



droit de Dlle. Dorothy Chalk Spoons par acquêt héréditaire par contrat en date du vingt-quatre Février mil neuf cent soixante-deux); ITEM, le fonds de certain chemin longeant au pourportant du côté Est dudit terrain présentement vendu ci-dessus décrit; ITEM, certain becquet de terrain de l'autre côté dudit fonds de chemin présentement vendu avec le mur du Nord vers la Grande Route, le tout se tenant et joignant ensemble et ne formant qu'un seul et même corps de bien-fonds joignant par l'Est au jardin appartenant à John Brookman, Ecr., (ayant droit de Joseph Wilfred Pym Ecr., par prise et acquêt héréditaires par contrat du dix-huit Juin mil neuf cent quarante-huit) par le Sud en partie à la propriété dudit John Brookman, Ecr., (ayant droit de Dlle. Madeleine Kate Le Maistre par acquêt héréditaire par contrat du dix-sept Avril, mil neuf cent quarante-huit), et au reste de ce côté à celle de Monsr. Edward Harry Raven et Dlle. Winifred Beatrice Tring, sa femme, (ayant droit par prise et acquêt héréditaires par contrat du vingt-huit Février, mil neuf cent cinquante-trois de Monsr. Peter Allez), par l'Ouest à celle desdits Monsr. Eric Patterson Haycroft et Dlle. Kathleen Cull, sa femme, (au droit susdit) et bordant par le Nord sur la Grande Route des Genêts."

There are two unusual instances which appear in the contract:-

"Et souffriront lesdits Acquéreurs le survivant d'eux et ses hoirs chemin et passage aux ayant droits en ces lieux-là comme d'ancienneté"

nd

"A LA CHARGE auxdits Acquéreurs au survivant d'eux et ses hoirs de se conformer à toutes les clauses, conditions et restrictions auxquelles ledit Vendeur pouvait être assujetti pour et à cause de la propriété présentement vendue à laquelle il avait droit par possession paisible pour au delà de quarante ans."

It will immediately be seen that the plaintiffs owned two parcels of land. On one was a house and garage; the other was a vegetable patch and each parcel was divided by a roadway which ran into a housing development known as Le Clos de la Marquanderie.

The conveyance gave to the plaintiffs the whole of the area described. Had the plaintiffs' plans approved in a Planning Permit of the 24th January, 1968, been followed, the plaintiffs would have had a new entrance from a proposed new garage on to what is described as their "existing right of way" but which is, of course, the area of roadway over which they claim to have acquired the "fonds". As it is, and as it remained, the two parcels of land were left effectively cut off, one from the other,

by walls running around each property. There had been for some time a chain-link fence along the eastern edge of the roadway which, for the purposes of the drawing prepared by Mr. David Le Quesne and stamped approved on the 24th January, 1968, shows the "roadway" as being 20 feet wide at its entrance to Route des Genêts, 22 feet wide at its southern end where it abuts on the estate road and between these two points is never wider than 16 feet and narrower than 13 feet 6 inches. From north to south its length is 48 feet.

The contract of the 1st December, 1967, is unusual in its root of title. It becomes even more unusual when we see that on the 14th August, 1886, Jean Philippe Le Feuvre dit Filiastre (the father of the 1967 vendor) had sold the property to one Jean François Faudemer. We set the whole of the latter part of the contract out "in extenso". It will be seen that the consideration is paid as to £5 for the vegetable plot and £14.15s.0d. for the main plot.

*"Premièrement un certain petit becquet de terre avec le fossé et relief de l'Ouest et le fossé du Nord, joignant par le Sud à la terre de Mr. James D'Aubert par l'Est à celle d'Ernest Briant Ecr., et bordant par l'Ouest sur un chemin ou passage de huit pieds de laize et par le Nord sur le chemin public; Ledit Bail et Vente héréditaire de ce premier corps de bien-fonds fait en considération de la somme de Cinq livres Sterling Monnaie de la Grande Bretagne que ledit Preneur et Acquéreur ou ses hoirs paieront audit Bailleur et Vendeur ou à ses hoirs en espèces toutes fois et quantes comme il est ci-après stipulé. Et secondement un autre becquet de terre avec le fossé et relief de l'Est et le fossé du Nord, joignant par le Sud à la terre des hoirs de feu Henry Vatcher, Ecr., par l'Ouest à celle de Mr. Edouard Huelin, bordant par l'Est sur ledit chemin ou passage de huit pieds de laize et par le Nord sur ledit chemin public. Ledits terrains tels qu'ils sont avec tout et autant d'autres droits chemins appartenances et dépendances comme en peuvent appartenir situés en la Paroisse de St. Brélade sur le Fiéf de Noirmont ou autre Fiéf. Lesdits Bail et Vente héréditaires de ce deuxième corps de bien fonds fait en considération de la somme de Neuf livres quinze chelins Sterling Monnaie de la Grande Bretagne, quelle somme ledit Preneur et Acquéreur ou ses hoirs paieront audit Bailleur et Vendeur en espèces toutes fois et quantes. Etant convenu et stipulé entre lesdites parties que ledit Bailleur et Vendeur ni ses hoirs ne pourront exiger dudit Preneur et Acquéreur ou de ses hoirs le remboursement des susdites sommes s'élevant ensemble à la somme de quatorze livres, quinze chelins sterling avant l'expiration de deux années de la date de ce présent contrat, ledit Preneur et Acquéreur s'obligeant pour lui et ses hoirs de payer à qui a droit l'intérêt sur ladite somme au taux de cinq pour cent par an jusqu'au remboursement*

*d'icelle. A la charge audit Preneur et Acquéreur et ses hoirs de se conformer à toutes les clauses conditions et restrictions auxquelles ledit Bailleur et Vendeur pourrait être sujet pour et à cause des prémisses. Au reste le tout franc et quitte de toutes rentes et redevances sauf les Droits Seigneuriaux. Possession du contenu des prémisses du jour de Noel dernier et ensuite le tout à fin d'héritage."*

The contract, as we have said, is unusual. There is a deferred future payment of the consideration and a retrospective period of possession. We know nothing more. Did Jean François Faudemer die without heirs? Did he leave the Island because of financial problems? Neither counsel could help the Court. Was the property taken back because of the certainty that the Faudemer line had vanished without trace? We do not know. We were not told. We know that J. F. Faudemer paid no rates in St. Brelade in 1887 or in any subsequent year.

What we do know is that Filiastre "père" made no claim to the roadway. Filiastre "fils" did.

Mr. Sinel told us that there was "nothing significant" in the fact that the roadway is described in 1886 as being of "*huit pieds de laize*". That was the standard width for a roadway.

Seventy-one years after his father sold the property without claiming the roadway, the son sold "*un seul et même corps de biens fonds*" claiming right by way of "*possession paisible pour au delà de quarante ans*".

The pleading of the plaintiffs in this matter is illuminative for in their reply they say this:-

*"The plaintiffs do not claim prescriptive rights in the roadway. The rights claimed are rights of ownership".*

In 1967 when the plaintiffs purchased the property they obtained a States' loan which is charged by way of a "*hypothèque conventionnelle simple*" on the property exactly as it was described in the contract of purchase.

One can see that, if the plaintiffs are not correct, there will be an immediate problem under Article 21 of Loi sur la Propriété Foncière which reads:-

*"Toute hypothèque conventionnelle, foncière ou simple, devra être créée ou constituée sur un biens fonds spécial et déterminé qui seul en sera grevé."*

The Crown Solicitor, however, accepted the title as being good. The States' loan was checked by him and obviously approved by him.

The property was again checked by an independent source for there was a road widening scheme authorised by the States and on the 6th November, 1970, the Attorney General and the Greffier of the States purchased in the name of the public "*un seul et même corps de biens fonds*" containing one thousand two hundred and sixteen square feet of land. The description is as it was in the 1967 contract of purchase.

The road widening provided for two pavements - one on the north side of the Route des Genêts, the other on the south. We saw the 1964 survey plan prepared by the then States' Engineer Mr. G. C. Law. Mr. Michael John Isaacs a civil engineering technician employed by Public Services measured from the survey for the Court.

The survey showed 22 feet across the north of the roadway and at the line of the back edge of the proposed footpath, 15 feet.

The plaintiffs had originally lived in the property Minquiers View as tenants of Mr. Filiastre for some seven years before they purchased the property. They paid £65 per annum to rent it. There was a closure order upon it. The valuation prepared for the States for the road widening purposes by Langlois Limited on the 24th January, 1966, recites that order.

*"The Public Health Authority order closure and demolition of the premises as dangerous and injurious to health, and therefore unfit for habitation."*

The septic tank for the property was situated in the roadway, the soakaway was in the vegetable garden and the septic tank had to be emptied approximately four times a year.

The property "Sydmor" - that replaces Minquiers View - is now on main drains but the septic tank is utilised to take rain water from the yard of "Sydmor".

When the plaintiffs acquired "Sydmor" they took out an insurance policy to cover any balance of the forty year period. We were not shown that insurance policy.

The plaintiffs have received compensation from two neighbours residing in the Clos de la Marquanderie, Mr. and Mrs. Lannoy and Mr. and Mrs. Vasselin, to enable them to pass over their roadway. They were to have had a further arrangement with a Miss Brookman but complications arose when the defendant apparently asked too much for the part of the roadway which, without dispute, he owns.

**THE DEFENDANT'S CLAIM**

On the 11th December, 1970, the defendant who then owned "Sommet Vert" (which bordered La Route des Genêts on its north and on its south the field "Le Clos de la Marquanderie" then owned by Mr. and Mrs. Raven who developed the Estate) purchased from Edward Harry Raven and Winifred Beatrice Tring, his wife:-

*"droit de chemin et passage toutes fois et quantes et à tous usages pour les besoins dudit terrain au Sud de ladite maison à travers ledit chemin ou avenue et ce à partir de la Grande Route qui mène de la Chapelle de Tabor aux Rouges Maisons et allant Sud de ladite Grande Route et ensuite vers l'Ouest au Nord des maisons érigées dans ledit becquet de terre et lequel droit de chemin se terminera au point où ledit chemin tourne vers le Sud à son extrémité Ouest. Etant entendu que tel droit de chemin et passage ne comprend pas le droit de stationnement;"*

The contract claims that Mr. and Mrs. Raven are owners of the roadway.

On the 15th June, 1973, Mr. and Mrs. Raven sold for seven hundred pounds:-

*"tout et autant de propriété comme peut appartenir auxdits Vendeurs dans le reste de certain chemin particulier établi par lesdits Vendeurs sur la partie Nord et Est de certaine pièce de terre appelée "Le Clos de la Marquanderie" et aucunes autres issues y dépendant et ce à partir de la Grande Route qui même de l'ancienne Chapelle de Tabor aux Rouges Maisons jusqu'à atteindre la partie Ouest et Sud dudit chemin appartenant à Monsr. Ernest Brandon, (ayant droit desdits Vendeurs par autre contrat en date de ces jour et an recours à icelui).*

*LESDITS chemin et issues tels qu'ils sont avec tout et autant de droits appartenances et dépendances comme en peuvent appartenir situés en la Paroisse de St. Brélade, Vingtaine des Quennevais."*

It is noteworthy that the claim of Mr. and Mrs. Raven is to land which touches the Route des Genêts and then proceeds until it reaches the remainder of the roadway which is to the west of the defendant's land and which they had sold on the same day to Ernest Brandon.

The contract to Ernest Brandon gave him and his heirs or assigns all necessary *"droits de chemin et passage de huit pieds de roi de laize toutes fois et quantes et a tous, usages"* along the road which they were about to sell to the defendant and which had its exit on the Route des Genêts.

The predecessor in title to Mr. and Mrs. Raven was Peter Allez from whom they bought La Clos de la Marquanderie on the 18th December, 1953. There is a jointure on to the main road. There is mention of the property:-

*"joignant par l'Est en partie à la propriété appartenant à Mons. Peter Le Feuvre dit Filliastre ..." and "par l'Ouest ... au reste de ce côté à celle dudit Monsr. Peter Le Feuvre dit Filliastre."*

The only possible boundaries east and west with the Filliastre land are where the roadway runs for some 48 feet through the two parcels ("Minquiers View" to the west, the vegetable garden to the east) owned by him. The northern boundary is described thus:-

*"et en partie à celle dudit Monsr. Peter Le Feuvre dit Filliastre et bordant au reste par le nord sur la Grande Route qui conduit de la Chapelle Tabor aux Rouges Maisons".*

It must be admitted that there are no jointures on the roadway until 1953 but it is clear from the Ordnance Survey Maps of 1935, 1958 and 1981 and from aerial photographs taken on the 14th August, 1944, (from a British Mosquito Aircraft of the Royal Air Force) and in 1957 (as part of the preparation for the 1958 Survey) that the physical features of the land have changed very little over the years. It is a rectangle of land, bordering fields on all its boundaries apart from the north east where a "swan's neck of land" appears to link the field with the public road. Indeed the 1944 photograph shows that the roadway is defined by hedges along both its sides.

#### LE CLOS DE LA MARQUANDERIE

Let us for a moment examine how early contracts have described the field.

Only four contracts were shown to us.

On the 17th August, 1811, Samuel Le Feuvre sold to his brother François Le Feuvre:-

*"une certain maison & offices, belle & Hôgard, avec les Jardins à potage à l'Ouest & à l'Est de ladite maison & y joignant, le Jardin ou valette plantée à pommiers & les Côteaux au nord & au Sud de ladite maison & Jardin, fossés ou murailles & reliefs tout autour; Item le Jardin & Côteau de la ferme; le clos des Millons, terre champartière fossés & reliefs de l'Est & du Sud vers le chemin public le Hurel d'abraham, la valette de la ferme, le champ de pertel & la Pièce de l'Autel Philippole, les quatre dernières pièces ne*

faisant présentement qu'une seule & même piece de terre fossés & reliefs du Nord vers le chemin public, un bout de celui de l'Ouest par le bout du Nord jusqu'à la recourbe du clos d'Helier Mauger & un bout de celui de l'Est par le bout du Nord au pourportant de la terre de Mr. Thomas Le Feuvre Dit Filliastre; à la charge audit preneur de souffrir à Helier Mauger, chemin et passage à tous usages, par dans la susdite piece le long du fossé de l'Ouest selon qu'il y est dû, Item le Hurel de la Jehandoise fossés & reliefs tout autour. Toutes les susdites terres s'entretenant & joignant ensemble situées en la paroisse de St. Brelade partie sur le fief du Roi & partie sur celui de Noirmont. Item le clos de dessus la valeur, fossés & reliefs tout autour. Et les deux champs du Nord de la Marquanderie avec la levée du Nord & de l'Est au pourportant joignant par le sud à la terre de Mr. Thomas Piton & par l'Ouest à celle de Mr. Jean Alexandre; les deux dernières pièces de terre situées en ladite Paroisse, sur le fief du Roi. Le tout tel qu'il est et qu'il se pourporte avec autant d'issues & autres appartenances & dépendances qu'audit ténement en peuvent appartenir sans aucune réserve ni retenue."

Here then is the sale of the whole farm property which included "Le Champ" de la Marquanderie. We must remind ourselves that in 1811 Les Quennevais was not the urban development that we have today. We can see that in the Richmond Map of 1795. Vast areas of sand dunes stretch along the plateau of land above St. Brelade's Bay. However as we have said, there seems little doubt that the physical features of the field, divorced as it was from the main farm and its fields, have changed little over a very considerable period of time.

Mr. Falle asked us to note in this, and to later contracts to which we shall refer, the use of the word "issues".

When François Le Feuvre sold the property that he purchased in 1811 to Helier de Gruchy on the 12th October, 1844, the description has changed slightly. The "deux Champs" have been transformed into one "Clos" - that is, a cultivated field enclosed in some way to give formal boundaries.

"Une certaine maison, offices, Belle et Hôgard, avec les Jardins à Potage à l'Ouest et à l'Est de ladite maison et y joignant, le Jardin ou Valette planté à Pommiers et les Côteaux au Nord et au Sud le ladite maison et Jardins, fossés, banques ou murailles et reliefs tout autour; Item le Jardin et côteaux de la Ferme; le Clos des Millons (terre champartière), fossés et reliefs de l'Est et du Sud vers le chemin public, le Hurel d'Abraham, la Valette de la ferme, le Champ Pertel, la pièce de l'Hôtel Philippole (this was, of course, l'Autel Philippole in 1811) et le Hurel de la Jehandoise, les cinq dernières pièces ne faisant présentement



qu'une seule et même pièce de terre, fossés et reliefs du Nord vers le chemin public et vers la terre de Monsr. François Alexandre, et un bout de celui de l'Ouest par le bout du Nord jusqu'à la recourbe du Clos de Mr. Hélier Mauger, et un bout de celui de l'Est par le bout du Nord au pourportant de la terre de Mr. Thomas Le Feuvre dit Filliastre. A la charge audit Preneur de souffrir audit Hélier Mauger chemin et passage à tous usages par dans la susdite pièce le long du fossé de l'Ouest, selon qu'il y est dû. Toutes les susdites terres s'entretenantes et joignant ensemble situées en la paroisse de St. Brelade, partie sur le fief de la Reine et partie sur celui de Noirmont; Item, le Clos de dessus la Valeure, fossés et reliefs tout autour, et le Clos de la Marquanderie, avec les fossés, murailles et reliefs du Sud, du Nord et de l'Est et un bout de celui de l'Ouest, joignant par le Sud à la terre de Mr. Thomas Piton, et par l'Ouest à celle des hoirs de Mr. Jean Alexandre, les deux dernières pièces de terre situées en ladite paroisse, sur le fief de la Reine; le tout tel qu'il est et qu'il se pourporte, avec autant de droits, issues et autres appartenances et dépendances comme audit ténement en peut appartenir, mesurant vingt-neuf vergées, trente-trois perches, quatre pieds de terre, mesure agréée et accordée entre lesdites parties et généralement tout et autant comme feu Mr. François Le Feuvre père dudit bailleur en prit à fin d'héritage de Mr. Samuel Le Feuvre, son frère par contrat en date du l'an mil huit cent onze, le dix-septième d'Août, sans en rien réserver ni retenir."

By 1859 when Helier de Gruchy sold (on the 2nd July of that year) to François Charles Godel (we will not repeat the description of the property) the field is so clearly delineated as to warrant description by reference to its "fossés, murailles et reliefs":-

"Item le Clos de dessus la Valeure fossés et reliefs autour et le Clos de la Marquanderie avec les fossés murailles & reliefs du Sud du Nord et de l'Est et un bout de celui de l'Ouest joignant par le Sud à la terre qui fut à Mr. Thomas Piton & par l'Ouest à celle de Mr. Jean Alexandre les deux dernières pièces de terre situées en ladite Paroisse sur le Fief de la Reine. Le tout tel qu'il est et qu'il se pourporte avec autant de droits issues et autres appartenances & dépendances comme en peut appartenir mesurant trente vergées de terre mesure agréé et accordé ente lesdites parties."

When on the 10th August, 1866 Thomas Small (there had been a décret) sold to Henry Vatcher the description changes a little in its use of terms:

"Item le Clos de dessus la Valeure, fossés et reliefs tout autour et le Clos de la Marquanderie, avec les issues qui peuvent en appartenir, fossés, murailles et reliefs du Sud et du Nord et de l'Est et un bout de celui de l'Ouest joignant par le Sud à la terre qui fut à Mr. Thomas Piton, et par l'Ouest à celle de Mr. Jean Alexandre, les deux dernières pièces de terres situées en ladite paroisse de St. Brelade sur le Fief de la Reine, le tout tel qu'il est avec autant de droits, issues chemins, appartenances et dépendances comme à ladite propriété en peut appartenir."

Because we shall, in a moment deal with the points raised by Mr. Falle we note that immediately before this passage there is a clause dealing with another field which reads "à la charge audit Prèneur de souffrir audit Mr. Edouard le Bas et ses hoirs, chemin et passage à tous usages, par dans la susdite pièce le long du fossé de l'Ouest selon qu'il y est dû ..." It is clear that rights of way (where they existed) were recognised and drafted as such.

#### WHAT IS AN "ISSUE"?

Mr. Falle was faced with a dilemma. He attempted to explain it to us in this way. The 1953 contract is the first contract that lays a real and specific claim to the roadway.

That 1953 contract has an excellent pedigree which can be traced with comparative ease back to the 17th August, 1811.

The ordnance survey maps and the photographs give support to the argument that Le Clos de la Marquanderie has changed little over the years.

The answer to the dilemma, according to Mr. Falle, lies in the word "issues". So we see the use of the word thus:-

In 1811 : "le tout tel qu'il est et qu'il se pourporte avec autant d'issues et autres appartenances et dépendances qu'audit ténément en peut appartenir sous aucune reserve ni retenue".

In 1844 : "avec autant de droits, issues et autres appartenances et dépendances comme audit Ténément en peut appartenir ..."

In 1859 : "avec autant de droits, issues et autres appartenances et dépendances comme audit Ténément en peut appartenir."

In 1866 : "le Clos de la Marquanderie avec les issues qui peuvent en appartenir, fossés, reliefs et murs ..."

and then again (but in a slightly different form):-

*"le tout tel qu'il est avec autant de droits, issues, chemins, appartenances et dépendances comme audit Ténément en peut appartenir."*

It will be recalled that in 1953 the words used are *"avec les issues qui peuvent en appartenir, les fossés, murailles et reliefs ..."*

And finally:-

*"Avec tout et autant d'autres droits, appartenances et dépendances comme en peut appartenir."*

Mr. Falle referred us to the Dictionnaire Jersiaise - Français (1966) par Frank Le Maistre. Under the entry "issue" there are two meanings. The first is "au sens de débouché" or outlet. Dr. Le Maistre states that in contracts one reads *"avec les tours d'échelles et issues qui en appartiennent"* and he mentions *"les bels, haûgards et issues d'la ferme"*.

The second is *"lisière d'herbe et au bord de la route"* or verge.

The word "issues", we were told, is ordinarily employed in the plural.

So it is that in Jersey Place Names Volume I "Issue, Issues" the definition is of *"egress from farm premises on to a road"* including a verge between the outer wall or hedge of a property and the road. In the Dictionnaire de l'Académie Française (the Edition published in the seventh year of the Republic) - "issue" is defined as *"sortie"*. The learned authors speak of *"les issues d'une Ville, d'une maison"* as meaning *"Les dehors et les environs"*. They go on to say *"En ce sens il ne dit guère qu'au pluriel"*.

Or again, where Jean Poingdestre is writing in his Lois et Coustumes of *"Confins des Territoires"* he mentions (at page 184) examples where disputes may occur and says:-

*"ou entre deux voisins pour quelque piece de terre, fossé, chemin, banque ou issue, que chascun des deux, pretend luy appartenir"*.

Mr. Falle called as a witness Miss Jean Arthur who has studied the French language and has for many years been involved in research for La Société Jersiaise. She is a co-author with the late Charles and Joan Stevens of that magnum opus "Jersey Place Names". She is now employed (and has been for 12 years) as a conveyancing clerk with Bois, Labesse.

Mr. Sinel called three witnesses on this matter, Mr. Anthony de Ste Croix, now self-employed but with twenty-seven years of conveyancing experience, Mr. Michel Bougeard, whose first language is French and who has been a conveyancing clerk (he is now with Bailhache and Bailhache) for nineteen years and Mr. Barry Le Feuvre who has been a conveyancing clerk with Le Masurier, Giffard and Poch for twenty-eight years.

With no disrespect to any of these highly skilled draughtsmen, each of whom gave his or her evidence with conviction, we find it surprising in the extreme (if evidence of this kind is helpful) that not one practising Advocate (and there are still many who specialise in the complex art of conveyancing) was called to give evidence. If counsel is aware of the Best Evidence Rule in relation to documents we feel that, by analogy, we would have been so better helped had we had the advantage of hearing qualified practitioners as opposed to their clerks. This Court must often decide as best it can on the authorities and law which both counsel, in their wisdom, see fit to lay before it.

Not one of the witnesses called by Mr. Sinel supported the views of Miss Arthur. There is no dispute whatsoever that everyone in Jersey can understand the French word "issues" to mean an outlet in the sense mentioned in E. T. Nicolle's Town of St. Helier (1931) where it is said (page 45) "The extremities of the Town; that is La Motte Street (Rue de la Motte) and Charing Cross were called "Les Issues de la Ville" - the outlets of the Town". One does not need Bescherelle's 1877 Dictionnaire National to understand "Passage, endroit d'ou une chose peut sortir" nor Miegé's French Dictionary of 1687 - "Issue" - an issue, or passage out". Perhaps there is a French Theasaurus which gives as a synonym of cul-de-sac - "Rue sans issue".

We have, after anxious consideration, come to a very clear conception that in conveyancing terms "issues" mean those strips of land which are the consequence of a road having been driven through a field and which are left isolated when the road has been completed. They will sometimes be of irregular shape although normally they will be in the form of long strips "au pourportant" of the road in question. They are, in our view, used in the saving clause "avec autant de droits, issues et autres appartenances et dépendances comme en peut appartenir" simply because they are sometimes difficult to identify. They are not "ejusdem generis" with avenues, chemins, passages, or chasses - although they owe their existence to roadways they do not in themselves describe the roadway.

If an "issue" (or "issues") is a debouchment on to a road then the three witnesses called by Mr. Sinel went to some lengths to explain that they had never come across such a drafting use in what was an impressive number of years of practical experience. Mr. Le Feuvre told us that if he wished to describe an entrance

out of a field on to a road he would use "*sortie*" or "*ouverture*" to convey his meaning. Mr. Bougeard with French as his first tongue was well aware that "*issue*" meant a roadway or an exit in French. He could think of no case where he would have used the word to describe this particular roadway - which is, after all, 47 feet long.

Although Miss Arthur told us that she had seen "*issues*" (in the sense of "*chemins*") used in partages Mr. Falle brought no *contrats de partage* to Court.

At one stage Mr. Falle spoke of "monoglot conveyancing clerks". In one sense that is inaccurate. Mr. Bougeard was certainly an exception, but we are not talking of the word "*issues*" of something which, in its French dictionary sense, is difficult to understand.

The feeling that we have is that the word is not used today by draftsmen in the sense that Mr. Falle gave it to us and we can see no logical reason why a conveyancing clerk in the nineteenth century (a true polyglot speaking, as Miss Arthur reminded us, three languages) would have any difficulty in communicating his understanding to his modern day counterpart. If the definition of "*issues*" has contracted to its narrow present day meaning then Mr. Falle had to satisfy us that in the nineteenth century the custom of conveyancers was not what it is today. That he quite failed to do. We are not prepared to agree that because the word "*issues*" is used in the four contracts that is in itself the description of the roadway. It may well be that the inclusion of "*issues*" means that by the very definition of the word there must have been a roadway or roadways in existence.

It may well be that the draftsmen grappled with the difficulty of a strip of land (the swan's neck) which was wider than any "roadway" that had previously been encountered. We do not know.

What we must remember, however, is that contracts are good against the parties who dealt with them. They do not affect third parties who had no knowledge of them. In any event we are not troubled by the argument on "*issues*" which we do not consider to be of any great significance.

Everything, in our view, militates against the plaintiff's claim. The shape and description of Le Clos de la Marquanderie, the fact that the roadways have been enclosed, by a wall on its western boundary, by a chain link fence (replaced by a wall) on its eastern boundary, the lack of means of access to cross the roadway in order to get from one property to the other and the fact that the roadway is tarmacadamised along the whole of its length by the owner of Le Clos de la Marquanderie. It also becomes apparent that for many years the owners of "Minquiers

View", and its replacement, had no use for the roadway. They enclosed it from the roadway. They used the dangerous main road to get from the "Minquiers View" to the vegetable patch.

The plaintiffs say in their reply that "they do not claim prescriptive rights in the roadway ... The rights claimed are rights of ownership."

The title upon which they rely, however, which is their title of purchase in 1967 says:-

*"A la charge auxdits Acquéreurs au survivant d'eux et ses hoirs de se conformer à toutes les clauses, conditions et restrictions auxquelles ledit vendeur pouvait être assujetti pour et à cause de la propriété présentement vendue à laquelle il avait droit par possession paisible pour et au delà de quarante ans".*

That may well establish a good title to defeat a claim to "Sydmor" and the vegetable patch by any member of the Faudemer family.

The Code of 1771 encapsulates the rule completely (Loix page 223):-

*"Les personnes qui ont possédé un immeuble paisiblement, et sans interruption, quarante ans, ou au delà, ne pourront être inquiétés, ni molestés à l'égard de la propriété dans la chose possédée, la possession quadraginaire donnant un droit parfait, et incontrovertible, selon l'ancienne coutume de l'isle, excepté en matière de servitude, laquelle ne peut s'acquérir par la prescription, fût-elle centenaire, mais dont on peut se libérer, ou acquérir la liberté par la prescription, c'est-a-dire, lorsque la servitude n'a point été excercée par quarante ans continuels."*

That may well establish that the plaintiffs now hold good title to "Sydmor" and its vegetable patch against any potential claimant but how can the plaintiffs claim title to the roadway? Their "root" must be the 1886 contract when Filiastre père made no claim to the roadway at all as it was described as a separately owned roadway and where he claimed no rights over it to get from one property to the other.

The "A la charge" clause in the 1886 contract reads:-

*"A la charge audit Preneur et Acquéreur et ses hoirs de se conformer à toutes les clauses conditions et restrictions auxquelles ledit Bailleur et Vendeur pouvait être sujet pour et à cause des prémisses."*

We saw no earlier contracts. We presume that Mr. Sinel did not consider them to be of importance.

HAS THE ROADWAY "CHANGED ITS SHAPE"?

In 1964 there was a wall on the west, or "Sydmor", side of the roadway. There were concrete posts with wire mesh on the east, or vegetable plot, side of the roadway. There was a lip of about four inches along the edge of the concrete posts and wire mesh.

The wall on the west side ran without interruption until it met the wall of the neighbour, Mr. Raven, in the Clos de la Marquanderie. The wall of course curved to the west as it came round the south of the "Sydmor" property. Entrance then, as now, opened on to the main road.

The septic tank in the roadway was there long before the plaintiff took a lease on "Minquiers View". Langlois Limited in their 1966 valuation took the view that "Minquiers View" was "*most probably built shortly before the turn of the century.*"

There are inspection covers in the roadway.

The plaintiff told us of an agreement reached between the Chief Public Health Officer, Mr. Raven, Mr. Filiastre and himself when the road was first tarmacadamised. There is no written or contractual evidence of that alleged agreement and we heard only the plaintiffs' interpretation of what happened. There was no corroboration or conflicting evidence.

The post and wire fence enclosed not only the vegetable garden but carried on some thirty yards down into Clos de la Marquanderie.

Entrance to the vegetable garden was through a small iron gate from the main road.

No alterations were made to the roadway enclosure when "Sydmor" was built and then not until 1974 when the States road widening took place and a wall was built along the road.

We turned to the Affidavit of the 14th June, 1991. In his Affidavit Mr. Arthur Francis Thomas swore that the "path" had a width of approximately ten feet. We know, of course, that it was 16 feet at its widest and 13 feet 6 inches at its narrowest. It was 20 feet wide where it debouched on to the Route des Genêts.

However, Mr. Thomas went on in his Affidavit to depose that when he removed the wire fence he took the opportunity in building a wall to extend the roadway "*for the convenience of his*

neighbours". He had built the new block wall approximately 3 feet back from where the fence had been. This would have made for a considerable roadway 19 feet at its widest and 16 feet 6 inches at its narrowest.

Mr. Thomas (Mrs. Thomas did not give evidence) was adamant that he widened the road beyond the limit of the wire fence. Mr. Falle, in cross examination, put it to Mr. Thomas that he had not widened the road. That Mr. Thomas denied.

Mr. Thomas then, when the action was before the Court (and in its final pleading stage) moved the wall on the vegetable garden side to the west. He narrowed the roadway. His motives are suspect. When Mr. Falle asked him whether he had carried out works which might obscure the scale of the roadway of which the ownership was in issue, Mr. Thomas very candidly replied "That is possible". But however he moved the wall he is estopped by the record of his own architect's plans from denying its customary width.

If the plaintiffs have altered the line of the wall then it will be comparatively easy to compare the line on the ground with the measurements taken from Mr. Smith's plan. We do not feel that the area of roadway can be any wider than it was when the chain link fence was in situ.

We are satisfied that the defendant has good title to the roadway. The alleged title of Filliastre fils is very suspect. His father, in selling the two parcels of land to Faudemer neither retained the roadway nor included it in the sale. In any event, the owners of Le Clos de la Marquanderie have apparently used the roadway without let or hindrance from time immemorial. This in our view puts the lie to any claim to possession of an "*immeuble paisiblement et sans interruption*".

It follows from our judgment that, as the defendant owns the roadway the plaintiffs have no title to the septic tank in the roadway.

Whether the defendant is minded to allow that servitude to continue is another matter which can only be resolved by negotiation. We can only hope that in these negotiations counsel will adopt a more helpful attitude to one another than has been shown in the past.



### Authorities

- Billet Vol. 77 pp. 153 and 260: Causes Remises Vol. II Le Neveu -v- De Gruchy.
- Dalloz: "Répertoire de Droit Civil" on Prescription: paras. 27-61.
- Dalloz: "Répertoire de Droit Civil" on Possession: Vol. VI paras. 40-96.
- Basnage on Prescription: (4th Ed.) Book 2 pp. 416 and 417.
- Domaz: Les Loix Civiles Livre III: Quadragénaire Titre VII, Sect. IV: De La Possession et des Prescriptions.
- Poingdestre: Lois et Coutumes de la Normandie: pp. 48-63; 183-191; 276.
- Poingdestre: Les Commentaires sur l'Ancienne Coûtume de Normandie: pp. 3, 45 (on the use of the word "issues").
- Code of Laws of Jersey (1771) at p.223 (on "possession quadragénaire").
- Grand Coustumier de Normandie: Le Chartre aux Normâns.
- Le Geyt: Privileges Loix et coutumes de L'Isle de Jersey, (printed 1953) Du Petittoire at p.39.
- Simon -v- Baudains (1970) JJ 1405.
- Vardon -v- Holland (1964) JJ 375.
- Le Gros: Traité du Droit Coutumier de l'Isle de Jersey (1943) "De la Servitude": pp.17-22; and "De la possession quadragénaire ou prescription acquisitive": pp.230-233.