle "est devenu." (Pothier, Traite de Droit de Propriété 276,277).

This question was discussed by the distinguished French author Marcel Planiol in his "Traité de droit civil" Vol.1 s.2446, who adopted a critical attitude to Article 2262 of the French Civil Code - an article which made "action en revendication" subject to "prescription extinctive". Relying on the constant traditions of Pre-revolutionary French Law he writes:

"Si nous supposons qu'un proprietaire d'immeuble "laisse son bien aux mains d'une autre personne "pendant de longues années, il pourra sans doute "perdre sa propriété par l'effet <u>d'une "prescription acquisitive</u>, si le possesseur de la "chose remplit les conditions voulues pour "l'usucapion et s'il a possédé pendant le temps "necessaire. Mais si ce possesseur, pour une "cause quelconque, n'a pas pu acquérir la "propriété, il n'y a pas de raison pour faire "échouer la revendication dirigée contre lui. "Le fair que le propriétaire est resté plus de "trente ans sans se servir de la chose est par "lui-meme incapable de lui faire perdre son

"droit, tant qu'il n'y a pas ou usucaption "accomplie par un tiers, la propriété peut donc "etre déplacée par l'effet de la prescription; "Elle ne peut pas etre perdu purement et "simplement. (Cass.12 juillet 1905, D.1907. "I.41, Pet. S.1907, I.273). On exprime ce "résultat en disant que la propriété, à la "différence desautres droits réels, ne se perd "pas par le non-usage. Par conséquent, la "revendication doit triompher, même après plus "de trente ans d'abandon, tant que l'adversaire "n'a pas lui-même acquis la propriété. Le "texte de l'article 2262 est donc trop absolu "et doit être rectifie. Cette correction se "fonde sur la tradition constante du droit "francais.

The Bailiff, Sir William Arnold said at the hearing of my appeal to Advocate Randell that Good faith is regarded at least in the Law of Normandy as Distinct from the Roman Law as being paramount in a matter of possession, because you can't acquire with bad faith, however long you are in possession.

In the present case, the learned Bailiff took the view that the defence of "prescription extinctive" could not be raised to my right of action unless the present Appellants were able to set up a title based on "prescription acquisitive". In this, although the authorities do not appear to have been cited before him, he was following Pothier in refusing to sever the question of "prescription extinctive" from that of "prescription acquisitive". It is my submission that the learned Bailiff was right in law in reversing the decision of a Seneschal's Court which had failed to investigate the present Appellants title.

I should now like to turn to the second limb of my case which concerns the interpretation placed by the Appellants on the wording of Section 1 of the "Loi relative à la Prescription Immobilière 1909.

This section 1 specifies that:

"With effect from the 1st April, 1909, all "realty and actions or those relating to realty "which are now prescribed by thirty years shall "be prescribed by a lapse of twenty years, and " possession for twenty years shall give good "title in matters of realty, provided such "possession is in good faith."

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

It is clear that the section, applying both to the prescription of realty and of real actions, covers the case of "prescription acquisitive" and "prescription extinctive". In the "Principes Généraux du Droit Civil et Coutumier de la Province de Normandie" par Maitre Charles Routier - Avocat au Parlement de Rouen 1748, pages 566-567 it is said:

> "L'action réelle, est celle en vertu de "laquelle le propriétaire d'une chose "Mobiliaire la revendique par trout ou il la "trouve; L'immobiliaire est celle par "laquelle le propriétaire d'un heritage "revendique des mains des possesseurs ou tiers "detenteurs dans les quarante ans."

The action which is now the subject matter of this appeal is an "Action Reélle Immobiliaire Hereditale".

In addition to fixing the prescription period at twenty years, the section of the law now in force in the Bailiwick specifies that in the case of "prescription acquisitive" (i.e. "Possession with good faith shall give good title in matters of realty") the party raising the defence of prescription must be in "good faith". Being given that my contention to the effect that the ownership of "Le Port à la Jument" vested in me automatically - or "entirely and directly" to use the words of the Patente of 1612 - was never denied successfully in the court of Sark or in the Royal Court.

To follow the evolution of the twenty year prescription period one must turn to the preambule of the "Loi relative à la Prescription Immobiliere" which describes the position in the following terms:

> "1. By the ancient law of Normandy, which was "still in force in 1851 within the Bailiwick "of Your Majesty's Island of Guernsey, the "Period required for prescription in matters "concerning realty was forty years.
>
> "2. That the said period of forty years was "reduced to thirty years by a law entitled "De "la prescription immobiliere" sanctioned by Her "Late Majesty in Council on the 15th day of "March 1852, registered on the records of that "island on the 15th day of March 1852".

It follows from this text, and indeed from the text of the Statute of 1852 itself, that the Law did not in any way affect the essential nature of the forty years prescription under the Old Custom of Normandy. It merely varied the duration of that prescription period, first from forty to thirty, and subsequently from thirty to twenty years. This prescription period as I have already said was rejected in the Coutume de Normandie, because as Pesnelle says "Nous rejetons la prescription de 10 et de 20 ans pour obvier aux contestations qui causent la preuve de la "BONNE FOI" et la qualite du "TITRE" qu'exige cette prescription. This, I submit, is a proof that the Seneschal was wrong in not examining all the points before adjudging that my action was prescribed.

To ascertain the circumstances in which prescription would occur under the Statutes of 1852 and 1909 it is my contention that one must, as the preambule to the Law of 1909 indicates, look back to the ancient law of Normandy as applied prior to 1851 in the Bailiwick of Guernsey.

Article 60 of the Coutume de Normandie as explained in "Principes Generaux de Droit Civil et Coutumier De la Province de Normandie" par Charles Routier Avocat au Parlement de Rouen 1748 page 485.

"Chacun est recu dans les quarante ans a "demander par action de loi apparente, à être "proprietaire d'héritage qui lui appartient, ou "qui a appartenu a ses predécesseurs, ou autres, "desquels il a le droit, et dont lui et ses "prédécesseurs ont perdue la possession depuis "les dites 40 années."

Here I am able to rely on the weighty authority of Laurent Carey who, writing with particular reference to the Custom as applied within the Bailiwick of Guernsey to the forty year prescription period, says:-

"Prescription ou la terms paisible pour quarante "ans suffit pour titre competent en toute "justice de quelconque chose que ce soit. <u>Elle "ne court</u> contre qui est émpéche d'agir, ou qui "est ignorant de son droit au moyen de fiction ou "de déception dont en aurait usé envers lui.

It is my contention that from the wording of the text itself, this rule applies both to "prescription

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

extinctive" (prescription) and to "prescription acquisitive" (terme paisible). This must be the case, otherwise the words "Elle ne court pas contre qui est èmpêche d'agir, ou qui est ignorant de son droit" have no meaning. I submit there is no conflict between the Old Custom of Normandy and between the Loi of 1909 insofar as the requirements (as opposed to the time) for prescription is concerned.

Where the defence of a "prescription extinctive" is raised, the Court must ascertain whether the party against whom time is alleged to run has been prevented from acting (èmpêche d'agir), and has, moreover been kept in ignorance of his rights by means of misrepresentation or deception. (ignorant de son droit au moyen de fiction).

> POTHIER. Traité du Droit de Domaine de Propriété, de la Possession et de la Prescription qui resulte de la Possession P.359 Para. 22.
>
> Le temps de la prescription d'une chose ne peut courir contre le propriétaire de cette chose, tant qu'il se trouve dans l'impossibilité d'intenter son action pour la revendiquer, suivant cette maxime Contra Non Valentem agere nulla currit PRESCRIPTIO.
>
> Para. 23.
>
> Il en est de même generalement de toutes les autres justes causes d'empêchement qui empechent le proprietaire d'intenter son action le temps de la prescription ne court pas tant que l'empêchment subsists.

When the defence of "prescription acquisitive" is raised, the Court must, as the learned Bailiff held, determine once again both by custom and by the Law of 1909, whether or not there was a "tenue paisible" and a "tenue de bonne foi".

> POTHIER in the said TRAITE DU DROIT DE DOMAINE DE PROPRIETE ETC. page 365 - para 34 says:
>
> Nous avons, dans notre droit francais abandonné sur ce point le droit Romain, et embrassé la disposition du droit Canonique, qui exige La Bonne Foi pendant tout le temps qui est requis

pour la prescription. Cette disposition du droit Canonique est tres équitable. Par la connaissance qui survient au possesseur avant qu'il ait accompli le temps de la prescription, que la chose qu'il avait commencé de "bonne foi" à prescrire ne lui appartient pas, il contracte l'obligation de la rendre; laquelle obligation nait du précepte de la loi naturelle, qui depend de retenir le bien d'autrui. Cette obligation etait une fois contractée, dure toujours jusqu'à ce qu'elle soit acquittée et resiste à la prescription elle passe aux heritiers de ce possesseur, et elle empeche pareillement que ses heritiers puissent prescrire.

Thus, even if the Appellants were correct in their contention that a lapse of twenty years would bar my action, such a bar would only operate if I were unable to show that I had been "empeche d'agir", or deliberately kept in ignorance of my rights.

If, on the other hand, I am correct in my contention that there can be no extinction of my right without prescription "acquisitive", the appellant raising peremption of my "Action Réele Immobilière Hereditale" should have proved to the Court that his possession was in good faith. Once he would have satisfied the Court on this point, the onus would have been on me to show that I was prevented from exercising my rights. (Empeche d'agir). Indeed the Seneschal should not have decided the issue without investigating the Appellant's title, which is what he precisely did not do.

Yet how was it possible for the Seneschal to appreciate whether the Appellants were in good faith, or whether I had been prevented from acting, without investigating the Appellant's title, and my own claim to be the "aisné", by Sark law, and heir of this Vaudin Ancestral Property.

On the 4th November, 1968, I wrote to the Seneschal the following letter ...

ADVOCATE FROSSARD: I do not know whether you can present fresh material (to the Court) I do not want to be unkind to Mr. Vaudin, who is conducting his own case .. I make the formal point ...

THE PRESIDENT: We agree with your point.

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

(Mr. Vaudin omits the letter from his speech).

MR. VAUDIN: In the first place, the standard of good faith which the first Appellant is required to show, in matters relating to prescription, is of a higher order than in ordinary civil matters. Norman Law requires that in such matters, good faith should arise out of a good title. Laurent Carey states the rule quite clearly when he writes "Prescription quadragénaire sur en titre vicieux ne vaut, si le possesseur la présente et y fonde sa possession". (Inst. Guern. 210, 207).

In this respect Pothier, whose authority commands great respect in our Island, also acknowledges that good faith for the purposes of Prescription must be based on a "juste titre" (good title), and he writes:-

> "La bonne foi qui doit accompagner la possession "pour opérer la prescription, peut se définir, la "juste opinion qu'a le possesseur qu'il a "acquis la domaine de propriété de la chose qu'il "possède; 'justa opinio quaesiti dominii'..."

> "L'Opinion que j'ai qu'on n'a transféré la "propriété d'un heritage, opinion fondée sur une "erreur de droit, n'est pas une juste opinion, et "elle n'a pas par conséquent, la caractère de "possession de bonne foi nécessaire pour la "prescription". (Traité de la Prescription, "S.29).

The same view is advanced by the great French text book author Planiol, in his Traite de Droit Civil, where he writes:-

> "Il peut arriver que le titre en vertu duquel la "chose est possédée n'existe que dans l'imagination "du possesseur. Tel est le cas de l'héritier "apparent, c'est à dire du parent qui se croit "appelé à recueillir la succession, mais qui, en "reálité, est exclu par un héritier plus proche "dont il ignorait l'existence. C'est ce qu'on "appelle le juste titre putatif. En matière "d'usucapion le titre putatif ne suffit pas; il "faut un titre réel". (Planiol Dr. Civ. I.2295).

Of more direct authority on the Custom of Normandy is the definition of "bonne foi" given by Houard in his Dictionnaire Analytique, Historique et interpretatif de la Coutume de Normandie (1781):-

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

"La bonne foi nécessaire pour que l'on "prescrive ne doit pas seulement résider dans "l'opinion que le possesseur a de la possession; "il faut de plus que cette opinion soit conforme "aux Lois naturelles ou civiles. Car on n'est "jamais présumé de bonne foi quand on a négligé "de s'instruire de ces lois".

Houard also says:-

"L'Ignorance de la loi, loin dêtre une "excuse, est un crime; on expose la "société à laquelle en vit, au trouble et à la "confusion, par sa négligence à s'assurer, "dans les divers actes qu'on fait des règles "qu'elle à établie pour qu'ils fussent faits "valablement et équitablement."

The justification of "BONNE FOI" is essential to such a degree that prescription of 20 years with "BONNE FOI" was rejected in the Coutume de Normandie.

This is what in fact the learned Bailiff must have had in mind, when he said in his judgment "In my view the Seneschal was wrong in deciding without hearing"more ... that in Law the first Defendant had lawfully inherited this property by valid prescriptive title through his father, or that he held it by representation of his father as the lawful heir."

Not only must "bonne foi" be based on a good title: the Court must satisfy itself that it was uninterrupted. The learned Bailiff quite correctly in my submission held that "The Court of the Seneschal should have satisfied itself that John Vaudin HAMON was the lawful heir, or if not, that in good faith he believed himself to be so ...; that he did not obtain possession of the property by either malice or impudence for if Mr. Hamon took possession of the property without malice, but by impudence, his action would still have constituted what Pothier in his Traité des OBLIGATIONS Tome 1 page 104 - 105 calls a "Quasi délit"

"Le Quasi Délit est le fait par lequel une personne sans malignité, mais par une imprudence qui n'est pas excusable, cause quelque tort à un autre.

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

"Les Delits et Quasi Délits, different des Quasi Contrats en ce que le fait d'où resulte le quasi - Contrat est un fait permis par les Lois; au lieu que le fait qui forme le delit ou quasi - délit est un fait condemnable."

That after his entry into possession he maintained it without lawful interruption and in good faith.

Pothier in the Traité du Droit de Domaine etc. page 365 para 34 observes:

"Par la connaissance qui survient au possesseur "avant qu'il ait accompli le temps de la "prescription, que la chose qu'il avait commencé "de bonne foi a préscrire ne lui appartient pas, "il contrate l'obligation de la rendre; laquelle "obligation n'ait du précepte de la loi naturelle "qui défend de retenir le bien d'autres. Cette "obligation étant une fois contractée, dure "toujours jusqu'à ce qu'elle soit acquittée, et "elle empêche pareillement que ses héritiers ne "puissent préscrir". (Tr. de la Prescription s.34).

This was the view also followed by the learned Bailiff, who held that the Court of the Seneschal should have satisfied itself that the Appellants had maintained their possession in continuing good faith.

In prescription of 20 years, such as expressed in our 1909 Law, the proof of "BONNE FOI" is essential to qualify for a "prescription acquisitive". I will quote again. Pesnelle avocat de Parlement says on Article 521:

"Il suffit d'observer que cet article de notre "Coutume de Normandie est extrait de la Chartre "aux Normands de l'an 1314, Nous rejetons la "Prescription de 10 ans et de 20 ans pour obvier "aux Contestations que causent la preuve de la ""Bonne foi" et la qualite qu'exige cette "prescription."

Even assuming that the original entry into possession of the first Appellant after the death of Elizabeth Mary VAUDIN in 1938, was in good faith it is my submission that the facts of this case raise serious doubts as to the continuance of the first Appellant's good faith, and that the Court of the Seneschal ought to have investigated those facts in

order to decide whether his plea of prescription could be successfully maintained. Indeed there was ample evidence that the first Appellant knew of my existence. I myself came to Guernsey in 1962 and began to collect evidence of the correctness of my claim. Because of the suspension of the prescription period in the Bailiwick of Guernsey for a period of five years by virtue of the law of 27th January, 1941, and the Confirmation of Laws (Guernsey) Law of 1945, I was still within the prescription period of 20 years from the death of Marie Elizabeth VAUDIN in 1938.

ADVOCATE RANDELL: I hesitate to interrupt - I suggest that the respondent is now trying to inject further evidence into this --

MR. VAUDIN: I am not. I am just saying exactly what I said to the Bailiff. There was ample evidence to show that during my geneological searches in Sark, the Church registers, which were according to the Vicar of Sark then kept in the Church Safe of which the first Appellant had a key, disappeared for a time, to reappear in mysterious circumstances after the prescription period had expired, and the property been safely sold to the second Appellant.

It is my submission that evidence of all these facts and many more, was hightly relevant to the determination of the preliminary issue of prescription - whether "acquisitive" or "extinctive" and should not have been disregarded, as the Appellants appear to claim in their contentions they should have been, because if defences quoted in appendixes A, B and C of Appellants' contentions are at all applicable to a case of "Action Réele" ou le proprietaire d'un heritage Immobilière le revendique de mains des possesseurs, I humbly submit that they are (the defences) still subjected to proof of "TITLES AND ACQUIRED PRESCRIPTIONS" as we shall see from the following explanations from Dr. Claude Joseph Ferriere who Gallienne quotes as an Authority.

Claude Joseph Ferriere a la page 928 explique FINS DE NON-RECEVOIR en terms suivants:

"Fins de NON-RECEVOIR, generalement parlant, sont toutes sorts d'exceptions Peremptoires, mais dans un sans moins etendue, on entend par fin de Non-Recevoir une exception qui repousse une demande, sans qu'on entre dans le fond. Mais on

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

appelle fins de Non-Recevoir, les exceptions par lesquelles le defendeur, sans entrer dans les moyens du fond, pretend être mal assigne, et que le demandeur n'est pas recevable en sa demande, soit pour venir à tard, et <u>après que les prescriptions ont ete acquises</u>."

<u>DEFENSES</u> par le même auteur page 634.

"En action Réelle, les defenses sont que l'heritage pour lequel on est poursuivi par cette action, nous appartient, ou en vertu d'un <u>TITRE</u>, <u>ou par prescription;</u> que le demandeur n'en a point le <u>TITRE</u> de propriete, ou que ceux dont il se sert, ne sont pas suffisants pour justifier qu'il est proprietaire de la chose".

As to my own right of action, assuming for the sake of argument that it is subject to the prescription period of twenty years, per se, and not dependant on there being any "prescription acquisitive" by the Appellants, it is my contention that my right is by no means <u>automatically</u> extinguished by the passing of twenty years. As I have already contended, the Laws of 1852 and 1909 merely reduced the duration of the prescription period; they in no way altered the essential nature and conditions of the old forty year prescription of the Customary Law.

According to the Custom - and indeed, I believe according to most advanced systems of law, the running of time may be postponed as a result of the existence of special circumstances. In the case of the Custom as applied to the Bailiwick of Guernsey, Laurent Carey writes that "Prescription ou la tenue paisible par quarante ans ... ne court pas contre qui est empêche d'agir ou qui est ignorant de son droit ay, moyen de fiction ou de déception dont on aurait usé envers lui". (Inst. Guernsey 207).

I have already submitted that this text applied both to "prescription acquisitive" and to "prescription extinctive"; if it did not the words "elle ne court pas contre qui est <u>empêche d'agir</u>" would have no meaning. This conceded on behalf of the second Appellants, before the Bailiff by their Counsel Advocate Randell who admitted that certain special circumstances suspended prescription. It is my submission that two classes of events will interrupt prescription within this Bailiwick though other rules may apply elsewhere. The first of these comprises "empêchements d'agir", which relate to

certain events of a fortuitous nature; the second comprises cases of either bad faith or imprudence with or without malice to keep the claimant in ignorance of his rights.

I should perhaps say that at the time of the death of MARIE ELIZABETH VAUDIN and of the entering of JOHN HAMON into possession in 1938, I was serving the Crown as a Civil Servant abroad where I continued to reside until I came to Guernsey in 1962. It is my contention that John HAMON, who first entered into possession of "Le Port de la Jument", being one of the Guardians of Mary Elizabeth VAUDIN, was under a duty to account to the true heirs of his ward for his administration.

I submit that in the fiduciary capacity, and before entering into possession himself, he should have made the usual enquiries as to the existence of any other claimants in particular as to the existence of any male descendants of a male VAUDIN line, and to take advice from the authorities as to their rights under the laws of Sark. I have at all times been prepared to adduce evidence that no such steps were taken. It was surely for the Seneschal's Court to decide on the evidence whether or not, I was in ignorance of my claim, and further whether or not I was deliberately left in ignorance.

Berault, at Volume II page 364 of his Coutume Reformeé de Normandie writes "Absence est legitime de restitution contre les prescriptions".

Merlin writes "Le mot absent, considéré relativement à la prescription, designee tantôt celui qui ne réside pas dans le lieu ou il devrait agir à l'effet qu'on ne prescrive contre lui tantôt celui qui ne réside pas dans le lieu où il faudrait le poursuivre pour l'empêcher de préscrire lui-même." (Repertoire de la Jurisprudence Vol.I, "Absent" (1827) p. 29.)

It is however in Pothier that the Court will find the most authoritative guidance on the subject:

"Le temps de la prescription ne court pas
"contre le proprietaire pendant qu'il est
"absent pour le Service de l'Etat, s'il n'y a
"personne qui soit chargé de ses affaires.
"Quand meme ce ne serait pas pour le service
"de l'etat que le propriétaire ait été absent,
"mais pour quelque chose autre juste cause qui

No.8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

"l'eut obligé de partir sans avoir le dossier de "charger quelque'un de ses affaires... il en est "de même généralement de toutes les autres justes "cause d'empêchement qui empechement le propriétaire "d' intenter son action; le temps de la "prescription ne court pas tant que l'empêchement "subsists." (Tr. Prescription, s.22-23).

In interpreting the maxim "Contra non valentem egere non currit prescriptio", a maxim which Pothier himself comments on and which has undoubtedly been accepted into the Custom of Normandy, and that even courts have held that mere ignorance of a right constitutes a "Juste cause" sufficient to postpone prescription. It is significant to note that the French Courts which, at the time of the Revolution sought to do away with the notion of "just cause" as postponing prescription, to adopt a more rigid attitude, have once again returned to the more equitable view expressed by Pothier. Even a party's ignorance of the existence of a right will suffice to postpone prescription. As Planiol remarks "La Cour de Cessation admet le suspension de prescription toutes les fois que le propriétaire peut raisonnablement ignorer le fait qui donne naissance à son action et à son interet d'agir (Cass. 27 mai 1857, D. 57.I.290). (Planiol Dr. Civil. I. 2705). Indeed the Decision of the Court of Cassation he refers to, assimilated ignorance of a right to "force majeure".

Where there is a suggestion that a party's ignorance of his right is the result of misrepresentation or fraudulent concealment, there can be no doubt that by the Custom of Normandy as applied in Guernsey, prescription will be postponed.

None of these matters was ever examined by the Seneschal's court, before holding that my action which is an "action réele immobiliere héréditale", (Principes Generaux de Droit Civil et Coutumier de la Province de Normandie par Maitre Charles Routier ancient avocat au Parlement de Rouen. "L'Immobiliere est celle par lequelle le proprietaire d'un heritage le revendique des mains des possesseurs ou tiers detenteurs dans les 40 ans") was time barred. An investigation of matters relating to good title, good faith, and "empêchements d'agir", must clearly involve the determination of a considerable number of questions, which also go to the merits of my claim to be the "aîné" in whom the ownership of "Le Port a la Jument" is vested.

It was for the Court of the Seneschal initially to examine whether or not I had a prima facie title to claim possession at all, and indeed whether the present Appellants had any status on which they could raise the defence of "extinctive prescription" in accordance with their contentions.

To sum up my case:-

1) I am the lawful heir of the property known as "le Port a la Jument"; the holder of the "droit d'ainesse" and rights of the Vaudin family. The ownership attached thereto passed to me "entirely and directly" without any need for a further grant, both under the Custom of Normandy as applied in this Bailiwick, and under the Patent of 1612. It makes no difference that I was unaware of the automatic vesting.

2) In my capacity of "ainé" and owner of "Le Port à la Jument" I cannot cease to be the owner by mere non-usage. I could only lose ownership - if indeed I can lose my prerogative rights at all, other than by my own volition and I pray that this court will disallow this appeal.

THE PRESIDENT: We now propose to adjourn to give everybody concerned an opportunity to consider what has transpired this morning. We will meet again at 3.30.

(Adjourned)

(The Court reassembles at 3.30 p.m.)

THE PRESIDENT: (to the respondent): Is there anything you would like to add to what you said this morning?

MR. VAUDIN: No, I don't think there is anything to say.

THE PRESIDENT: I wonder if you could help us in your reasoning, and say precisely what, in your opinion, it is that would have stopped prescription running against you in this case, whether the prescription be either acquisitive or extinctive? Why you say it does not run against you in this case. In your pleadings, you conceded the fact that Miss Vaudin died in 1938, and you conceded that Mr. Hamon took possession

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

at that same time. Why do you say prescription in this case does not run?

MR. VAUDIN: Well Sir, when my father died, I was seven years old - I was abroad and I had no contact at all, I knew nothing at all about it. I knew my grandfather initially came from the Channel Islands. All my life I was trying to come back here.

Two-thirds of her life Miss Vaudin was shut in, supposed to be insane - she had no way of communicating with me.

It was only when I came here in 1954 that I went to Sark, and I was informed by somebody that there was a man, Mr. John Vaudin Hamon on the island, and the name "Vaudin" appealed to me - I went to see him; that was when I knew about it.

I went back to my job and I had to finish my time before coming over here - I had no other means - I was serving the Crown.

When I came back in 1962, it was then that I tried to find out more of my ancestors, and, in 1954 the possessor saw me - he never told me anything at the time.

In 1962 when I came here and I heard about it, somebody told me: "Why don't you enquire a bit further"? I knew the property was there - I did not know whether I had a right to it.

Then I tried each day to find out about it - about the documents to show whether I was related to her. I tried to find out from the person who was responsible for the keeping of the register. I tried to get the documents, and, in the meantime, I tried to get legal assistance. I could not obtain that - I could not get any assistance due to pressure of work of members of the Bar - some others were involved in this case - and so I had myself to go and dig again into the legal position. So I had to go and read - so much so that I became a "bookworm", reading all the time, trying to prove that I was entitled.

In 1964, a year after this property was sold, I had a call from the Vicar of Sark, saying: "I have

found that Register which was missing - it is a small Register". When I went back, I saw the small Register in which parents are registered. I became very interested.

When I went before the Court of Sark, I went to present my case to the Seneschal. I was given a first hearing on the assumption that everything was all right. Suddenly I exposed everything to the Court - all that I knew about my researches. When the Court heard me, the Court asked Mr. Hamon whether he had anything to say, and he said: "My father has been in this property more than 20 years, and I inherited from my father".

The Seneschal adjourned the hearing for a fortnight to give his judgment. Seven days before that time, I was informed that the first hearing would be cancelled owing to the fact that one of the appellants was not present in Court. Then there was another hearing fixed, and, at the second hearing, both appellants were represented, one by Mr. Frossard, the other one by Mr. Randell.

And again I went into all this, and when I had finished, Mr. Randell took up this question of prescription against me, and Mr. Frossard took up the question of title which I absolutely refuted.

THE PRESIDENT: You are saying that prescription does not run against you because you were unaware?

MR. VAUDIN: I was absolutely unaware, and I had no means to find out. I never asked the Court of Sark to invent some obscure law to dispossess somebody - I went to the Court of Sark in good faith; I asked the Court of Sark to examine my claim, and this happened.

THE PRESIDENT: Mr. Vaudin, there is one more question I would like to ask. Are you alleging that there was a deliberate attempt to conceal the true situation from you?

MR. VAUDIN: Well, Sir, as I explained this morning, I suppose it was either by ignoring my rights, or it could have been through mistake on the part of these people. It could have been by imprudence, because there was the "curatelle", and the possessor or people who

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

took possession of the property should have enquired.

THE PRESIDENT: I do not really see that "curatelle" has got anything to do with the issue we have to try - that obviously came to an end with the death of Miss Vaudin?

MR. VAUDIN: Pothier, if I may quote Pothier again, in "Obligations, page 111, section 126, third paragraph, says:-

"Par example lorsqu'un curateur créé à une "succession vacante administre les biens de "cette succession il contracte envers la "personne fictive de la succession vacante "l'Obligation de rendre compte de sa gestion "et vice versa, cette personne fictive de la "succession vacante contracte envers ce curateur "l'obligation de lui faire raison de ce qu'il "lui en a conté pour sa gestion".

I have no legal aid, but when I read this this is what I thought myself: the "curatelle" at least could not simply say "That's finished, all right, we wash our hands of it" and call the first man from the road. If they had done at least something through the Court or through some legal man. They should have tried to find out who were the claimants. Whether there were no further claimants.

MR. J.G. LE QUESNE: I am not sure, Mr. Vaudin, that I can see yet what is your answer to the President's question? The President asked you whether you are saying that there was a deliberate attempt to conceal the truth of the matter from you. Do you say there was?

MR. VAUDIN: Well it is what I have just said. They saw me in 1954 then they concealed the facts to me.

MR. LE QUESNE: Who?

MR. VAUDIN: Mr. Hamon himself concealed the facts to me.

MR. LE QUESNE: I see, yes.

ADVOCATE D.W.M. RANDELL: Sir, if I might just perhaps very briefly take up the time of the

Court to refer to some of the contentions which Mr. Vaudin has made this morning.

I think there are possibly two matters. These were firstly a large proportion of Mr. Vaudin's submission this morning appeared to turn on this question of "bonne foi", good faith.

I tried to indicate this morning that, in my view, in the law of 1909, the law distinguishes between "prescription extinctive" and "prescription acquisitive", and it is only a little sentence which relates to "prescription acquisitive". It is only that sentence, dealing with "prescription acquisitive", which deals with the question of "bonne foi". I do not think the question of "bonne foi" arises in this. Here we have something which as I said this morning, is akin but not identical with "prescription extinctive".

It is a defence which is available to the defendant. If I could put it this way:- you can acquire a title by "prescription acquisitive". You can, conversely, lose a title by "prescription acquisitive." Or you can lose a right to take action by "prescription extinctive" as in this case, and we would suggest that, in this case, time is the important and essential element in this.

The question of fraud I do not think really arises, and I may say with respect that neither you nor your learned colleague had a true answer from Mr. Vaudin on this point. He says when the person died the "curatelle" came to an end - nobody then told him he was involved. Indeed, when he went to Sark there was no need; they were under no duty to tell him. Mr. Hamon, Senr., maintained he was the owner of the property; there was no necessity, no duty upon him to disclose that he inherited it from Mary Elizabeth Vaudin in case Mr. Vaudin himself had a better right - he considered and has considered and his successors beyond him considered all along - and it will certainly be submitted if this matter has to go back to the Seneschal's Court - that, in fact, they were rightful owners. There was no duty upon them. I cannot see that there is any question of bad faith here. They have not failed in any duty towards him. Gallienne, again, if I could go back to this, gives the description of liberating oneself. If I could refer again to Gallienne, page 314, towards the foot of page 314,

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

Section II - De la prescription:-

"Il y a deux espèces de prescriptions: la prescription à fin d'acquérir et la prescription à fin de se libérer. La première peut être définie "l'acquisition de la propriété d'une chose par la possession paisible et non-interronpue qu'on en a eue pendant le temps réglé par la loi"..."

and the next paragraph:-

"La prescription à fin d'acquérir est fondée sur le principe que la possession pendant un certain laps de temps vaut titre."

Then it goes on:-

"La Prescription à fin de ses libérer n'est pas seulement fondée sur la présomption que le créancier, qui a négligé de demander paiment de sa créance pendant le temps favorable, en a recu le montant; elle est etablie comme une peine contre celui qui pouvait réclamer un droit, mais qui, par sa négligence, ne l'a point fait valoir ou reconnaître dans le temps réglé par la loi. On voit donc qu'il y a bien de la différence entre prescrire une chose et prescrire une action. Prescrire une chose, c'est l'acquérir par le bénéfice du temps; et prescrire une action, c'est seulement se maintenir dans la possession de ce qu'on possède et se defendre contre le trouble qu'on y pourrait faire."

It continues on the next page and there is a note at the bottom of page 316, the very last paragraph:-

"C'est ici une conséquence du principe que la prescription doit être plaidée comme exception, et que, quoiqu'elle soit acquise de plein droit au débiteur, c'est-à-dire, qu'il n'est pas nécessaire qu'il forme une action à voir dire qu'elle lui est acquise, il doit cependant l'opposer formellement lorsque actionné par son créancier."

THE PRESIDENT: If the principle behind "extinctive prescription" is, in fact, punishment of negligence and is a form of penalty, what is the position of a creditor who is, in fact, totally unaware of his rights. Is he to be blamed for the delay in that case?

ADVOCATE RANDELL: Yes, I think so, Sir. I think this happens quite frequently that a person has a right to personal damages in some particular circumstances. They are ignorant of this .. they come perhaps to the lawyer at some later date and tell him of the circumstances .. and one has to advise them that "this happened 25 years ago (or however many years ago it was) - you are too late now to do anything about it."

THE PRESIDENT: If, in fact, he is not only unaware of his rights - if he is unaware of the occurrence itself which gave rise to his cause of action - what then? It is theoretically possible. What is the position of a man who is unconscious for years as a result of an accident which was clearly caused by somebody's negligence?

ADVOCATE RANDELL: If I might answer your first point first, Sir. I think that there, if he is unaware of the occurrence then I think the law is designed to cater for just this situation - that he cannot come here after years and years and years and say: "I have just discovered that this has happened". I dealt with this this morning. If I could extend this theory to absurdity - take, if you will, the present case. Mr. Vaudin says that Miss Vaudin died in 1938 and that it was a long time before he was aware that she had, in fact, died. Now supposing that instead of having discovered this in, perhaps, 1954 or even in 1964, he had not discovered it until 1984 - or, in fact, if he had not discovered it at all and his son came along in 1984, or in a 100 years, is the Court going to say "Yes, all right, we will listen to you". That situation would be guarded against by "prescription acquisitive", because then the person who had been in possession until 1984 subject to the requirements of the law about "bonne foi" and so on would have a perfectly good defence arising out of his own possession.

THE PRESIDENT: So that you don't require to predicate the "prescription extinctive" to produce the result which is obviously necessary in the interests of the community at large in these circumstances, do you? You have got two barrels to your gun, one of which is appropriate in some circumstances and the other in others?

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

ADVOCATE RANDELL: This takes us back possibly, Sir, to your colleague's earlier question this morning in relation to the property which was vacant for 20 years, and so on - I think it is partly similar to that, but if you are not allowed to say that "prescription extinctive" does not start to run until the man has discovered it, this makes nonsense of the principle of prescription. As I say, somebody else may have acquired good title in the meantime, but it does mean that somebody can come along after a hundred years and say: "I have only just discovered it, therefore you cannot claim I am too late". Well this, I would have thought, is precisely what the law had in mind when designing prescription, that you cannot come after a hundred years and say: "I am the owner; I have only just discovered it last week" irrespective of whether somebody has acquired good or better title in the meantime.

I do not know if that answers the point of the learned President?

THE PRESIDENT: Putting it another way, you would say, if, in point of fact ignorance prevents "extinctive prescription" from running, then it must equally prevent "acquisitive prescription" from running?

ADVOCATE RANDELL: Yes Sir.

THE PRESIDENT: I suppose you could make a distinction on the grounds that the reasons for the introduction of one conception into the law differs from the reasons given for the introduction of the other?

ADVOCATE RANDELL: Yes sir.

MR. J.G. LE QUESNE: I was wondering when you were saying that, Mr. Randell, is it possible for somebody to get a new title by "acquisitive prescription" while the old title holder's right of action is not barred by "extinctive prescription"? It seems an odd state of affairs, if so. Supposing the old title holder knew nothing about the position - if what Mr. Vaudin is saying is right, "extinctive prescription" would not be running against him, but, at the same time, there may be somebody else sitting in possession of the property in perfectly good

faith - I suppose "acquisitive prescription" is running in his favour?

ADVOCATE RANDELL: Yes, Sir, provided he was an occupier in good faith, and so on, that would be running undoubtedly, and he could, after 20 years, I submit, acquire by "acquisitive prescription".

MR. LE QUESNE: Title passes to him and in twenty years ipso facto the previous owner loses both his title and his right of action.

ADVOCATE RANDELL: Whether he is in ignorance or not.

THE PRESIDENT: How do you translate the last words of the first paragraph of the law relating to prescription?

ADVOCATE RANDELL: The 1909 law, Sir.

THE PRESIDENT: How do you translate? "Pour titre compétent en matière héréditale"?

ADVOCATE RANDELL: I would have translated it: "For good title in matters relating to realty".

THE PRESIDENT: "Héréditale" has nothing to do with inheritance?

ADVOCATE RANDELL: We speak in Guernsey of matters "héréditale" - which relates to realty". We have our Saisie procedure, which is foreclosing procedure, when the property is finally vested in the pursuing creditor he is "Saisi héréditale". He has, in the property an estate of inheritance. I think it is generally used over here as meaning the same thing as what is sometimes referred to as "réel". We also have, Sir, what is known as "Plaids d'héritage" which is the time at which these particular type of saisi proceedings take place. "Héréditale" is synonymous with "realty" or "réel".

THE PRESIDENT: There is another question I would like to ask you - if one put to you that the Common Law of Sark never recognised the principle of "extinctive prescription" and, therefore, was wholly concerned with "acquisitive prescription" after continuous possession for 40 years, did this law do anything more than merely reduce the period

No. 8

Guernsey Court of Appeal (Civil Division)

Official Report of Proceedings

13th November 1969 (continued)

from 40 to 20 years, or would you argue that it introduced any change?

ADVOCATE RANDELL: I would say, sir, that the law of 1852 and the law of 1909 merely reduced the period, because in both cases it is prefaced by the fact that "those causes of action which were previously prescribed by a certain time shall now be prescribed by a lesser period", but, Sir, even if, in fact, the "prescription extinctive" did not apply in Sark (which I do not admit at the moment) - even if that were not so, I would say it would apply here as a defence to an action. (When I say "here", in Sark as well as in Guernsey). This is a defence which is available to the defendant. He has not got to prove, in our submission, that the right has been extinguished. He has merely got to say"You are beyond 20 years - you are too late to come here". It is a separate defence available without necessarily proving the extinguished title.

THE PRESIDENT: Now, other than that, there is not a single old authority which talks about "extinctive prescription" in relation to realty at all and yet they are full of accounts of "extinctive prescription" in relation to many many other matters?

ADVOCATE RANDELL: Yes Sir, and, of course, there were various periods for various types of dispute.

MR. LE QUESNE: I wonder whether the passage you read from Gallienne talks about "extinctive prescription" in relation to matters affecting realty? That depends whether you think he is applying what he calls "le second espèce" to actions affecting realty or not? Do you say he is?

ADVOCATE RANDELL: Yes, Sir, I would say that that is so, Sir.

MR. LE QUESNE: The language which he uses, "debtor and creditor" and so on, rather suggests an action to recover a money debt, does it not?

ADVOCATE RANDELL: Well, Sir, except that this language is probably not the language we would use today. It is 1845. He speaks at the bottom of the next paragraph - I think in fact I read it

to the Court, of :

> "Prescrire une chose, c'est l'acquérir par le bénéfice du temps; et prescrire une action, c'est seulement se maintenir dans la possession de ce qu'on possède et se defendre contre le trouble qu'on y pourrair faire."

and I think those words can be used to relate to the possession of a chattel, a chair or a bed equally to the possession of a property. I do not think he makes a distinction between the two.

MR. LE QUESNE: It is a quotation from somebody else - Ferriere?

ADVOCATE RANDELL: Yes Sir.

MR. LE QUESNE. He is a French writer, not a local writer?

ADVOCATE RANDELL: Oh yes Sir.

THE PRESIDENT: We are much obliged to you for your assistance in this matter, Mr. Vaudin; we are grateful to you for having taken the trouble to have written all you wished to say. We find it most helpful - thank you very much indeed.

Gentlemen, we must reserve judgment and we will communicate with you again when are are ready to deliver it.

(Hearing adjourned).

No. 8

Guernsey Court of Appeal (Civil Division)

Judgment

11th March 1970

IN THE COURT OF APPEAL (CIVIL DIVISION) GUERNSEY

ON APPEAL FROM THE ROYAL COURT SITTING AS AN ORDINARY COURT

WEDNESDAY, March 11th., 1970

In the matter of the Appeal from the judgment of the Royal Court sitting as an Ordinary Court delivered on the 21st January, 1969

B E T W E E N : ADOLPHUS JOHN HAMON and ALAN JAMES MESNEY and DOROTHY LUCIEN MESNEY Appellants

- and -

ADOLPHUS HENRY VAUDIN Respondent

ADVOCATE D.W.M. RANDELL: Sir, you will obviously be aware of this - in this matter I appeared for the appellants Mr. and Mrs. Mesney. My friend Mr. Frossard appeared on behalf of Adolphus Hamon. My friend has now been appointed by Her Majesty to the post of Comptroller, and my friend Mr. Lenfesty is now appearing for Adolphus Hamon; and Mr. Vaudin appears in his own right.

THE PRESIDENT: In the reading of this judgment, I propose to omit the references for the sake of convenience.

There is in the Island of Sark a house known as Le Port à la Jument. At the beginning of 1938 it was owned and occupied by a Miss Marie Elizabeth Vaudin. She was an elderly lady, and on the 19th September, 1938, she died. Thereupon Le Port à la Jument passed into the possession of a Mr. John Vaudin Hamon. He was a distant cousin of Miss Vaudin, and by all who were concerned with the matter at that time was believed to be the lawful heir to the house. This litigation arises out of the claim of the Respondent that he, not Mr. John Hamon, was at all times the lawful heir.

By the law of Sark there is no testamentary power over immovable property. It passes on the death of the owner to the nearest relative in the male line. Immovable property is not partable. That is to say, the nearest relative in the male line inherits the whole of it, to the exclusion of all other relatives. The Respondent claims that, while Mr. John Hamon and he

were both relatives of Miss Vaudin, he was the nearer relative in the male line, and was therefore entitled to inherit Le Port à la Jument to the exclusion of Mr. Hamon.

In 1938 the Respondent was in Mauritius, where he had spent all his life. At that time he knew nothing either of Miss Vaudin or of her house. (As will appear, no evidence has been given in this case. The facts being recited were mentioned in the course of the argument by the Respondent, who has conducted his own case throughout the proceedings). He visited the Channel Islands for the first time while on holiday in 1954. He spent a day in Sark, where he introduced himself to Mr. John Hamon and his son (Mr. Adolphus Hamon, the First Appellant). He did this simply because he had heard that his own name, Vaudin, was one of Mr. John Hamon's Christian names. He returned to Guernsey at the end of 1962, and then discovered the relationship between himself and Miss Vaudin. At that time, however, some of the documents necessary for the proof of this relationship, such as birth and marriage certificates, were missing. These missing documents came to light in Sark at the end of 1965. Meanwhile, Mr. John Hamon had died in August, 1964. His son, the first Appellant, inherited (or was regarded as inheriting) the house, and sold it two-months later to Mr. and Mrs. Mesney, the second and third Appellants, who live in it now.

The Respondent instituted proceedings against the three Appellants by presenting a petition in the Court of the Seneschal of Sark on the 23rd August, 1968. The petition read as follows:

"Que je suis fils de JOSEPH VAUDIN et petit fils de feu le REVEREND ADOLPHUS VAUDIN fils légitime de feu THOMAS VAUDIN du Port à la Jument en cette qualité, je suis l'héritier légal à la Succession de MARIE ELIZABETH VAUDIN MA COUSINE issue de Germain.

1. Que suivant la succession de Mademoiselle MARIE ELIZABETH VAUDIN Ma Cousine Issue de Germain qui décéda en 1938 à l'Ile de Sercq, la Succession de la Maison Ancestrale appelée Le Port a la Jument fut par manque de renseignments à mon sujet attribuée a feu Monsieur JOHN HAMON fils de BERNEL HAMON.

No. 8

Guernsey Court of Appeal (Civil Division)

Judgment

11th March 1970 (continued)

2. Votre remontrant prie très humblement Votre Cour:-

(a) de m'entendre aux fins de déclarer que le titre de la propriete du Port à la Jument a été mal attribuée.

(b) de déclarer et ordonner que la vente de la propriété par Monsieur ADOLPHUS HAMON est Nulle et de nul effet.

(c) d'ordonner que le dit ADOLPHUS HENRY VAUDIN a droit à la possession de la propriété que de fait lui appartient.

(d) de faire tel autre ordre ou de prendre telles autres mesures que Votre Cour dans sa sagesse trouvera juste et équitable.

Et Votre remontrant sera toujours tenue de prier."

In accordance with what appears to be the normal practice in the Court of the Seneschal, no further written pleadings were delivered. The case came before the Court on the 23rd November, 1968. Counsel appearing for the Appellants then took the point that the action was barred by prescription. The Seneschal proceeded to hear argument on that point, and then, without taking any evidence, gave judgment upholding the plea of prescription and dismissing the action. No note of the proceedings has been put before us, but the formal order of the Court read as follows:

"Upon hearing the Plaintiff and the Advocates for the Defendants the Court adjudged that, by virtue of Section 1 of the 'Loi relative à la Prescription Immobilière 1909' registered in the records of the said Island of Sark in the month of April, 1909, the action of the Plaintiff was prescribed by reason of the lapse of at least twenty years from the date on which the Plaintiff's cause of action arose, which the Court found to be the 19th day of September, 1938, the date of death of MARY ELIZABETH VAUDIN, whom all parties to the action accepted to be the rightful owner of the tenement known as 'Le Port à la Jument' in the Island of Sark.

Plaintiff gave Notice of Appeal."

No. 8

Guernsey Court of Appeal (Civil Division)

Judgment

11th March 1970 (continued)

From this judgment the Respondent appealed to the Royal Court of Guernsey. The appeal was heard by the Bailiff on the 14th January, 1969. On the 21st January the Bailiff delivered judgment, allowing the appeal. The order of the Royal Court did not say expressly that the action was to be remitted to the Court of the Seneschal for further proceedings there, but that must have been the intention and also the effect of the order.

The learned Bailiff said it was

> "if not the law then certainly a long established practice in the courts of this Bailiwick that, where prescription is set up as a defence or one of several defences to an action, that question should be settled first and certainly before contestation de cause."

He went on to say that the date on which Mr. John Hamon took possession of Le Port a la Jument had not been established in the Court of the Seneschal, nor had it been established that he had held the house peaceably, in good faith and without interruption until his death, so as to acquire a good title to pass to the first Appellant. The Court, he said, should first have decided who was Miss Vaudin's lawful heir, because, if the Respondent had been found not to be the lawful heir, that would have been the end of the matter, apart from any question of prescription. It was also most important to know when Mr. John Hamon took possession of the house, if he did, for it was then that any cause of action against him arose. The three following quotations from the judgment shew the basis of the learned Bailiff's decision:

> "The decision of the Court of the Seneschal was wrong in establishing that the Plaintiff's cause of action arose on the death of Mary Elizabeth Vaudin (on the 19th September, 1938) without establishing also that the Plaintiff in that action was the lawful heir. And it was wrong in deciding, without hearing more, that the Defendants were entitled to judgment merely on a mathematical calculation and without being satisfied that in law the first Defendant had lawfully inherited this property by valid prescriptive title through his father or that he held it by representation of his father as the lawful heir. The Court of the

No. 8

Guernsey Court of Appeal (Civil Division)

Judgment

11th March 1970 (continued)

Seneschal, thus failed to establish, as the basis of its decision, the essential facts which warranted the application of the law in the sense indicated in its judgment.

There is evidently therefore an unexplained gap between the date of the death of Mary Elizabeth Vaudin in 1938 and the death of John Vaudin Hamon in 1964 in which the Court of the Seneschal should have satisfied itself that John Vaudin Hamon was the lawful heir, or, if not, that in good faith he believed himself so to be; that he entered into possession on a date at least 20 years previous to the date of his death; that after his entry into possession he maintained it without lawful interruption and in continuing good faith.

In my view therefore it is not possible to ascertain the date when the cause of action arose without first ascertaining that the Plaintiff had a right to assert and there is nothing before me to show that that received the attention of the Court of the Seneschal or, if it did, what was decided about it."

From this judgment the Appellants have appealed. The grounds of their appeals are that the learned Bailiff was wrong (i) in holding that the Court of the Seneschal should have examined all points in issue between the parties before reaching a decision on prescription, and (ii) in holding that the Court of the Seneschal had been in error in holding that the Respondent's action had been prescribed by the lapse of at least twenty years from the date on which the cause of action arose.

The first of these grounds of appeal does not, in our view, describe fairly the process of reasoning of the Bailiff's judgment. He recognised explicitly the rule that prescription, where it is pleaded, should, in his own words, "be settled first and certainly before contestation de cause". We do not read his judgment as indicating any intention to question this rule or to do anything other than apply it. The ratio of the Bailiff's decision is revealed by the closing words of the first of the quotations from his judgment set out above. "The Court of the Seneschal", he said, "thus failed to establish, as the basis of its decision, the essential facts which warranted the

application of the law in the sense indicated in its judgment." Thus, when the Bailiff criticized the Court of the Seneschal for not deciding certain issues of fact, what he was saying was not that the Court should have examined all points in issue between the parties before reaching a decision on prescription, but that certain matters of fact essentially relevant to the issue of prescription itself had not been considered and decided.

What we have to consider, therefore, is whether it was necessary for the Court of the Seneschal to decide all the questions of fact mentioned by the Bailiff in order to decide whether the Appellants' plea of prescription was good. This involves consideration of the nature of prescription and the facts which must be established in order to set it up.

The law of Guernsey on this subject is contained in the Loi relative à la Prescription Immobiliere of 1909 (O. en C., vol. IV, P.281) S.1 of that Law reads:

> "1. - A partir du 1er avril 1909 toutes choses immobilières, et actions réelles ou dépendantes de la réalité, qui se prescrivent maintenant par le laps de trente ans seront prescrites par le laps de vingt ans; et suffira la tenue de vingt ans, bien entendu qu'elle soit de bonne foi, pour titre compétent en matière héréditale."

It was faintly argued by the Respondent that this Law has no operation in Sark, because the Court in Sark seems never to have made an order registering it. We do not consider that there is anything in this point. The Order in Council sanctioning the Projet de Loi ordered that it

> "have the force of law within the Bailiwick of Guernsey",

and

> "be entered upon the Register of the Island of Guernsey".

The Order in Council was registered in Guernsey by an order of the Royal Court dated the 23rd April, 1909. Thereupon, in accordance with the plain terms of the Order, the Law became effective throughout the Bailiwick.

No. 8

Guernsey Court of Appeal (Civil Division)

Judgment

11th March 1970 (continued)

It willbe observed that the application of s.1 of the Law of 1909 is to

> "toutes choses immobilières et actions réelles ou dépendantes de la réalité, qui se prescrivent maintenant par le laps de trente ans."

This drives one back to a Law of 1852, entitled De La Prescription Immobilière (O. en C., vol. I, p.207). S.1 of that Law reads:

> "1. - Toutes choses immobilières, et actions réelles ou dépendantes de la réalité, qui se prescrivent maintenant par le laps de quarante ans, seront à l'avenir prescrites par le laps de trente ans; et suffira la tenue de trente ans pour titre compétent en matière héréditale."

The Order in Council sanctioning the Law of 1852 recites the petition of the Bailiff submitting the Projet de Loi, in which petition the Bailiff stated:

> "That by the ancient Law of Normandy, as still in force within the Bailiwick of Your Majesty's Island of Guernsey, the period of Prescription, in matters concerning the Realty, is forty years:- That at the Chief Pleas after Easter, holden on the 28th day of April in the year 1851, the Royal Court, for the purpose of reducing the said period from forty years to thirty, adopted a Projet de Loy intituled 'De la Prescription Immobilière' in order that, if approved by the States, the same might be submitted to Your Majesty's gracious consideration:"

It is thus clear that the period of prescription appropriate to a claim for the recovery of land, such as the Respondent makes in this action, was originally forty years, and has been successively reduced by the Laws of 1852 and 1909, first to thirty years and now to twenty.

S.1 of the Law of 1909 appears, as it is printed, to fall into two parts. The first part deals with prescription operating as a bar to a right of action, or, as the French writers call it, prescription extinctive. The section provides that such prescription is to arise upon "the lapse of twenty years". The second part of the section deals with prescription operating as a source of title, or prescription acquisitive. The section provides that

twenty years is to suffice for this also, but with an important qualification - "provided that it be in good faith".

The Appellants submit that the section is indeed to be interpreted as falling into these two parts. It deals separately, they say, with with extinctive and acquisitive prescription, and the proviso requiring good faith applies only to the latter. The Respondent, on the other hand, submits that in relation to the recovery of land extinctive prescription, as something distinct from acquisitive prescription, is unknown to the law of Guernsey. A right of action for the recovery of land is never barred by prescription, he says, unless the defendant can shew that the lapse of time has created a good title in him. The two parts of s.1 are not dealing with different legal concepts, but simply with two consequences of one concept, viz. twenty years' possession in good faith. Unless there has been such possession, it is argued, neither of the consequences which flow from it can occur; no prescriptive title will have been acquired, nor will any right of action be barred.

The point thus raised is important because of its bearing upon the question of what a defendant must shew in order to make good a plea of prescription in answer to an action for the recovery of land. If the Respondent is right, the defendant has not only to shew that he has been in possession for twenty years, he must also shew that his possession has been in good faith. On the other hand, if the Appellants are right, the defendant has only to shew twenty years' possession. Good faith, or its absence, are irrelevant, while anything which would prevent, or interrupt, the running of time for this purpose must be alleged and established by the plaintiff.

The form of s.1 appears to us to support the Appellants' contention rather than that of the Respondent. If, as the Respondent argues, the essential feature of all prescription were the acquisition of title by the occupier, and the barring of rights of action in other people were only a consequence of that acquisition of title, one would have expected the two parts of the section to appear in the reverse order. It is hardly logical or natural to state the consequence first and the cause second. Furthermore, if what really defeats the plaintiff's claim is not merely the passage of time,

No. 8

Guernsey Court of Appeal (Civil Division)

Judgment

11th March 1970 (continued)

but the creation of title by that passage of time in the defendant, it is at least imprecise draughtsmanship to say that the action is to be prescribed by the lapse of twenty years; and the fault is aggravated when the draughtsman goes on to refer to the acquisition of title, using different language and not inserting any word to indicate that what is stated in the first part of the section is essentially dependent upon what is stated in the second.

However, these considerations, persuasive though they may be, are not conclusive. What does appear to us to be of crucial significance is the state of the law before it was altered by statute in 1852. For the purposes of the point now under consideration, the Law of 1852 differs from the Law of 1909 in one point only, viz, the words bien entendue qu'elle soit de bonne foi appear in the second part of s.1 in 1909, but not in 1852. If before 1852 the law of Guernsey recognized the barring of rights of action and the acquisition of title as distinct consequences of prescription, it would be impossible to contend that the Law of 1852 abolished the distinction. On the other hand, if before 1852 the law of Guernsey recognized in matters of realty only acquisitive prescription, a serious question would arise whether the Law of 1852 was intended to introduce, or did introduce, the concept of the barring of the right of action for recovery as a separate consequence of prescription.

The common law of the Bailiwick of Guernsey is that set out in Le Grand Coutumier du pays et Duché de Normandie. Before we consider that, however, it is helpful to refer briefly to the Roman law. The original compilers of the Grand Coûtumier must certainly have been familiar with Roman law, so a knowledge of Roman law is helpful to an understanding of the Coûtumier itself.

The Roman law on this subject is conveniently summarized in two leading text books: Girard's "Manuel Elementaire de Droit Romain", 8th ed. (1929), at pp.322-336, and Buckland's "Text-Book of Roman Law", 3rd ed. (1963), at pp.241-252. From its earliest period, Roman law recognized usucapio, described by Buckland (at p.241) as "acquisition of dominium by possession for a certain time". The necessary period of possession for land was only two years, but the possession had to be accompanied by bona fides and had to originate in a justa causa. Buckland explains

(at p.246) that the requirement of justa causa meant that "the taking must have been based on some fact which is ordinarily a basis of acquisition". The application of usucapio was limited, for it operated only in favour of Roman citizens and did not (even for them) affect provincial land. There consequently grew up beside it what was known as longi temporis praescriptio. This, says Buckland (at p.250), "was in principle merely negative or extinctive. It gave the holder a defence if sued for the res, but did not make him owner .... Before Justinian, however, and probably long before, it became acquisitive". The period of possession required was ten years if both parties were present in the same district, twenty years if they were not; and the possession had to be accompanied by bona fides. Under Justinian, usucapio and longi temporis praescriptio were fused. The resulting system was acquisitive, and was governed by the rules of praescriptio. Meanwhile, there had been introduced in the 5th century A.D. a parallel system, known as longissimi temporis praescriptio. The period of possession required for this was forty years, subsequently reduced in certain cases to thirty years. Its effect was extinctive only. It provided the occupier, that is to say, with a defence to an action for recovery of the land, but did not give him title. The peculiar characteristic of longissimi temporis praescriptio was that, unlike both usucapio and longi temporis praescriptio, it operated irrespective alike of bona fides and of justa causa. All that was required was possession for the necessary period, whatever the origin of the possession or the state of mind of the occupier. A refinement was, however, introduced by Justinian, who gave to longissimi temporis praescriptio acquisitive, as well as extinctive, effect in cases in which the possession had been accompanied by bona fides.

It is thus clear that Roman law recognized the distinction between the extinctive and the acquisitive effects of prescription. Furthermore, the conditions under which the two could arise were not the same. An occupier might, after the lapse of the necessary period, obtain the benefit of extinctive prescription although the circumstances of his possession were such that he could never acquire a prescriptive title.

In the earliest work on the Grand Coûtumier, which we have been able to consult - that of

No. 8

Guernsey Court of Appeal (Civil Division)

Judgment

11th March 1970 (continued)

Guillaume Le Rouillé d'Alencon, published in 1539 - no distinction is drawn between the circumstances in which acquisitive prescription could arise and circumstances in which extinctive prescription could arise. There are, on the other hand, indications that Le Rouille regarded the extinctive and the acquisitive as two distinct effects of prescription, even though both, according to his doctrine, flowed from the same cause. The definition of "prescription", in chapter CXXV, emphasizes its extinctive effect:

> "Prescription est une préclusion de réponse procrée de temps procédé ou escheu."

On the other hand, Le Rouillé quotes from Le Charte aux Normands, which, he says, was granted by King Louis X at Vincennes on the 19th March, 1314, the following words:

> "Item, que prescription ou la tenue de quarante ans suffise à chacun en Normandie dorénavant, pour titre competent, en toute haulte justice ou basse, ou de quelconque autre chose que ce soit".

The same double effect is recognized by Terrien in his Commentaires du Droit Civil tant Public que Privé, Observé au pays et Duché de Normandie (we quote from the edition of 1654).

> "Il y a deux manières d'exceptions ou défenses. Les unes sont dilatoires, les autres peremptoires ... Les exceptions peremptoires sont perpetuelles pource que toujours ont lieu, et resistent au demander et periment sa demande, ... Lesquelles se doivent proposer après la cause contestée, si elles ne sont telles qu'elles empêchent l'entrée du procés: qu'on peut aussi nommer fins de non recevoir: comme sont prescription ..... quae vocantur exceptiones litis finitae."

He then states the provision relating to prescription and the relevant provision of "La Charte aux Normans" of Louis X and concludes the chapter in these words:

> ".... qu'en prescription statutaire ou coûtumiére il n'est besoin de prouver titre, afix que le statut ou la coûtume adjoute quelque chose au droit commun, par lequel le titre est requis avec la possession. Et a lieu telle prescription en

choses héréditales et actions réelles, ou dépendantes de realité."

The rule of the Ancienne Coûtume, therefore, was that forty years' possession of land both barred the right of the owner to recover it, and conferred a good title to it upon the occupier. This resulted no matter how the possession might have begun, and whether it had or had not been accompanied by good faith. Good faith in this connection means simply absence in the occupier of knowledge, and of reason to suppose, that he was not entitled to occupy the land. Lack of good faith, therefore, is something less than fraud. If the occupier was guilty of fraud, neither the Ancienne Coûtume nor the law of Guernsey - nor, we may add, any other civilized system of law - would allow prescription to run in his favour.

It is unnecessary to consider in any detail the Norman Coûtume Reformée. This, being compiled after the political separation of the Channel Islands from Normandy, was never introduced into Guernsey. Its relevance to the present problem, therefore, is no greater than that of an analogy. Art. 521 of the Coûtume Reformée reads:

"Prescription de quarante ans vaut de titre en toute Justice pour quelque chose que ce soit pourvu que le possesseur en ait jouit paisiblement par ledit temps, excepté le droit de Patronnage des Eglises appartenant tant au Roi qu'autres."

The commentators recognize that the effect of this prescription was both extinctive and acquisitive, and the predominant view among them is that good faith was not a condition of its operation.

This rule of the Coûtume Reformée is the more noteworthy because of its contrast with systems of law prevailing in other parts of France. These systems were more influenced by the canon law, which produced, in the words of Sir Henry Maine, "a disrelish for prescriptions" ("Ancient Law", new ed. 1930, p.305). The result may be seen in the writings of Pothier. (We refer to the complete edition of his works published in Paris by Pommeret and Guenot in 1844). The only prescription which he recognized as relevant to an action for the recovery of land was acquisitive prescription. The origin of this, he said,

No. 8

Guernsey Court of Appeal (Civil Division)

Judgment

11th March 1970 (continued)

"doit être une possession civile et de bonne foi, qui procède d'une juste titre, qui ait été publique, paisible, et non interrompue" (vol. X, Traité de la Prescription, Partie I, Ch. II, para. 26, p.361). In writing of systems, such as the Custom of Paris, which required long periods (i.e. thirty or forty years) for prescription, he says that the occupier is not then obliged to establish either juste titre or bonne foi, but this is merely because the burden of proof is moved; if the plaintiff can establish the absence of either, prescription will not run (Ibid. Partie II, Article ler, section III, para. 172, pp. 441/2). He contrasts this acquisitive prescription with prescription à l'effet de libérer, which would bar an action for the recovery of rent or other sums charged upon land. This latter prescription, he says, is based upon the negligence of the creditor, and therefore

> "peut être opposée par le possesseur qui a eu connoissance (sc. de ladite rente ou autres charges), et même par celui qui en auroit été expressément chargé" (Ibid. Partie II, Article ler, section V, para. 180, p.445).

These distinctions and niceties were finally swept away in France by the Napoleonic Code. This introduced extinctive prescription after thirty years, irrespective of bonne foi or juste titre, as a general rule. The relevant provision is art. 2262 of the Code Civile:

> "Toutes les actions, tant réelles que personelles, sont prescrites par trente ans, sans que celui qui allègue cette prescription soit obligé d'en rapporter au titre, ou qu'on puisse lui opposer l'exception déduite de la mauvaise foi."

If one more analogy may be permitted, we would refer to Jersey. This is of interest because, while the law of Jersey has developed separately, and in many respects differently, from that of Guernsey, the common law of both islands is Le Grand Coutumier du pays et Duché de Normandie.

An authority upon whom much reliance is placed in Jersey, Jean Poingdestre, wrote a treatise, Loix et Coutumes de l'Ile de Jersey. He was Lieutenant Bailiff from 1669 to 1676. That treatise was printed in 1928.

In the section headed "De la Prescription Quadragenaire" on page 59, Poingdestre insists that prescription was subject to all the rules of canon law, but clearly that was not the view of the Court he served, for he says on page 60:

"Or toutes sortes d'Imeubles de quelque sorte qu'ils soient (excepté ceux dont il a esté parlé cy dessus) se prescriuent par 40 ans en nos Isles; et ie ne trouue point que nos Messieurs dans leurs Jugements se donnent la peine d'examiner, si le Prescriuant a eu Titre ou bonne foy, quou que l'un & l'autre, mais principallement la bonne foy, soit recue universellement presque par tout le monde, come elle l'a tousiours esté par tous les Juris-consultes & Canonistes, par lesquels elle est estimée un Ingredient si essentiel de la Prescription, mesme quadragenaire, qu'il est impossible de prescrire auec la mauuaise foy (c'est à dire, quand on scait bien que ce qu'on possède appartient a autruy) & par consequent, qu'en alleguant la prescription, il faut tousiours deduire le temps q̃ la chose a esté possedée de mauuaise foy. Ce qui ne se considere pas en nre pays; ou une exception de la mauuaise foy du prescriuant, ou son manque de Titre, ne seroit pas recue, ny entendue; quoy qu'elle soit si iuste & necessaire, que ie ne comprends pas come on peut faire droit, et s'en passer. Et partant nos Messieurs feront bien d'estudier ce point la: Et en mesme temps ils doiuent se souuenir de deux choses dont la premiere est que la bonne foy est tousiours supposée s'il n'apparoist due contraire (ex ipsis actis) par les Actes de la cause; la seconde que c'est a celuy qui propose la mauuaise foy de sa partie en cour a la prouuer: car assenentis est probare."

The views of Jean Poingdestre appear to have been shared by another writer, Phillipe Le Geyt, who wrote on the "Privilèges Loix et Coûtumes de l'Ile de Jersey", it is thought in 1698. The work was printed and published in 1953. On page 63 (Titre X, Des Prescriptions, Article 1), he says:-

"Possession quadragenaire et paisible, en toute matière d'héritage, vaut de titre si l'on ne montre qu'elle est de mauvaise foy."

No. 8

Guernsey Court of Appeal (Civil Division)

Judgment

11th March 1970 (continued)

On the other hand, when a miscellany of laws came to be compiled for the Island in 1771, the practice of the Court appears to have been favoured over the views of Jean Poingdestre and Phillipe Le Geyt. It is provided on page 223 of the miscellany, exaggeratedly known as the Code of 1771:

> "Les personnes qui ont possédé un immeuble paisiblement, et sans interruption, quarante ans, ou au-delà, ne pourront être inquiétés, ni molestes à l'égard de la propriété dans la chose possédée, la possession quadraginaire donnant un droit parfait, et incontrovertible, selon l'ancienne Coûtume de l'Isle, ..."

Advocate Randell, who appeared for the second and third Appellants, referred us to Gallienne's Traité de la Renonciation par Loi Outrée et de la Garantie. This is a significant authority, for Gallienne was a Guernsey lawyer and his book was published in 1845. It may therefore be regarded as expressing views accepted in Guernsey only a few years before the Law of 1852 was passed. The section dealing with prescription begins on p.314. Gallienne's discussion of this subject contains nothing different from what we have found to be the rule of the Ancienne Coûtume. In particular, there is not a word to suggest that good faith was a necessary accompaniment of possession for the purpose of prescription. Gallienne regards prescription as no more and no less than a matter of time.

Immediately before the Law of 1852, then, the law of Guernsey recognized two consequences of prescription in matters of real property. The first was the barring of any right of action for recovery of land. The second was the acquisition of a good title by the occupier. Both these consequences followed upon forty years' possession, whether that possession had been accompanied by good faith or not.

It is now possible to see why s.1 of the Law of 1852 was drawn as it was. It fell into two parts, because it was dealing with two separate consequences of prescription. It provided that the period of possession to give rise to these consequences, which thitherto had been forty years, should thereafter be thirty years. S.1 of the Law of 1909 follows the same form. Again it falls into two parts, because it dealt with two separate consequences of prescription. It reduces the period of possession to give rise to

these consequences from thirty years to twenty; but, unlike the Law of 1852, it makes another change as well. This change is wrought by the words, bien entendu qu'elle soit de bonne foi. The history of the antecedent law supports the inference arising from the language of the section alone, that this change relates only to the second consequence of prescription mentioned in the section, viz. the acquisition of title. In 1909 the legislature was content, in relation to the barring of rights of action, to leave untouched the ancient rule of the common law of Guernsey, that prescription operated without any requirement of good faith. In relation to the acquisition of title, however, the legislature decided that, as the period was to be reduced to twenty years (only half the period originally required by the common law), an additional requirement should be imposed, that the possession must be accompanied by good faith.

In this case the Appellants did not assert their own title. They said simply that any right of action to recover the land from them was barred. All that they had to shew to establish this was that they and their predecessor in title, Mr. John Hamon, had held possession of the land adverse to the Respondent for the requisite period before the Respondent instituted proceedings. We agree with the learned Bailiff that for this purpose it was necessary to shew

> "when precisely John Vaudin Hamon took possession if in fact he did, for that is when the cause of action arose."

We do not agree with him that it was necessary for the Court to be satisfied

> "that in law the first /Appellant/ had lawfully inherited this property by valid prescriptive title through his father or that he held it by representation of his father as the lawful heir."

We also disagree with the learned Bailiff that the passages which he quoted from Pothier are applicable to the law of Guernsey, and that by the law of Guernsey the question of good faith is relevant to the case of a defendant who relies purely upon extinctive prescription.

We have referred to possession of the land "for the requisite period". In this case that period

No. 8

Guernsey Court of Appeal (Civil Division)

Judgment

11th March 1970 (continued)

exceeds twenty years, because, by virtue of a Law (No. I - 1941) promulgated on the 27th January, 1941, and an order made thereunder by the Royal Court of Guernsey on 20th August, 1945 (No. XX - 1945) the period from the 1st July, 1940, to the 31st December, 1945, is for purposes of prescription to be deemed dies non juridici. The requisite period in this case, therefore, is twenty-five years and six months

In order to calculate when this period expired, it is, of course, necessary first to know when it began. This means, as we have said, that it is necessary to know when Mr. John Hamon took possession of Le Port à la Jument. No evidence, properly speaking, either written or oral, has been given in the course of these proceedings. The only facts which can be said to have been proved, therefore, are those which have been admitted, either by the Respondent in his petition or by either party in the course of argument. There does not appear to have been any admission by the Respondent of the date on which Mr. John Hamon took possession of the house. Nevertheless, we think it would not be right to decide the case upon this point. It is regrettable that the Court of the Seneschal did not receive evidence formally on points relevant to the plea of prescription. (We recognize the difficulties which confront a lay tribunal, but we hope that for the future somewhat stricter standards of procedure may be observed, at least in cases which are obviously of a substantial nature). However, this was not done. All parties were content to allow the point to be argued upon unsworn statements of fact informally made during argument, and to some extent, as it appears to us, even upon assumptions made more or less tacitly. Undoubtedly this was irregular; but when, in unusual circumstances such as those of the present case, a civil case has been conducted in this way we do not think it is always incumbent upon an appellate tribunal to apply strict rules of evidence, and so to introduce upon appeal standards quite different from those observed at the trial by common consent of all parties and also of the tribunal itself.

The Respondent pleaded in his petition that upon the death of Miss Vaudin in 1938

> "la Succession de la Maison Ancestrale appelee le Port à la Jument fut .... attribuée à feu Monsieur John Hamon."

He also referred in that pleading to

> "la vente de la propriete par Monsieur Adolphus Hamon."

It appears to us that throughout the three Courts the case has been argued upon the following admitted, or assumed, facts:

(a) that Mr. John Hamon entered into possession of the house shortly after Miss Vaudin's death;

(b) that he remained in possession until his death in 1964;

(c) that shortly after his death his son, the first Appellant, sold the house to the second and third Appellants;

(d) that the second and third Appellants have remained in possession of the house since that sale up to the present.

Neither in the course of the argument before us nor, to judge from the transcript, in the Royal Court was anything said inconsistent with any of these facts. We treat them as the facts upon which we have to decide.

It is not possible to put a precise date upon Mr. John Hamon's entry into possession. It appears to us that it must, at the latest, have been at some time in 1939. (In his written submissions presented to us, the Respondent actually referred to "the entering of John Hamon into possession in 1938".) Thereafter there has been unbroken possession, undoubtedly adverse to the Respondent, right up to the present. Even if it be assumed that Mr. John Hamon did not take possession until the end of 1939, i.e. more than a year after Miss Vaudin's death, the period of prescription still expired at the end of 1965. The Respondent did not institute proceedings until the 23rd August, 1968.

The Respondent, while ultimately admitting that he could not press any allegation of fraud, did rely upon the following passage from Laurent Carey's Essai sur les Institutions, Lois et Coutumes de l'Ile de Guernesey:

No. 8

Guernsey Court of Appeal (Civil Division)

Judgment

11th March 1970 (continued)

"[La prescription] ne court contre qui est empêché d'agir, ou qui est ignorant de son droit au moyen de fiction ou de déception dont on avait usé envers lui." (p.207.)

Of this it is sufficient for us to say that the Respondent did not suggest any facts which could possibly support an answer to the plea of prescription on either of the grounds suggested by Carey. We therefore conclude that the Appellants established their plea of prescription. The appeal must be allowed, the order of the Royal Court set aside, and the action dismissed.

ADVOCATE D.W.M. RANDELL: Sir, I do not know whether the Court would consider making an order for costs in favour of my clients. They have indeed been at three separate hearings of this - the hearing initially in the court of Sark, again before the Bailiff where no order as to costs, either in their favour or against them, was made - and, of course, at this somewhat lengthy proceedings which you gentlemen have heard, culminating in the judgment this morning.

I would ask for an order for costs in favour of my clients, the two Mesney Respondents.

THE PRESIDENT: (to Mr. Adolphus Henry Vaudin) Mr. Vaudin have you anything to say in relation to this application?

MR. VAUDIN: Well Sir, I would ask leave to appeal to the Privy Council.

THE PRESIDENT: We will deal with that question in a moment; do you wish to say anything in regard to the application that has been made for costs up to the present stage of the proceedings?

MR. VAUDIN: Well, I would at this stage suggest, if my request is accepted by your Court, that the whole thing should come after.

ADVOCATE RANDELL: I would say, Sir, that it is usual for the Court pronouncing the decision to deal with the question of costs up to that stage; if there be authentic opposition in relation to this matter, then that is a matter for the tribunal which is then dealing with the matter. I would say it is quite appropriate at this stage for this Court to make an order in favour of my clients.

MR. VAUDIN: My submission to the Court is that I would rather see the whole thing, if you are agreeable to my request, come after.

THE PRESIDENT: Mr. Randell, you make your application on behalf of all the Appellants?

ADVOCATE RANDELL: In particular, Sir, I make application on behalf of the Appellants the Mesneys. I think that my friend Mr. Lenfestey would like to make a similar application in relation to his client.

Possibly, I might refer you, Sir, to Article 18 of the Appeals Law, and it is in Volume XVIII - this is The Court of Appeal (Guernsey) Law, 1961. Article 18 says:-

> "18. (i) The costs of and incidental to all proceedings in the Court of Appeal under this Part of this Law shall be in the discretion of the Court, and the Court shall have power to determine by whom and to what extent the costs are to be paid."

I would suggest that is authority for the Court to be able to exercise its discretion in favour certainly of my clients' - indeed in favour of Mr. Lenfestey's - costs.

ADVOCATE E.J.T. LENFESTEY: Sir, I would also ask for costs in favour of my client, the first appellant.

THE PRESIDENT: We take it now, gentlemen, that you are referring to the costs of this appeal?

ADVOCATE RANDELL: Yes Sir - the question of the costs of the earlier appeal was dealt with by the learned Bailiff.

(The Court considers the matter).

THE PRESIDENT: We are unanimous in thinking that the costs of the appeal should follow the event. (to Mr. Vaudin): You have a further application you wish to make, Mr. Vaudin - you are applying to us for leave to appeal to Her Majesty in Council? (to Advocates Randell and Lenfestey): Have you anything to say about the application, gentlemen?

No. 8

Guernsey Court of Appeal (Civil Division)

Judgment

11th March 1970 (continued)

ADVOCATE RANDELL: Sir, I think the matter is regulated also by the same law that I quoted to you - this would be at Article 16 of the same law, which says:-

> "16. No appeal shall lie from a decision of the Court of Appeal under this Part of this Law without the special leave of Her Majesty in Council or the leave of the Court of Appeal except where the value of the matter in dispute is equal to or exceeds the sum of five hundred pounds sterling."

Now, Sir, I have referred to Halsbury on this also, and perhaps I could just refer you to Volume V of the 3rd Edition of Halsbury's Laws of England at page 684 - it is dealing with the Judicial Committee of the Privy Council and it is headed "Subsect. (2). Appeals as of Right at the Court's Discretion."

> "Article 1460. Leave of court necessary. Even where appeal lies as of right application for leave to appeal must first be made to the court from which the appeal is to be brought, and it is the duty of the court to form a judgment whether the appeal lies or does not lie. Failure to express an opinion on the right, while accepting the necessary security from the appellant for prosecution of the appeal, is incorrect, and in such a case the Judicial Committee will determine for itself if the appeal is within the grant and allow it or refuse it accordingly."

It would appear to me here, Sir, that it is, according to Halsbury, necessary for this Court to grant leave for an appeal, even if the amount in dispute is over £500 I think, therefore, Sir, it is probably necessary for this Court to pronounce judgment as to whether the matter in dispute is, in fact of a value exceeding £500. If the Court so finds, then I understand that that is automatic. I think it is necessary that this court should find whether or not the matter in dispute is of the value of £500.

THE PRESIDENT: I do not suppose you are disputing that, Mr. Randell, are you?

ADVOCATE RANDELL: Indeed, we are not.

THE PRESIDENT: Mr. Vaudin we would be of a mind to grant your application, but there will remain for consideration the question of the amount of security that should be provided.

MR. VAUDIN: Yes, Sir.

THE PRESIDENT: I think that is a matter for us, is it not?

ADVOCATE RANDELL: I think it is certainly in the discretion of this Court. If I might again refer you in this case to the Privy Council Rules, Sir, and I think there is reference to it in Halsbury. The Privy Council Rules were registered here in 1957. Rule 6 provides for the giving of security for costs. I think it refers in Halsbury to the amount.
Halsbury, Volume V again - it is in fact the next paragraph, 1461:-

> "Regulation of conditions of appeal. In most cases Orders in Council regulating appeals lay down similar conditions to the following effect. The appeal lies as of right from any final judgment when the matter in dispute on the appeal amounts to or is of the value of a sum usually fixed at £500 or upwards or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the like value. In addition, the appeal lies at the discretion of the court from any other judgment, whether final or interlocutory, if in the opinion of the court the question involved in the appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council for decision. But leave to appeal will only be granted upon condition that the appellant within three months, or a shorter period fixed by the court, enters into security to the satisfaction of the court in a sum not exceeding £500 for the due prosecution of the appeal and the payment of such costs as may become payable to the respondent in the event of the appellant not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution or of Her Majesty in Council ordering the appellant to pay the respondent's costs. The

No. 8

Guernsey Court of Appeal (Civil Division)

Judgment

11th March 1970 (continued)

court may also impose conditions as to the time within which the appellant shall take the necessary steps for the preparation of the record and its despatch to England."

THE PRESIDENT: Will you repeat where there is reference to a sum of money?

ADVOCATE RANDELL: There is one reference: " ... leave will only be granted upon condition that the appellant within three months, or a shorter period fixed by the court, enters into security to the satisfaction of the court in a sum not exceeding £500 for the due prosecution of the appeal and the payment of such costs as may become payable to the respondent in the event of the appellant not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution or of Her Majesty in Council ordering the appellant to pay the respondent's costs.

MR.J.G. LE QUESNE: This is merely Halsbury saying what the Order in Council usually provides?

ADVOCATE RANDELL: Yes, it is, indeed.

MR. LE QUESNE: The position is there is no such Order in Council applying in Guernsey?

ADVOCATE RANDELL: We have nothing, as far as I am aware, except this question of the Privy Council Rules of 1957 registered here by virtue of the Orders in Council regulating the rules for appeals in the Privy Council generally. There are no special rules relating to Guernsey, as far as I am aware.

THE PRESIDENT: The 1957 Rules don't say anything about the amount of security?

ADVOCATE RANDELL: I have not found anything, Sir.

THE PRESIDENT: (to Mr. Vaudin) Do you wish to add anything?

MR. VAUDIN: No Sir.

THE PRESIDENT consults his colleagues.

THE PRESIDENT: Well, the Court is of opinion that the appropriate amount in this case would be the sum of £1,000, for which security should be given to the satisfaction of the Greffier of the Court, and that the period for the lodging of the record in London should be three months. I think you will find when you get to the Privy Council they will require you to produce an order giving final leave to appeal - what I mean is, when you have complied with those conditions I think you will have to come back to the court and ask for an order giving you not conditional, but final leave. That is what you require.

MR. VAUDIN: Go back to your court?

THE PRESIDENT: That is right.

MR. VAUDIN: As regards the costs, are the court going to fix costs?

THE PRESIDENT: The costs of this appeal have been awarded to the appellants, Mr. Vaudin.

ADVOCATE RANDELL: Indeed, Sir.

THE PRESIDENT: I repeat that the security required by this court in relation to the further appeal is in the sum of £1,000 and the period for the necessary documents to be lodged in relation to the appeal will be three months.

(Signed)

Official Court Reporter

No. 9

NO. 9

Act of Guernsey Court of Appeal and Order granting Conditional Leave to Appeal to Her Majesty in Council

11th March 1970

ACT OF THE GUERNSEY COURT OF APPEAL AND ORDER GRANTING CONDITIONAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

IN THE COURT OF APPEAL OF GUERNSEY
(CIVIL DIVISION)

The eleventh day of March, 1970

Before: Sir Robert Le Masurier, D.S.C., Bailiff of Jersey.
Mr. J.G. Le Quesne, Q.C.
Mr. P.H.R. Bristow, Q.C.

ADOLPHUS JOHN HAMON and
ALAN JAMES MESNEY and
DOROTHY LUCIEN MESNEY
(née Price) his wife — Appellants

v.

ADOLPHUS HENRY VAUDIN — Respondent

In the matter of the appeal against the judgment of the Ordinary Division of the Royal Court in the above cause given on the 21st day of January, 1969.

The Court, after hearing Counsel for the Appellants and the Respondent who appeared in person, allowed the appeal and ordered that the said judgment of the Ordinary Division of the Royal Court be set aside, that the action be dismissed and that the Respondent be condemned in the costs of the appeal.

On the application of the Respondent, the Court granted leave to appeal to Her Majesty in Council upon condition that the Respondent shall, within three months, enter into good and sufficient security, to the satisfaction of the Court, in the sum of One thousand pounds sterling, for the due prosecution of the appeal and the payment of all such costs as may become payable to the Appellants in the event of the Respondent's not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution, or of Her Majesty in Council

ordering the Respondent to pay the Appellants' costs of the appeal, as the case may be.

R.H. VIDELO

Registrar of the Court of Appeal.

Certified true copy

R.H. VIDELO

Registrar

No. 9

Act of Guernsey Court of Appeal and Order granting Conditional Leave to Appeal to Her Majesty in Council

11th March 1970 (continued)

NO. 10

No. 10

Guernsey Court of Appeal

Order granting Final Leave to Appeal to Her Majesty in Council

15th June 1970

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

IN THE COURT OF APPEAL OF GUERNSEY
(CIVIL DIVISION)

This fifteenth day of June, 1970

ADOLPHUS JOHN HAMON and
ALAN JAMES MESNEY and
DOROTHY LUCIEN MESNEY
(née Price) his wife — Appellants

v.

ADOLPHUS HENRY VAUDIN — Respondent

Sir William Arnold, Kt., C.B.E., President of the Court, in the exercise of the powers of a single judge vested in him by virtue of section 21(1) of The Court of Appeal (Guernsey) Law, 1961, having heard that the Respondent, Adolphus Henry Vaudin, did, on the fourth day of May, 1970, lodge with the Registrar the sum of One thousand pounds sterling, in cash, and having heard Counsel for the Appellants thereon, granted FINAL LEAVE to appeal to Her Majesty in Council against the judgment of the Court of Appeal given on the eleventh day of March, 1970.

R.H. VIDELO

Registrar

IN THE PRIVY COUNCIL NO. 29 OF 1970

ON APPEAL FROM

THE COURT OF APPEAL (CIVIL DIVISION) GUERNSEY

B E T W E E N :

ADOLPHUS HENRY VAUDIN — Appellant

- and -

ADOLPHUS JOHN HAMON and ALAN JAMES MESNEY and DOROTHY LUCIEN MESNEY (nee Price) his wife — Respondents

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