ROYAL COURT

23rd December, 1988

Before: Commissioner F.C. Hamon.

Between	Ruth Winifred Allen wife of Douglas Evans	Plaintiff
And	James Philip Le Feuvre	Defendant

Advocate A.P. Begg on behalf of the Plaintiff
Advocate A.P. Roscouet on behalf of the Defendant

JUDGMENT

COMMISSIONER HAMON: On the 19th February, 1927, James George Allen purchased in his own name, "Roche Vue", St. Brelade, for a consideration of Nine Hundred and Thirty Three Pounds Four Shillings and Three Pence, Sterling.

James George Allen was married to Clara Ann Allen (née Le Feuvre) and they had one child - Gladys Margaret Le Feuvre Allen.

James George Allen's last Will and Testament of Realty was Registered on the 16th December, 1939. In that last Will and Testament "Roche Vue" was devised to his wife, Clara Ann Allen.

Clara Ann Allen continued to own "Roche Vue" until she died intestate. The property then passed on intestate succession to her daughter, Gladys Margaret Le Feuvre Allen. Gladys was a spinster and left no issue.

There are two claimants to the property, the Plaintiff who is the first cousin of Gladys in the paternal line, and the Defendant who is the first cousin of Gladys in the maternal line.

The point of law that I have to decide is a narrow one.

The Plaintiff contends that "Roche Vue" in the hands of Gladys was a paternal "propre". The Defendant contends that "Roche Vue" in the hands of Gladys was a maternal "propre".

There was little disagreement by counsel on the law. "Roche Vue" was acquired by James George Allen "à titre onéreux" and was classified as an "acquêt". It passed to his widow by Will and (by analogy with the judgment of the Superior Number in Harden, Tuteur -v- Harden, Tutrice (1918) 12 C.R. 136) was classified as an "acquêt". When, however, it came to Gladys on her mother's intestacy, it was classified as a "propre".

Both counsel agreed that there are three "golden rules" to determine Paternal and Maternal "Propres".

I have carefully considered all the helpful passages from the authorities cited to me by both counsel. This consideration of the old commentators has, of course, to be tempered with the caveat issued by Sir Richard Couch in Falle -v- Godfray (1888) 14 A.C. 70 at page 75, where he said:-

"The learned counsel for the respondent relied upon passages

which he quoted from writers upon the law in the provinces of France where the Roman law prevailed. It did not in the Duchy of Normandy, from which the laws of Jersey were derived. The opinions of those writers cannot have the same value upon this question as they would if they were writing about the law of Jersey. The use which may be made of them is such as is stated in the judgment of La Cloche v. La Cloche (1) with regard to the Coutume de Paris and Coutume d'Orléans. They may be legitimately referred to for the purpose of testing the interpretation put on a custom of Jersey, and also for the purpose of explaining the force and effect of particular expressions. In this way they may have been referred to in the Jersey Courts. That is not how they were sought to be used in this appeal. Their Lordships were asked to treat them as shewing what is the law of Jersey. The passages relied upon do not profess to be statements of the law or custom of Normandy, or to be founded upon it, and their Lordships cannot accept them as authorities for the law of Jersey".

Many of the authorities dealt with Coutumes other than the Coutume de Normandie, but all expressed the same bases of law, albeit in different ways. The main propositions can be summarised in this way without the necessity of setting out long passages from the works of the learned commentators:-

1. Paternal "propres" must remain in the father's family and maternal "propres" must remain in the mother's family.

2. To classify the "propre" you must discover the person in whose hands it was last an "acquêt": "Pour trouver le propre, il faut remonter jusqu' à l'acquéreur" (see Basnage Article CCXLVII page 390).

3. In cases of doubt the paternal side is preferred: "Le côté paternal l'emporte par dignité".

On reading the pleadings I had thought at one stage that the Plaintiff was set on an attempt to attack the judgment of the Superior Number in Harden, Tuteur -v- Harden, Tutrice. The Plaintiff's Order of Justice contains a submission at paragraph 11 that:-

> "The Plaintiff does not admit that "Roche Vue" in the hands of the deceased's mother was an "acquêt".

Certainly, as I saw from the Defendant's bundle of authorities, that judgment was heavily criticised in the "Evening Post" of Friday, June 28th, 1918. Be that as it may, the argument was not taken and both counsel told me that they were happy to abide by the decision of the Superior Number in the Harden Judgment. Mention of the judgment allows me to comment on Advocate Begg's partial reliance in developing his argument on what was at one time a hallowed principle of Jersey law: "la conservation du bien dans la famille".

In Basden Hotels Limited -v- Dormy Hotels Limited (1968) J.J. page 911, the learnèd Deputy Bailiff said this, at page 916:-

> "In Dolbel -v- Aubin et ux. (1796) 3 C.R. 69, it was held that an agreement to pass a contract of sale of a house or to pay a penalty could not be enforced against the heir of the promisor, but in relation to this judgment one must have regard to the fact that, at that time, the right of the heir to inherit was unassailable and that non-one had any power to dispose of realty by will. It was not until 1851 that the principle of Jersey law "de la conservation du bien dans la famille" came under attack. The "Loi (1851) sur les testaments d'immeubles" conferred on persons leaving no descendants surviving them the power to dispose of (i) their "acquêts" and (ii) their "propres" which they had inherited from a person not an ancester of their heirs. This testamentary power was extended to persons leaving descendants by a Law sanctioned on 6th March, 1902, and the "Loi (1926) sur les héritages propres" gave an unrestricted right to persons having testamentary capacity to dispose by will of their realty. The only reservations made by the Law of 1926 were in respect of the widow's right of dower and the widower's right of "viduité", neither

of which has anything to do with "la conservation du bien dans la famille".

Mr. Valpy also drew our attention to the "Loi (1960) modifiant le droit coutumier" which removes a number of rights which heirs had to have contracts and wills declared invalid. This indeed stresses the intention of the legislature to free persons from restrictions on dealing with their own immoveables as they see fit.

The judgment of the Superior Number in Harden, Tuteur, -v- Harden, Tutrice (1918) 12 C.R. 136, applies the Laws of 1851 and 1902 in such a manner as to affect a fundamental principle applicable to the devolution of realty on an intestacy for the Court held that realty left by will to an heir, in whose hands it would have been "propres" if he had succeeded to it on an intestacy, did not have the nature of "propres" but instead had the nature of "acquêts".

We come therefore to the conclusion that the effect of the Law of 1926 is virtually to set at naught the fundamental principle of Jersey law "de la conservation du bien dans la famille" so far as immoveables are concerned, and consequently that where the only reason why an obligation entered into by and enforceable against a person in relation to immoveables should not be enforceable against his successor in title is that the successor is an heir, the heir no longer has the right to avoid the obligation".

I therefore do not feel that much reliance can be placed on the principle in the context of the present case.

Advocate Begg's argument centred around the second of the "golden rules" (Article 247) where Basnage says:-

"Il n'en est pas de même quand un propre est pretendu par les parens paternels et par les parens maternels, car alors quoi que ce bien ait été fait propre en la personne du defunt, il ne s'enfuit pas qu'il soit de son propre et qu'il faille lui faire commencer la ligne en sa personne, mais on remonte jusqu'à la personne de celui qu l'à

acquis, pour lui donner l'estoc et la ligne".

He put his argument this way. It was important that acquisitions should be actual acquisitions brought about by hard work. He used the words: "the sweat of one's brow". He relied heavily on a passage in Basnage at page 391.

I may say in passing that because I was given extracts from the late F. de L. Bois's compilation of the works of Messrs. G.F.D. Le Gallais and E.F. Le Gresley, the commentary relied upon by Advocate Begg can be found summarised with a family tree at page 15 of that work.

The passage in Basnage concludes with these words:

> "..... encore que la fille ni son petit fils ne fussent pas capables de succeder il falait considerer cette donation comme un suplément de legitime autrement la donation n'eut pû valoir comme contraire à l'article CCCCXXXI et qu'enfin on ne reputait acquêt que ce qui provient de son industrie: Par arret du 28 de Mars 1622, au confirma la sentence qui avait ajugé aux soeurs de père et de mère des choses donnés entre Jean Lécolier et Marseille".

I confess that I find the reference to "industrie" in the context incomprehensible: I would need to see and study the Arret of the 28th March, 1622, before I could comment further. What I do not find incomprehensible is the definitions of "acquérir" and "acquêt" which were taken from the Larousse Universel (1982 edition) where the definitions read as follows:-

> "**acquérir:** Devenir possesseur par le travail, par l'achat, par échange (acquisition à titre onéreux) ou bien par donation, par succession (acquisition à titre gratuit).
>
> **acquêt:** Bien acquis à titre onéreux ou gratuit pendant le mariage par l'un ou l'autre des époux ou par les deux".

Nor do I find it difficult to comprehend C.S. Le Gros in his "Treaté du Droit Coutumier de L'Ile de Jersey" in the chapter headed "De la Distinction des Propres et des Acquêts" at page 105 where he says:-

> "Les propres sont les biens immeubles possédés à droit successif ou de lignage; les acquêts sont les bien possédés autrement dans le régime successoral. Tous biens sont réputés propres s'il n'est justifié qu'ils soient acquêts".

The case of Harden, Tuteur -v- Harden, Tutrice is perhaps only helpful to explain that realty left by will to an heir in whose hands it would have been a "propre" had he succeeded to it on an intestacy, did not have the nature of a "propre" but instead had the nature of an "acquêt". I do not see how it is otherwise helpful in the context of the present case, other than, of course, to widen the definition of "acquêt".

I cannot see how one can have grades of "acquêt" - those which are "earned" and those, less important, which are acquired by chance.

The Plaintiff's contention is that to interpret the maxim, "pour trouver le propre il faut monter à l'acquereur" one has to move beyond the person who last held the property as an "acquêt" if that person held the property by good fortune and find the person who laboured to bring the property into the family by, for example, purchasing it.

Advocate Begg was at a loss to explain what would have happened in the present case if James George Allen had received the property "à titre gratuit" from a stranger. It does seem to me that the contentions of the Plaintiff are without foundation in law.

I have no doubt that the "acquéreur" of "Roche Vue" was Clara Ann Allen. The property passed to Gladys Margaret le Feuvre Allen who inherited it as a maternal "propre".

I dismiss the action. The Defendant shall have his costs.

Authorities cited

A.B. Harden, Tuteur -v- H.M. Harden, veuve Colley, Tutrice (1918) 6th June

A.B. Harden, Tuteur -v- H.M. Harden, veuve Colley, Tutrice (1918) 12 CR 136

Extract from the late F. de L. Bois' compilation of the work of the late G.F.D. Le Gresley, Solicitor, and notes made by E.F. Le Gresley in respect of the case of Harden -v- Harden (supra) - in particular, notes at p.15

C.S. Le Gros - Traité du Droit Coutumier de l'Ile de Jersey - "De la Distinction des Propres et des Acquêts" - pages 105 to 118 inclusive

Basnage - Commentaires sur la Coutume de Normandie, 3rd edition (170
Volume 1 - on Article 242 of the Coutume Reformée at pages 376 and 377
on Articles 245, 246 and 247 of the Coutume Reformée at pages 384 to 392 inclusive
on Article CCXLVII (247) at page 300

Bérault - La Coutume Reformée du Pays et Duché de Normandie - on Articles 245, 246 and 247 at pages 277 to 283 inclusive

Poingdestre - Remarques et Animadversions sur la Coutume Reformée de Normandie - on Articles 245, 246 and 247 at pages 145 to 147 inclusive

Terrien - Commentaire du Droit Civil tant public que prive observe au pays et Duché de Normandie (1768) 2nd edition, pages 195 to 201 inclusive

F. de L. Bois' compilation of the work of the late G.F.D. Le Gallais Solicitor, and notes made by E.F. Le Gresley at pages 6 to 11 inclusive and at pages 13 to 19 inclusive.Also at pages 36, 37, 106 and 107

F. de L. Bois' compilation of the work of the late G.F.D. Le Gallais - definition of "Acquêts" at pages 56 and 101

Larousse Universal (1982 edition) - definition of "acquérir" and "acquêt"

Basden Hotels Limited -v- Dormy Hotel Limited (1968) JJ 911 at p 916

Falle -v- Godfray (1888) 14 AC 70 at page 75

P.C. Timbal and A. Castaldo ; Histoire des Institutions Publiques et des Faits Sociaux" - Section II "Les Biens dans la Famille" at pages 187 to 189 inclusive

P.C. Timbal ; Droit Romain et Ancien Droit Français" - Section II - "Succession au propres" at pages 158 to 160 inclusive