44 pages.

ROYAL COURT 53.
(Samedi Division)

Hearing dates: 28th February, 9th and 10th March, 1995.
Judgment reserved: 10th March, 1995.
Reserved Judgment delivered: 17th March, 1995.

Before: P.R. Le Cras, Esq., Lieutenant Bailiff,
Single Judge.

Between:	Frank James Maynard	Plaintiff
And:	The Public Services' Committee of the States of Jersey (formerly the States of Jersey Resources Recovery Board).	Defendant

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Preliminary point: whether the Plaintiff's right of action is prescribed in contract and/or in tort.

Advocate D.F. Le Quesne for the Plaintiff.
Advocate S.C.K. Pallot for the Defendant.

JUDGMENT

THE LIEUTENANT BAILIFF: This is a preliminary hearing concerning points of law and for the purpose, and only for the purpose, of hearing these preliminary points the Court was informed that it might treat certain facts as being agreed.

As outlined by Mr. Pallot for the Committee, these are that the Plaintiff was employed by the Defendant Committee in 1978 and 1979 as a freeloader driver operating a loading machine at the sorting shed at La Collette. The job involved pushing refuse into a sorting shed and using a loading machine to sort and turn refuse into different heaps.

The Plaintiff's employment terminated in 1979. In May, 1993, he was informed by his doctor that he was suffering the effects of asbestosis. The action asserts that the illness is attributable to the failure of the Defendant Committee to protect the Plaintiff adequately from exposure to asbestos related waste. It is common

ground that the effects of such exposure may appear or, rather, become apparent, many years later.

The claim is brought in both contract and tort. No claim of fraud or deception is brought against the Committee which denies negligence and has pleaded prescription.

It is as a result of this plea that the points of law have arisen. There are two of them and the purpose of this preliminary hearing is to obtain a ruling on these two separate but interconnected points.

The first is to define the date upon which the cause of action accrues.

The second is whether, in a case such as this, there is or may be any suspension of the period of limitation in the absence of knowledge and where no fraud or deception is alleged against the Defendant.

The Defendant contends that the cause of action arose in tort when it reached the stage, whether then known or unknown, at which a Judge could properly give damages for the harm that had been done; whilst in contract time runs from the breach without regard for the ensuing damage, albeit that the breach was not discovered nor the damage resulted until after the expiration of the limitation period from the date of the breach. In either case, that is in respect of both tort and contract, the Defendant asserts that once the cause of action has arisen there is no suspension in the flow of prescription.

The Plaintiff, on the other hand, contends that in both cases the cause of action should accrue when the person suffers the wrong. In personal injury cases the wrong cannot occur before the damage is or ought to be perceived by the victim. The test ought therefore to be subjective; there can be no wrong if the victim has not knowingly suffered one and the perpetrator does not know he had inflicted one.

Insofar as concerns both tort and contract, if his submission fails as to the dates of the accrual of the cause of action, the Plaintiff asserts that the circumstances are or may be such as to entitle the Plaintiff to a suspension of prescription.

The first point, therefore, which falls for a decision by the Court is a declaration as to the date on which the cause of action accrues.

In support of his argument on this point, Mr. Pallot made a series of detailed submissions. His starting point, insofar as the action lay in tort, was that the Court should be guided by

sections 2(1) and 2(2) of the Law Reform (Miscellaneous Provisions) (Jersey) Law, 1960 which read as follows:

"ARTICLE 2.

EXTENSION OF PERIOD OF PRESCRIPTION OF ACTIONS FOUNDED ON TORT.

(1) The period within which actions founded on tort may be brought is hereby extended to three years from the date on which the cause of action accrued.

(2) The provisions of this Article shall be without prejudice to any rule of law allowing for the extension of such a period as aforesaid".

He next referred the Court to the wording of the Limitation Act, 1939, section 2(1) of which provided:

2. Limitation of actions of contract and tort, and certain other actions. - (1) The following actions shall not be brought after expiration of six years from the date on which the cause of action accrued, that is to say:-

(a) actions founded on simple contract or on tort;
(b) actions to enforce a recognisance;
(c) actions to enforce an award, where the submission is not by an instrument under seal;
(d) actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture".

and section 26 of which provided:

"26. Postponement of limitation period in case of fraud or mistake. - Where, in the case of any action for which a period of limitation is prescribed by this Act, either -

(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent, or
(b) the right of action is concealed by the fraud of any such person as aforesaid, or
(c) the action is for relief from the consequences of a mistake, 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 could with reasonable diligence have discovered it:

Provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which -

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed, or

(ii) in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made".

He drew attention to the phrasing of the Act, and the use in particular of the wording *"cause of action"* which is the phrase used in the 1960 Jersey Law *(v. supra)*.

Since the enactment of the Limitation Act 1939, there have been a series of amendments in England, viz. in 1954, 1963, 1975 and 1980. None of these had force of Law in the Island, but were, in his submission, relevant as pointing to the clear distinction made by the draughtsman between the date the cause of action accrued and the date of knowledge. For example, the 1975 English Act referred at section 2A to:

a) the date on which the cause of action accrued; or
b) the date (if later) of the Plaintiff's knowledge.

In passing it may be convenient to note, at this point, that these Acts, it seems, (see Cartledge -v- E. Jopling & Sons Limited [1963] 1 All ER 341-352 *infra* at 351C) derive ultimately from the Limitation Act 1623. There is, and it is common ground, no such derivation in Jersey. Counsel employs them in this part of his argument to demonstrate the wording and the distinction made by the draughtsman.

He then went on to put his proposition (in tort) in this way: for the purposes of this hearing the Court starts with the proposition that the latest date on which the injury was caused was 1979. The date that the cause of action accrues is the stage at which the Court could properly give damages and it is this date - which may not of necessity be the date on which the injury was caused - from which prescription runs.

As authority for this proposition he referred the Court to Cartledge -v- E. Jopling & Sons Limited. The headnote of this well-known case, which was decided by the House of Lords, reads:

"A steel dresser, one of the plaintiffs, had been employed for many years at the defendant's factory. In the period affected by war-time difficulties, between 1939 and 1950, effective ventilation was not provided in the factory, this failure being a breach of s. 4 and s. 47 of the Factories Act, 1937. This breach had caused actionable injury to the plaintiff before October, 1950, who contracted pneumoconiosis. The breach ceased by October, 1950. By that time the plaintiff was suffering from pneumoconiosis, which was an insidious industrial disease giving no indication of its presence in its early stages, and the plaintiff then had no reason to suspect it and was unaware of it. The plaintiff continued at work. During succeeding years he discovered that he had pneumoconiosis. On October 1st, 1956, he began an action against the defendants for damages for breach of statutory duty. In the circumstances his conduct in not commencing the action before then was neither dilatory nor unreasonable. At the trial it was found as a fact that he had suffered damage from the disease before October, 1950.

Held: the cause of action was barred by s. 2(1)(a) of the Limitation Act, 1939, because -

(i) on the true construction of the Limitation Act, 1939, time did not run from the date when the plaintiff knew or ought to have known that he was suffering from pneumoconiosis, but from the date when the cause of action accrued (see p.352, letter E, p.343, letter H, and p.344, letter H, post).

Urie v. Thompson, Trustee ((1948), 337 U.S.Rep. 163) not followed.
Archer v. Catton & Co., Ltd. ([1954] 1 All ER 896) applied.

(ii) the cause of action for breach of statutory duty arose when material damage had been suffered by the plaintiff (although he was then ignorant of the damage)...."

(iii) only one action might be brought in respect of all damage from personal injury, so that no new cause of action accrued when the plaintiff first became aware that he was suffering from pneumoconiosis (see p.350, letter A, post)".

He went on to refer to a series of further passages in that case. Although they are well-known, they are important to this case. He cited first a passage from Lord Morris at 345, letter I:

"My Lords, for the reasons which my noble and learned friend Lord Pearce sets out in his speech, I see no escape from the conclusions that if a breach of duty causes an injury to the lung, a cause of action arises when that injury is done and that the cause of action is not postponed until such time as there is (or ought to be) knowledge of the occurrence of the injury. The presence in the Limitation Act, 1939, of the provisions which are contained in s. 26 points in my view to the conclusion that apart from some special provision the accrual of a cause of action is not dependent on knowledge that it has accrued. If someone knew that he had a long injury but did not know that it had been contemporaneously caused by some breach of duty which had occurred in the past I cannot think that such lack of knowledge would serve to defeat a plea that the breach of duty that had occurred at a date more than six (or three) years previously".

He followed that with a series of references to the Judgment of Lord Pearce. The first was at p.348:

"When the writs were issued, six years had already elapsed since the cessation of the breach which caused the damage. The claims would therefore be barred if the date of the breach of duty was the date on which the causes of action accrued. But negligence and breach of statutory duty are not actionable per se and no cause of action arises unless and until the plaintiff can show some actual injury. Normally the injury is contemporaneous with the wrongful act, but it is not necessarily so. In the present case, therefore, the causes of action did not accrue until some actionable injury was caused to the plaintiffs by the defendants' breach of duty. The learned judge found that "Each of these men had suffered damage and causes of action had accrued in each case before Oct. 1, 1950". Counsel for the appellants contends that the learned judge erred in principle in so finding. First he contends that the injury to the plaintiffs must be taken to have first occurred when the man became aware of his disease; since a man who does not feel any symptoms or have any knowledge of his physical disease has suffered no injury. Secondly he argues that even if a cause of action accrued when the unknown injury was done to the lungs, a fresh cause of action accrued when the damage was discovered. Finally he argues that in the case of injury by such insidious diseases as pneumoconiosis the courts should import into the words of the Limitation Act, 1939, a gloss that the cause of action does not accrue or time does not begin to run until such time as the plaintiff knows or ought to know that he has suffered injury. Counsel for the appellants' attractive argument would produce a result according with common sense and would

avoid the harshness and absurdity of a limitation that in many cases must bar a plaintiff's cause of action before he knows or ought to have known that he has one".

As he emphasized, there had been in that case a finding of fact that the actionable injury had been caused in each case before 1st October, 1950. There is, of course, no such finding of fact before this Court.

He then referred to further passages at 348, letter I and 349:

"Such observations naturally proceed on the normal basis that personal injury involves some pain or patent loss of amenity, but the unusual question before your Lordships is whether a hidden painless injury or latent loss of amenity sounds in damages. And in no case is it laid down that hidden physical injury of which a man is ignorant cannot, by reason of his ignorance, constitute damage.

In my opinion it is impossible to hold that a man who has no knowledge of the secret onset of pneumoconiosis and suffers no present inconvenience from it cannot have suffered any actionable harm. So to hold might possibly on the wording of the Fatal Accidents Act deprive of all remedy a widow whose husband dies of pneumoconiosis without having had any knowledge or symptoms of the disease. And it would be wrong to deny a right of action to a plaintiff who can prove by x-ray photographs that his lungs are damaged, but cannot prove any symptom or present physical inconvenience. Nor can his knowledge of the state of his lungs be the deciding factor. It would be impossible to hold that while the x-ray photographs are being taken he cannot yet have suffered any damage to his body but that immediately the result of them is told to him, he has from that moment suffered damage. It is for a judge or jury to decide whether a man has suffered any actionable harm and in border-line cases it is a question of degree. My noble and learned friend Lord Reid observed in a pneumoconiosis case (Bonnington Castings, Ltd. v. Wardlaw (7)):

"What is a material contribution must be a question of degree. A contribution which comes within the exception de minimis non curat lex is not material, but I think that any contribution which does not fall within that exception must be material. I do not see how there can be something too large to come within the de minimis principle, but yet too small to be material"."

He continued with this passage in Lord Pearce's Judgment:

My Lords, such an analogy would provide an attractive escape from the difficulties of this case, but in my opinion it would be unsound. The law as it has developed in subsidence cases cannot be extended to cover the present case. In cases of personal injury the law is clear and has been settled for many years. Although two separate actions may be brought one for personal injury and one for damage to property, both being caused by the same negligence (Brunsden v. Humphrey), only one action may be brought in respect of all the damage from personal injury. In 1701 in Fitter v. Veal or Fetter v. Beale the plaintiff, after recovering damages for an assault and battery, discovered that his injuries were more serious than had been supposed. He sought to bring a second action for the fresh damage. It was held, however, that he had but one cause of action which had been extinguished by the judgment in the former case. That principle has never since been doubted. In each case the judge assesses the damages once and for all, with the knowledge that the plaintiff can get no further damages for the possible traumatic consequences, such as arthritis or epilepsy, which may occur in the years to come. Lord Halsbury said in Darley Main Colliery Co. v. Mitchell:

> *"No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and for ever. A house that has received a shock may not at once show all the damage done to it, but it is damaged none the less then to the extent that it is damaged, and the fact that the damage only manifests itself later on by stages does not alter the fact that the damage is there; and so of the more complex mechanism of the human frame, the damage is done in a railway accident, the whole machinery is injured, though it may escape the eye or even the consciousness of the sufferer at the time; the later stages of suffering are but the manifestations of the original damage done, and consequent upon the injury originally sustained".*

In the present case the known pneumoconiosis was but an extension of the unknown. The cause of action accrued when it reached a stage, whether then known or unknown, at which a judge could properly give damages for the harm that had been done. In these cases that stage, on the findings of the trial judge, was reached before October, 1950."

Counsel urged the Court to accept the definition of the date of accrual of the action as defined by his Lordship, viz. *"The*

cause of action accrued when it reached a stage, whether then known or unknown, at which a judge could properly give damages for the harm that had been done".

As to the actual date of accrual that would be a matter for proof. What was required in this hearing was a decision as to whether the Court accepted the definition regarding the point at which the cause of action accrued.

Counsel for the Defendant then referred the Court to Pirelli General Cable Works Limited -v- Oscar Faber & Partners (a firm) [1982] 1 All ER 65-73, the headnote of which reads:

> *"In March, 1969, the defendants, a firm of consulting engineers, advised the plaintiffs on the design and erection of a boiler flue chimney at their works. The chimney was installed by specialist sub-contractors. However, the defendants were negligent in the design of the chimney and damage in the form of cracks occurred in the chimney. The damage was not discovered by the plaintiffs until November, 1977. In October, 1978, the plaintiffs issued a writ against the defendants claiming damages for negligence in relation to the design of the chimney. The judge found that the damage, in the form of cracks at the top of the chimney, could not have occurred later than April, 1970. The judge further held that the plaintiffs could not with reasonable diligence have discovered the damage before October, 1972, and that the cause of action accrued when the plaintiffs and not the building suffered damage and that the plaintiffs only suffered damage when they discovered or ought with reasonable diligence to have discovered the damage. The judge accordingly held that the cause of action had accrued within the six-year limitation period and that the plaintiffs were entitled to judgment. The defendants appealed to the Court of Appeal contending that the action was time-barred. The Court of Appeal dismissed the appeal and the defendants appealed to the House of Lords.*
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> *Held - A cause of action in tort for negligence in the design or workmanship of a building accrued at the date when physical damage occurred to the building, e.g. by the formation of cracks, as a result of a defect, whether or not the damage could have been discovered with reasonable diligence at that date by the plaintiff. It followed therefore that the plaintiffs' claim was time-barred because the cause of action accrued in April, 1970, when damage, in the form of cracks at the top of the chimney, came into existence. The appeal would therefore be allowed (see p.70 f g and p.72 f g and j to p.73 b, post). Cartledge v. E. Jopling & Sons Ltd [1963] 1 All ER 341 applied."*

In his submission the Judgment (per Lord Fraser at 68, 69) in Cartledge v. Jopling applied equally to the facts as stated in Pirelli; and (v. 69c) it was to be taken that Parliament had deliberately left the law unchanged for cases other than those consisting of or including personal injuries.

In particular he referred the Court to a further passage in Lord Fraser's Judgment at 70 b:

> *"My Lords, I find myself with the utmost respect unable to agree with that argument. It seems to me that there is a true analogy between a plaintiff whose body has, unknown to him, suffered injury by inhaling particles of dust, and a plaintiff whose house has unknown to him sustained injury because it was built with inadequate foundations or of unsuitable materials. Just as the owner of the house may sell the house before the damage is discovered, and may suffer no financial loss, so the man with the injured body may die before pneumoconiosis becomes apparent, and he also may suffer no financial loss. But in both cases they have a damaged article when, but for the defendant's negligence, they would have had a sound one. Lord Pearce in Cartledge v. Jopling [1963] 1 All ER 341 at 349, [1963] AC 758 at 778-779 showed how absurd it would be to hold that the plaintiff's knowledge of the state of his lungs could be the decisive factor. He said:*
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> > *'It would be impossible to hold that while the x-ray photographs are being taken he cannot yet have suffered any damage to his body but that immediately the result of them is told to him, he has from that moment suffered damage. It is for the judge or jury to decide when a man has suffered any actionable harm and in borderline cases it is a question of degree'.*

In his address counsel laid stress on Lord Fraser's finding at 70 d, where he clearly approved Lord Pearce's finding in Cartledge v. Jopling when he stated that the latter *(v. supra)* had showed how absurd it would be to make knowledge the decisive factor.

He referred the Court further to a passage at 72 b:

> *"Counsel for the defendants submitted that the fault of his clients in advising on the design of the chimney was analogous to that of a solicitor who gives negligent advice on law, which results in the client suffering damage and a right of action accruing when the client acts on the advice (see Howell v. Young (1826) B & C 259, [1824-34] All ER Rep 377 and Forster v. Outred & Co [1982] 2 All ER 753, [1982] 1 WLR 86). It is not necessary for*

the present purpose to decide whether that submission is well founded, but as at present advised, I do not think it is. It seems to me that, except perhaps where the advice of an architect or consulting engineer leads to the erection of a building which is so defective as to be doomed from the start, the cause of action accrues only when physical damage occurs to the building. In the present case that was April, 1970, when, as found by the judge, cracks must have occurred at the top of the chimney, even though that was before the date of discoverability. I am respectfully in agreement with Lord Reid's view expressed in Cartledge v. Jopling that such a result appears to be unreasonable and contrary to principle, but I think the law is now so firmly established that only Parliament can alter it. Postponement of the accrual of the cause of action until the date of discoverability may involve the investigation of facts many years after their occurrence (see, for example, Dennis v. Charnwood) with possible unfairness to the defendant, unless a final longstop date is prescribed, as in ss 6 and 7 of the Prescription and Limitation (Scotland) Act 1973. If there is any question of altering this branch of the law, this is, in my opinion, a clear case where any alteration should be made by legislation, and not by judicial decisions, because this is, in the words of Lord Simon in Miliangos v. George Frank (Textiles) Ltd [1975] 3 All ER 801 at 823, [1976] AC 443 at 480, 'a decision which demands a far wider range of review than is available to courts following our traditional and valuable adversary system - the sort of review compassed by an interdepartmental committee'. I express the hope that Parliament will soon take action to remedy the unsatisfactory state of the law on this subject."

The Court found this an interesting passage as His Lordship would appear to have moved some way from his earlier statement (cited *supra*). Counsel, as the Court understood him, had some difficulty in reconciling the passages, but relied on this passage as authority for the proposition that insofar as concerned the time of accrual of a cause of action the law (in England) was fixed and would require to be changed by legislation.

Mr. Le Quesne, in his submission, urged the Court to approach a definition of the date on which a cause of action accrued without reference to the law of England.

In England, the approach which had been adopted had led the Courts into terrible difficulties, and a reasonable result had to be achieved by legislation. If, he submitted, there is a clear path unencumbered by obstacles the Court should take it, as

otherwise the legislature will have to remedy the situation at the cost of a great deal of suffering to a number of individuals.

Apart from the passage in Pirelli cited above, he referred the Court to the remarks of Lord Reid in Cartledge at p.343:

> *"My Lords, I have had an opportunity of reading the speech which my noble and learned friend Lord Pearce is about to deliver and I agree with it. It is now too late for the courts to question or modify the rules that a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible, even when that injury is unknown to and cannot be discovered by the sufferer; and that further injury arising from the same act at a later date does not give rise to a further cause of action. It appears to me to be unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury and therefore before it is possible to raise any action. If this were a matter governed by the common law I would hold that a cause of action ought not to be held to accrue until either the injured person has discovered the injury or it would be possible for him to discover it if he took such steps as were reasonable in the circumstances. The common law ought never to produce a wholly unreasonable result, nor ought existing authorities to be read so literally as to produce such a result in circumstances never contemplated when they were decided.*
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> *But the present question depends on statute, the Limitation Act, 1939, and s.26 of that Act appears to me to make it impossible to reach the result which I have indicated. That section makes special provisions where fraud or mistake is involved: it provides that time shall not begin to run until the fraud has been or could with reasonable diligence have been discovered. Fraud here has been given a wide interpretation but obviously it could not be extended to cover this case. The necessary implication from that section is that, where fraud or mistake is not involved, time begins to run whether or not the damage could be discovered. So the mischief in the present case can only be prevented by further legislation".*

Although the animadversions of the Judges are *obiter* they are forceful and he invited the Court to follow them.

It is quite clear that their Lordships were grappling with a most difficult and serious problem, and one much affected by the provisions of ss.2 and 26 of the Limitation Act 1939 *(v. supra)*,

as is shown in particular in the passage from Lord Reid's speech, cited above.

In the argument before this Court it is, with respect, of the utmost importance to distinguish between the date of the accrual of the cause of action and the suspension, if any, of prescription.

In the view of the Court there has to be some point at which the cause of action accrues. A decision of their Lordships has very considerable persuasive authority in this Court which finds that there are cogent reasons for following the definition given to the date of the accrual of a cause of action, in Cartledge, viz. the finding at 350E: *"The cause of action accrued when it reached a stage, whether then known or unknown, at which a Judge could properly give damages for the harm that had been done".*

The Court adopts this definition and declares this to be the date at which a cause of action accrues in tort.

Mr. Pallot then made his submissions as to when a cause of action arises in contract.

To do this, he referred the Court to English authorities.

He referred first to 4 Halsbury 28 paragraph 662:

> *"When the cause of action arises. In an action for a breach of contract the cause of action is the breach. Accordingly such an action must be brought within six years of the breach; after the expiration of that period the action will be barred although damage may have accrued to the plaintiff within six years of action brought. In such an action it is necessary to prove actual damage, and special damage is merely alleged as a measure of the damages to be recovered. Although time may be extended for the reasons subsequently stated, it is not extended merely by the fact that the breach has not been discovered or that damage has not resulted until after the expiration of six years".*

He submitted that the position in Jersey was precisely the same, save of course, that the period was one of ten years and not six.

He put it in this way: in Jersey law it is the contract which is the source of the obligation, whereas in tort it is the wrongful damage, and arises *ex delictu* and not *ex contractu*. In contract, the obligation and the breach are the gist of the action and time runs from the breach without regard for the ensuing damage. Thus the damage is not the source of the obligation but the breach.

Mr. Le Quesne, in effect, made the same submission that he had in tort. Once again, on the authorities cited, the position of the Committee appears to be the correct one, and the Court so finds. The Court finds, therefore, that the date of the accrual of the cause of action in contract is the date of the breach.

This brings the Court to a consideration of the remaining point for decision, that is whether the period of prescription is, or, rather, may be, suspended on the agreed facts.

Mr. Pallot began his submissions with regard to this part of the hearing by conceding first, that there was no Statute of Limitations equivalent to the Limitation Act 1623 and that the question was to be established by an examination of the Law of the Island: and, second, that the passage in Cartledge cited at 351F was not a finding that applied to the Island.

Third, (and given the saving made by Article 2(2) of the 1960 Jersey Law, both counsel agreed that the maxim *"Non valenti agere non currit praescriptio"*, (in one form or another) or in its French form *"A qui ne peut agir la prescription ne court point"* applied in the Island. What counsel disagreed on was the extent and ambit of the maxim.

The basis of Mr. Pallot's submission was that those in whose favour prescription runs acquire certainty of title; and that to infringe these legal rights can cause both distress and hardship.

The Court had to ascertain with care the state of the law as it applied in the Island. Article 2(2) did not give the Court an entire discretion. Although the Coûtume was, as with any system of customary or common law capable of adaptation in changing circumstances the Court could not import a novel feature and declare it to be part of customary law.

In order to consider the extent of the maxim, counsel made a detailed and lengthy analysis of the authorities. As not all of these are readily available, they have been set out at much greater length than might normally have been considered necessary.

First, counsel put to the Court a passage from Terrien's Commentaires du Droit Civil, tant public que privé, observé au pays et Duché de Normandie, Livre VIII: D'act, querel, ou clameurs: pp.331-2 (Paris, 1578). Although it appears to be based on an Ordonnance Royale published in 1561 and is not *per se* of legislative authority, nonetheless he submitted that it may have, over the course of many years, been subsumed into the law of the Island. In this regard he referred us to the case of Vaudin v. Hamon [1974] AC 569 where the Privy Council had relied on a passage from the Charte aux Normands issued by Louis X in 1314. The passage is interesting. It reads:

"ADDITIO.

C'est est donné à sainct Germain en Laye au mois de Ianuier, & publié en la Cour le 20 de Mars en l'an 1561.

Loys xii 1510.

A fin que les domaines & proprietez des choses ne soiet incertaines & sans seureté, és mains des possesseurs d'icelles, si longuement qu'ils ont esté cy deuat: & que la preuue des parties ne perisse, ou soit redue difficile par laps de temps, és cas cy apres declarez: Nous auons ordonné & ordonnons que toutes rescissions de contracts, distracts ou autres actes quelconques, fondees sur dol, fraude, circonuention, crainte, violence, ou deception d'outre moitié de iuste prix, se prescriront desormais en nostre pays de Normandie, par le laps de dix ans continuels: à conter du iour que lesdits contacts, distracts, ou autres actes auront esté faicts: & que la cause de crainte, violence, ou autre cause legitime empeschant de droict ou de faict le poursuitte desdites rescissios, cessera".

The passage clearly applies to contract and, as the Court reads it, provides that actions for the rescission of contracts founded on "dol" or other (similar) causes shall be prescribed after the lapse of 10 years, provided that the cause of the fear, violence or other legitimate cause hindering or preventing ("*empeschant*") in law or in fact the pursuit of such *"rescissions"* shall cease. It does, however, go further than "dol" and so forth by referring to *"autre cause légitime empêchant de droit ou de faict....".*

The footnote - at h - to the words *"de droit ou de fait"* adds a gloss as under:

"De droict ou de faict. De droict, comme la femme mariee, qui ne peut ester en iugement sans l'authorité de son mary: ou le fils de famille sans l'authorité de son pere: ou le mineur sans l'authorité de son tuteur. De faict, come si aucun est prins des ennemis, ou longuement detenu en prison ou maladie, ou absent pour la chose publique d'absence necessaire & non affectee: ou bien allant traffiquer en pays estrange, estant contraint y demourer long temps par quelque fortune. Car à ceux-la prescription ne court durant tels empeschemens, sinon qu'il fust en leur puissance de les oster. Rebus apres les autres".

Although the start of the *ordonnance* makes its purpose clear, it would appear from this that the certitude of title which was

being sought was subject to a number of exceptions where a person was, through no fault of his own, not in a position to look after his affairs. The footnote would seem to infer a much wider suspension of prescription than is apparent on the face of the *ordonnance*.

It is this aspect which appears to be of the most importance in these proceedings as here, of course, there is no allegation of fraud, or so forth, as set out in the *ordonnance*, made against the defendant.

Counsel then referred the Court to a series of long and interesting extracts from Poingdestre, "Les Lois et Coûtumes de l'Ile de Jersey" (Jersey, 1928). The passage is headed *"Le temps ou la prescription ne court point"* and counsel first referred the Court to the passage at p.48:

> *"Come il y a de certaines choses qui ne peuuent estre prescriptes, il y a aussy des temps ou la Prescription dort, & n'a aucun effet; ascauoir, l'Age pupillaire ou Minorité, le temps qu'un home a esté hors du sens; le temps qu'on a esté empesché d'agir, & de poursuiure son Droict; le temps d'absence pour cause legitime: Le temps de contagion, & celuy de Trouble & de Guerre".*

The first ground is of little relevance save perhaps to note that the period differs from that prescribed by the *Ancienne Coûtume*.

Counsel then turned to the third ground at p.49:

> *"Pour le 3me qui est l'Empeschement d'agir, c'est une Règle en Droit tirée de la loy Cum notissimi Illud. C. de Praescript. 30 annos. que Non valenti agere non currit praescriptio., c'est a dire a qui ne peut agir la prescription ne court point. Laquelle Regle a pourtant quelques limitations. En general nous pouuons dire, que la ou Prescription a esté introduite pour punir les negligents: come la quadragenaire que a esté receue en haine & detestation de la negligence de ceux qui auoient negligé si long temps a poursuiure leur Droict; en ce cas la dis-ie, un home ayant esté empesché d'agir, & n'estant coulpable d'aucune negligence, il n'y auroit pas de raison de le punir pour une faute supposée, de laquelle il ne séroit pas coulpable: Et d'autre part, on peut aussy dire, qu'en tous les cas ou la Prescription a lieu contre les personnes priuilegiées, come Pupilles, Insensez & Absents, elle a aussy bien lieu contre celuy qui n'a peu agir: come cela s'obserue en la Prescription d'An & Jour en matiere de Retraict lignager, & autres semblables, lesquelles ont cours contre tous generalement, sans excepter Pupilles ny autres quels qu'ils soient. Et de mesme les Juges doiuent*

considerer si l'empeschement est legitime, & s'il a continué tout le temps de la Prescription, ou seulement une partie du temps.

It is plain in the passage, he submitted, that prescription is there to punish the negligent, but whether ignorance is a cause of such hindrance is quite another matter. It mentions *"absents"* but not *"ignorants"*.

He construed the passage in this way, that *"empêche"* as here does not include mere ignorance. One will not act if one does not know: but the possibility of acting may be there nonetheless, as the condition was or may have been susceptible of ascertainment. In the example given by Poingdestre (which follows the passage) it was only when the rente was unpaid that the failure - a breach of contract - was susceptible of ascertainment. If the condition were capable of ascertainment he is not *"empêché"*.

He turned next to the fourth case by Poingdestre at pp.50,51:

"Le 4me cas ou la Prescription dort est celuy d'Absence, laquelle a auec elle une iuste & legitime ignorance, & partant ne peut estre accusée de negligence, ny porter la peine introducte contre les negligents. Mais come les Jurisconsultes s'accordent bien que la Prescription ne peut commencer a courir contre un Absent ou ignorant, aussy aduouent ils que elle se peut continuer & mesme acheuer contre eux. Praescriptio non incipit quidem, currit tamen & continuatur caepta absenti & ignoranti. Et faut cecy non seulement d'une ignorance affectée, mais aussy d'une telle ignorance qui eust peu estre en un home diligent; car lors qu'il y a eu quelque negligence a omettre ce qu'on estoit obligé de scauoir & de faire, ce n'est plus simple negligence, mais coulpe, come si un heritier estant maieur, auoit negligé de s'enquerir de l'estat de l'heritage qui luy estoit escheu, & que par sa negligence quelque Rente ou obligation se trouuas prescripte, son ignorance ne le releueroit pas. Or ce q i'ay dit la Prescription ne ce comence pas contre un absent, mais qu'elle continue son cours, lors qu'elle a eu comencement auant l'absence, s'entend ainsy; come si un home auoit laissé couler 15, 20 ou 30 ans, sans demander une Rente non payée, & qu'apprez cela il s'absentast quelqúes années, & qu'a son retour il acheuast de la laisser prescrire; Je dis qu'il ne pourrit se preualoir de son absence, ny la deduire (pour) empescher la prescription. Et de ceste mesme Regle se peut on seruir po decider les questions mobiliaries, lesquelles so prescriuent chez nous par l'espace de dix ans les unes, & les autres de cinq ou de moins: en toutes lesquelles il faut retenir pour condition necessaire & infallible, que celuy qui est en mauvaise foy (c'est a dire, qui scait de

certain que la chose qu'il possede & laquelle il pretend prescrire; n'est pas a loy; ou qui n'est pas ignorant qu'il est redeuable de la debte qu'on luy demande) ie dis qu'un tel ne scauroit iamais prescrire; non plus qu'un voleur ne scauroit prescrire la bourse qu'il a desrobée."

He approached the passage in this way, by submitting that it is absence which causes prescription to sleep. If it were otherwise, he had only to write *"une juste et legitime ignorance".*

However, he had to deal with two further passages at p.52. The first of which read:

"Dauantage il est requis l'absence qu'on allegue soit telle, que la personne absente n'auroit pu apprendre l'estat de la chose en question, ny y pouruoir par Procureur, ou autrement: come chez nous la Prescription ne laisse pas de courir contre ceux qui font des voyages en France ou en Angleterre, ou ailleurs, lors qu'on a laissé Procureur auec authorité suffisante."

Whilst the second read:

"en tous lesquels cas, il faut bien considerer toutes les circumstances lesquelles peuuent informer les Juges de la sincerité des parties qui les alleguent; car ce qui se fait par fraude ou malice ou par quelque desseing, no doibt iamais estre receu pour excuser la partie qui en est coulpable; ny l'ignorance innocente & non affectée estre cause de condamner celuy qui en est enueloppé".

He conceded, in the view of the Court quite properly, that the Court would have to decide when dealing with the point of ignorance whether there was a parallel where instead of being on a legitimate journey abroad (*v.* at p.51) the Plaintiff unknowingly carried a latent injury. He conceded also that the words used are "absent" or "ignorant", though in his view they follow on from the first sentence which describes only absence.

He took the view that absence put the Plaintiff beyond the physical means of instituting the action: in the Seventeenth Century he could neither know of his rights nor take action from, for example, a fishing boat off the Grand Banks. Here there is no such physical barrier, and in his view this is essential. As he put it in his opening submission on this point, it was not for the Court to import a novel feature and declare it to be part of customary law.

His final submission on Poingdestre was a reference to the second case where prescription would not run, that is where a Plaintiff is *"hors du sens"* (at p.48). He put it in this way: here Poingdestre is directing his mind only to those insane people

who are in the same position as minors. He pointed out that without an enquiry one would not know whether time was running or not. In his submission it was here being used as a technical term to cover the case of a man who required a Curator, and not for someone who is in a state where he does not know the position.

He turned then to other authorities. First he cited, Le Geyt, Privileges Lois & Coustumes, de l'Ile de Jersey (Jersey, 1953): des Prescriptions, Articles 13 & 14:

"Article 13.

Prescriptions & peremptions d'instances courent contre Mineurs, Furieux & Prodigues, leur recours sauf contre leurs Tuteurs ou Curateurs en cas de negligence. Elles courent aussi contre tous absens, si ce n'est pour cause publique ou par captivité chez les Ennemis.

Article 14.

Le tems de l'empeschement d'agir est deduit de toute prescription ou peremption. Mais il faut, aprés que l'obstacle est levé, agir sans negligence, qui, mesme dans les plus longues prescriptions, ne doit pas estre d'an & jour".

As he rightly pointed out, although these Articles lack any gloss which invariably accompanies the Articles of the Coûtume e.g. in Basnage and the work of Poingdestre himself, they are much less favourable to the Plaintiff.

In Article 13, absence is limited to *"cause publique ou par captivité chez les ennemis".* No such exceptions for absence as are made by Poingdestre appear in this passage.

He then cited Laurent Carey, a Jurat in Guernsey from 1765-1769 from his chapter "des Prescriptions" in his "Essai sur les Institutions, Lois et Coûtumes de l'Ile de Guernsey" (Guernsey, 1889) at p.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."

He submitted that *"empêchement"* and ignorance are used disjunctively. As to *"empêchement"* it provided nothing new; but this was not the case for ignorance where to give rise to a suspension of prescription there had to be some *"fiction ou deception".* In his submission, if these were not present, absence or ignorance were not available to prevent time running. In his analysis there was a clear distinction between *"fiction ou deception"* and negligence. In a case where there is such a known

grave risk to the health of previous workers, to fail to warn them would be an act of *"deception"*; as would be the case where it was thought that an employee had an action and deceit was deliberately employed to prevent him from realising the position. Mere negligence however (as is alleged here) is not deception. If the Committee did not know of the risks at the time this would not qualify as *"deception"* and time would run.

The passage from Carey appears to have borne considerable weight in the case of Vaudin v. Hamon [1974] AC 569. Although primarily concerned with prescription, their Lordships dealt with *empêchement* in the following terms at p.586 para. 2:

> *"Suggestions were made in the course of argument before the Court of Appeal and their Lordships that the appellant would wish to argue that the period of prescription should not run against him while he was "empêché d'agir". That empêchement d'agir is recognised in the authorities as preventing the prescriptive period from running, their Lordships would accept, but in their Lordships' opinion that expression does not extend to the length contended for by the appellant.*
>
> *The key to its scope is provided by the word empêchement itself. There must be an impediment from acting: or as the Latin maxim states "contra non valentem agere nulla currit praescriptio". Older authorities provide a number of examples of what at various times were accepted as impediments: absence on public business (Terrien, l.c. p.332), absence in the service of the state if there is nobody entrusted with his affairs (Pothier (1831), vol. V., p.365), being a prisoner of the enemy (Terrien, l.c. p.332), or various types of personal incapacity. These cannot necessarily be carried forward into modern times without consideration of the essential question whether in modern conditions they bring about an impediment from acting. Mere absence overseas, even in Crown service, does not in their Lordships' opinion qualify: it may be the cause of ignorance, but not of impediment. As regards ignorance, this too is mentioned in some of the Commentators, but only when brought about by fraud or misrepresentation (see Carey, l.c. p.207)."*

It is apparent from this that the opinion of Jurat Carey carried considerable weight.

However, it would appear that although Poingdestre was cited (*v.* at 575A) it would seem that it was not on this point. In addition counsel referred the Court to a further Guernsey case, Smith v. Harvey (1981) Court of Appeal of Guernsey which considered *"Empêchement de droit"*. Although not strictly speaking relevant to the argument before the Court, (for the principle is,

as stated above, accepted by both parties), there is, however, a passage at p.14 which counsel very properly brought to the attention of the Court:

> *"We should add that reference was made to the law of Jersey, in particular to the case of Gautier v. Nicolle and the work of C.S. Le Gros. In relation to the question before us in this case we do not regard the law of Jersey as a sufficiently safe guide. We are not persuaded that the development of the separate systems has been so similar as to warrant the same result in each jurisdiction. We have accordingly sought to proceed on the basis of Guernsey law and authorities."*

The next author to whom he turned was Pothier: "Oeuvres complètes" (Nouvelle Edition): Tome II: Traité des Obligations (Paris, 1821). He cited a series of passages from pp. 187, 188, 191, 192:

> *"CHAPITRE VIII.*
>
> *Des fins de non-recevoir, et prescriptions contre les créances.*
>
> *ARTICLE PREMIER.*
>
> *Principes généraux sur les fins de non-recevoir, et sur les prescriptions.*
>
> *676. Les fins de non-recevoir contre les créances, sont certaines clauses qui empêchement le créancier d'être écouté en justice pour exiger sa créance.*
>
> *677. Une troisième fin de non-recevoir est celle qui résulte du laps du temps auquel la loi a borné la durée de l'action qui naît de la créance. On appelle cette espèce de fin de non-recevoir proprement prescription, quoique le terme de prescription soit un terme général, qui peut aussi convenir à toutes les autres finds de non-recevoir.*
>
> .....
>
> *II. De quand et contre qui court-elle.*
>
> *680. Il résulte de ce qui vient d'être dit, que le temps de la prescription ne peut commencer à courir que du jour que le créncier a pu intenter sa demande: car on ne peut pas dire qu'il a tardé à l'intenter, tant qu'il ne pouvoit pas l'intenter. De là cette maxime générale sur cette matière: Contra non valentem agere, nulla currit praescriptio."*

Pothier then goes on to give a series of examples regarding the application of the maxim.

The first example is where the action is not yet open, and is, in terms, very similar to the example cited by Poingdestre.

The second example he gives is that of a married woman, again one who suffers from a legal impediment.

The third, an heir for the debts he has against a succession (for he cannot act against himself).

The fourth, a minor who has no guardian (which he describes as a particular favour to minors).

The fifth *"insensés"* (i.e. those without curators), although here he points out that in such cases there are no certain limits, as with minors. This passage contains a telling remark ***"la prescription si necessaire à la tranquiullité des citoyens";*** a remark which may perhaps indicate where the sympathies of the great commentator lie.

It is only in his sixth example at pp. 195, 196 that he deals with absence, the passage reading:

> *"684. lorsqu'une personne est absente dans un pays trés éloigné, par example, aux grandes Indes; quoique la personne qui étoit chargée de sa procuration dans sa patrie soit morte, et qu'il n'y ait plus personne qui veille à ses affaires, le temps de la prescription ne laisse pas de courir contre elle: elle n'est pas pour cela dans le cas de la régle, Contra non valentem, etc. car quelque éloignée qu'elle soit, il ne lue est pas impossible de s'informer des nouvelles de son pays, et d'envoyer une procuration à une autre personne à la place de celle qui est morte. Voyez Catelan, à l'endroit cité.*
>
> *Il peut néanmoins se rencontrer des circonstances dans lesquelles un absent a été dans une véritable impuissance, et lorsque cela est évidemment justifié, on peut lui subve nir, en lui appliquant la règle, Contra non valentem, etc."*

However, it is to be noted that he modifies the original statement in the last paragraph cited.

He then deals with a series of comparatively minor issues. Prescription runs against a *"succession vacante"*, and against *"fermiers du Roi"*, but not against the Church unless 40 years have elapsed whilst secular communities have the same exemption.

It seems abundantly clear that he approaches the question of absence from the point of view of Poingdestre in his exposition, rather than from the point of view so briefly expressed of Le Geyt and Carey and that he draws a clear distinction between mere absence, and circumstances where *"un absent a été dans une véritable impuissance"*. However, he did not deal with ignorance *per se;* and Mr. Pallot suggests that this was because that this did not occur to him. Further, in Mr. Pallot's submission, this *"véritable impuissance"* only arose - or if applied to the circumstances of the present case only arises - when the facts giving rise to the cause of action are not objectively capable of ascertainment.

Mr. Le Quesne's submission on this point is, of course, precisely the opposite. In his view the categories of prescription are never closed, and a man - in circumstances never envisaged in the Eighteenth Century - who is suffering from absence of knowledge of a latent defect without negligence is in precisely the same position i.e. that of not knowing and not being able to know, as a man for example shipwrecked and cast away, and out of communication would have been in the Seventeenth and Eighteenth Centuries.

Mr. Pallot then referred the Court to a series of later French commentators. It is quite apparent from a perusal of those extracts which follow that the question which is before the Court today has been the subject of a good deal of attention in France.

He turned first to Dalloz: Répertoire de Législation, de Doctrine, et de Jurisprudence, Tome XXXVI: para. 738:

> *"738. La prescription court-elle contre celui qui ignore que l'on prescrit contre lui? L'affirmative n'est pas douteuse. "Généralement", dit Catelan, liv. 7, ch. 13, "la prescription court contre toutes sortes de personnes: il n'y a d'exceptés que ceux qui n'ont pas d'action ou ceux qui l'ayant, ne sont pas capables de l'exercer; mais cette incapacité s'entend de l'incapacité d'état et de personnes, non d'une incapacité étrangère et accidentelle". Hors la faveur personnelle attachée à l'état, tout le reste cède à la faveur que donne à la prescription, tout odieuse qu'elle peu être, l'effet qu'elle produit, d'ôter aux possesseurs l'inquiétude et la peine d'une incertitude perpétuelle. Ces raisons, décisives sous l'ancien droit, le sont encore plus sous le nouveau, en présence des dispositions si précises de l'art. 2251 (V. Merlin, Quest. de dr. v Prescript., sect. 1, 7, art. 2). - Il a été jugé: 1 que sous l'ancien droit un hériter qui, dans l'ignorance que le défunt a fait un testament par lequel il l'a institué légataire universel, se présente comme héritier légitime pour partie de la succession, ne peut plus, après trente ans, recueillir les*

avantages que lui fait le testament. Son ignorance n'a pas suspendu la prescription. (arrêts du parlement de Toulouse, 19 mai 1663; 18 juin 1704 et du parlement d'Aix, 30 juin 1679)."

This received some further explanation in a footnote:

"(2) (Domaine C. Pollenus) - La Cour; - Considérant que la règle, contra non valentem agere non currit praescriptio, n'a pas été violée par le jugement attaqué, parce que cette régle ne recoit son application que lorsqu'il y a un empêchement de droit, et non un empêchement de fait, et que, dans l'espèce, l'empêchement allégué par l'administration, ne provient que d'une simple ignorance de fait; - Qu'il s'ensuit que le tribunal de Hasselt; en accueillant la fin de non-recevoir proposée par le defendeur, a fait une juste application de la prescription ordinaire, suivie ci-devant dans le comté de Looz, et qu'il n'y a pas lieu de casser le jugement attaqué; - Rejetté.

Du 7 oct. 1822. - C. sup. de Bruxelles."

These passages appear to make the position quite clear, supported as they are by the Judgment of the Cour Supérieure de Bruxelles in 1822.

Simple ignorance is not enough and *"incapacité d'état"* cannot apply, in Mr. Pallot's submission, to Mr. Maynard.

In Mr. Pallot's submission, the tide was moving against the Plaintiff.

He then turned to Planiol, the 1939 edition, a book which, the Court was told, was translated for the Louisiana State Law Institute. (Treatise on the Civil Law, Vol 1, Part 2 (12th Ed'n)).

As might be expected, there were a number of passages dealing with prescription. First he cited paragraph 2699:

"Rule Followed Under Old Law

The old jurisprudence considered that prescription was suspended whenever he against whom it runs was unable to act. It repeated as an adage: "Contra non valentem agere non currit praescriptio" (Pothier, Prescription, no. 22 et seq. - Comp. Dunod de Charnage, Traité des prescriptions, part I, chap. 10). It was therefore incumbent upon the court in all cases to decide whether in fact there was a ground for suspension in favour of such and such a person. Unfortunately the courts showed too great a tendency to

hold that prescription had been suspended. They almost always found some reason for holding that the owner could not act, either because he did not know of his right, because he was absent or because he had lost his mind. And the possessor was deprived of the advantage of prescription.

Prescription is founded far more upon considerations of the general welfare which make of it the shield of patrimonies, than it is upon any intention of punishing negligent owners by the imposition of a forfeiture. Prescription should not be suspended except upon serious grounds, grounds so serious that they justify setting aside the dominant principle underlying the institution. And the law-maker should be the sole judge of these grounds."

Although the learned author makes his view on what the position ought to be quite clear he nonetheless equally makes it perfectly clear that, prior to the Code Napoléon, ignorance was indeed treated as giving rise to a suspension of prescription.

He then went on to deal with the new principle (at 2700, 2701) and how the Courts have dealt with the question.

"New Principle Formulated by Civil Code

The new rule, set forth in Art. 2251 is inspired by such consideration as these. It is thus expressed: "Prescription runs against all persons, unless they fall within some exception established by a law. This means that there are no exceptions other than those which are given in the Code. Unfortunately, when such a list of exceptions is established, there is great risk of its being incomplete and of forgetting special cases, that are just as worthy as those that are recognized. And this is what has taken place as regards the grounds of suspension. The courts were constrained to complete the list drawn up by the law-maker. The Code, after having admitted the suspension of prescription upon grounds that are not always decisive, omitted to establish it in instances where equity imperiously required it.

System Followed by the Courts

In order to adjust its decisions to the apparently restrictive language of Art. 2251, the jurisprudence bring out that the law meant to fix the grounds of suspension only in so far as they were based upon considerations relating to the person against whom the prescription runs. They draw their arguments from the terms of the law, thus expressed: "Prescription runs against all persons

unless....." The Code accordingly did not take up the grounds of suspension that have nothing to do with persons. The courts have thus retained, at all events in a large measure, that freedom of interpretation the old jurisprudence allowed. See comments of Laurent Vol. XXXII, no. 38 to no. 43. At present, the decisions make no attempt to justify the solutions therein given. They are expressed in terms that seem to assume the existence of the old maxim: "Contra non valentem agere non currit praescriptio" (Cass., June 28, 1870, D. 70. 1. 309; Nancy, Nov. 16, 1889, S. 91. 2. 161; Caen, June 4, 1891, S. 92. 2. 193)."

That the Courts have indeed continued to deal with the question as they did previously would appear to be amply confirmed by paragraph 2705:

"Ignorance of Existence of Rights.

The Court of Cassation holds that prescription is suspended whenever the owner may reasonably be unaware of the fact which gives rise to his right of action and his interest to act (Cass., May 27, 1857, D. 57. 1. 290). It has been objected, and not without reason, that this last ground of suspension almost entirely destroys the rule which makes prescription run in principle against all persons. It is not those who know their rights who permit prescription to run against them. It is those who do not know their rights who allow this to happen".

That the decision was pronounced as long ago as 1857, and as the author, whose views on the balance between the protection of persons and certainty of title are made abundantly clear, would appear to have found no later contrary decision, it would seem that the Courts in France do indeed treat ignorance as a proper ground of suspension.

Mr. Pallot then cited Merlin: "Répertoire de Jurisprudence" (9th Volume) (4th Ed'n) (Paris, 1813). This author, like the author of the passage in Dalloz and Professor Planiol, had firm views on the necessity for prescription to run.

Although the passage at pp.541-543 is a long one, it deserves to be cited in full:

"Question VIII. La Prescription court-elle contre celui qui ignore que l'on prescrit contre lui?

L'affirmative paraît, du premier coup-d'oeil, n'être susceptible d'aucune difficulté. La loi dernière, C. de Praescriptione triginta vel quadraginta annorum, et la loi unique C. de usucapione transformandâ, décident

expressément que l'ignorance n'arrête pas même la Prescription de dix et vingt ans: Nullâ scientiâ vel ignorantiâ spectandâ, ne altera dubitationis inextricablis oriatur occasio.

Mais, quoiqu'il n'y ait aucun texte de droit qui déclare restituable celui qui n'est pas informé de la Prescription qui court contre lui, les docteurs ne laissent pas de soutenir qu'il peut être restitué, et ils se fondent sur les termes de l'édit du Préteur, rappelés dans la loi I, in quibus causis majores, au Digeste: item si qua alia justa causa mihi videbitur, in integrum restituam (de même, quand il se présentera quelqu'autre cause juste, j'accorderai la restitution en entier). Suivant eux, celui qui est dans une ignorance probable de la Prescription que fait courir contre lui la possession d'un autre, mérite la même faveur qu'un absent; il est, comme lui, excusable de ne pas agir; comme lui, il a l'équité en sa faveur; et il ne doit pas être plus que lui puni comme négligent, puisqu'il ne l'est pas en effet.

De ce principe qu'ils supposent, ils concluent que l'ignorance du fait d'autrui est une juste cause de restitution; que cette ignorance est présumée, quand la connaissance ne l'est pas, c'est-à-dire, presque toujours; que les personnes grossières et rustiques, les femmes et les soldats qui ne connaissent pas les lois par eux-mêmes, sont restituables, quand ils ont omis quelque chose par ignorance du droit; et que tous les autres indistinctement doivent jouir du même avantage, quand il s'agit de ne pas perdre, de damno vitando.

Ils font ensuite sur tout cela un grand nombre de questions, d'ampliations et de limitations. Sans doute, on imagine bien que le droit et la raison ne tiennent pas, dans ce chaos, une place fort avantageuse; les erreurs, les absurdités y fourmillent; et si l'on fait une attention sérieuse aux inconvéniens sans nombre que produirait, dans l'ordre civil, la pratique d'une pareille doctrine, ils achèvant d'en nécessiter la condamnation.

Il y a, comme nous l'avons vu, des lois qui décident expressément que la Prescription court contre celui qui l'ignore: ou sont celles qui l'autorisent à s'en faire relever? Nulle part : elles permettent cependant en plusieurs cas la restitution pour cause d'absence. Celle qu'on voudrait accorder sur le seul fondement de l'ignorance, n'est donc qu'une invention des docteurs. Née dans la poussière de l'ecole, elle doit y rester ensevelie.

Mais c'est trop peu que d'invoquer ici le silence de la loi: la loi n'est pas demeurée muette, elle a parlé au contraire, et de la manière la plus expresse. Nous ne voulons pas, a-t-elle dit, qu'on mette la moindre différence entre celui qui sait et et celui qui ignore qu'on prescrit contre lui, DE PEUR QUE DE LA IL NE LAISSE UNE SECONDE PEPINIERE DE PROCES INEXTRICABLES: Nullâ scientiâ vel ignorantiâ spectandâ, ne altera dubitationis inexplicabilis oriatur occasio. Voilà ce qu'a dit la loi en traitant de la Prescription de dix et de vingt ans; et que n'aurait-elle pas dit au sujet des Prescriptions plus longues? - C'est donc éluder son but, son objet direct et formel, que d'admettre, en faveur de l'ignorance, la restitution en entier contre la Prescription. C'est introduire, entre celui qui ignore et celui qui connait, une différence qu'elle a rejetée; c'est retomber, par une voie indirecte, dans le labyrinthe de procès et de difficultés qu'elle a voulu éviter. Disons plus, c'est faire illusion à l'établissement de la Prescription et la rendre inutile. Combien de fois, en effet, n'arrive-t-il pas qu'elle court contre des personnes qui l'ignorent? Il est bien rare qu'un homme instruit de ses droits, en néglige la poursuite pendant un temps suffisant pour les prescrire. Comment d'ailleurs prouver qu'il en a eu connaisance? Il ne manquera jamais de le nier, et suivant les docteurs, c'est sur le prescrivant qu'en retombera la preuve; car, on l'a déjà dit, un de leurs principes est que l'ignorance est toujours présumée, si ce n'est dans les cas où la science ne l'est point; et ils ont soin d'ajouter que ces cas sont fort rares.

.....

Enfin, la loi veut que la Prescription donne une sûrete pleine et entière. C'est le language uniforme du droit civil et du droit cannon. (Lois sicut et omnes, C. de Praescriptione 30 vel 40 annorum; loi dernière, C. de Fundis patrimonialibus; chapitre ad aures, extrà de Praescriptionibus). Or, comment aurait-on cette sûreté, si, après la Prescription acquise, on pouvait encore être inquiété par une demande en restitution fondée sur un pretexte d'ignorance?

Il est vrai qué, dans les textes qui la promettent, cette sûreté, il ne s'agit que des Prescriptions de trente et de quarante ans. Mais, 1o ils la veulent du moins établir dans ces Prescriptions; 2o ils ne l'excluent pas de celles de dix et de vingt ans. Ils l'y supposent, au contraire, puisqu'il y a identité de raison et d'effet, et que si l'on ne veut pas tout rendre arbitraire, il faut ou l'admettre, ou la rejeter dans toutes, sans exception.

Du reste; c'est en vain qu'on oppose, l'édit du préteur, Si qua alia mihi justa causa videbitur, in integrum restituam. Il ne faut pas séparer ces termes de ceux qui les suivent, quod ejus per leges licebit (en tant que les lois m'y autoriseront): et ceux-ci marquent évidemment que l'intention du préteur est de ne restituer que dans le cas où la loi le permet.

Ajoutons qu'en France, la jurisprudence des arrêts a constamment rejeté la restitution pour cause d'ignorance.

Saint-Maurice, de restitutionibus in integrum, ch. 110, cite un ancien arrêt du parlement de Franche-Comté qui le juge ainsi.

Dunod, des Prescriptions, part. I, Ch. II, en rapporte un autre du 21 Décembre 1706, qui confirme cette décision. Il s'agissait, dans l'un et dans l'autre, de la Prescription de trente ans, la seule admise dans le comté de Bourgogne.

Catellan, liv. 7, ch. 13, nous en fournit un semblable, rendu à la grand'chambre du parlement de Toulouse. Il était également question de la Prescription trentenaire. Ce magistrat a soin de nous retracer les motifs qui, dans cette affaire, déterminèrent sa compagnie à prononcer de la sorte. "Généralement" (dit-il), "la Prescription court contre toute sorte de personnes": il n'y a d'excepté que ceux qui n'ont pas d'action ou ceux qui l'ayant, ne sont pas capables de l'exercer; mais cette incapacité s'entend de l'incapacité d'etat et de personnes, non d'une incapacité étrangère et accidentelle, telles que sont l'absence et l'ignorance. Hors la faveur personnelle attachée à l'état, tout le reste cède à la faveur que donne à la Prescription, tout odieuse qu'elle peut être, l'effet qu'elle produit, d'ôter aux possesseurs l'inquiétude et la peine d'une incertitude perpétuelle".

Catellan ajoute que, par un autre arêt rendu à son rapport, le 29 mai 1663, il a été jugé qu'il ne résultait aucun obstacle contre la Prescription, de l'espèce d'ignorance, ou plutôt de l'incertitude qu'avaient causée, sur les droits d'un héritier, les procès qu'il avait eu à soutenir pour se faire adjuger la succession. On prétendait qu'il n'avait pas pu agir avant que sa qualité fût établie et déterminée: mais, répondait le prescrivant, "selon la maxime générale de France, le mort saisit le vif. Ainsi, le vrai héritier avait l'action en main dès la mort. Capable d'agir, n'en étant point empêché par son état, la Prescription a pu courir contre lui"."

The passage has been reproduced at considerable length as it must be said that it appears to reflect much more what the author would wish the law to be, rather than his statement of what the law is; and although he gives a judgment of 1706 as in his favour, and cites Catellan (whose views appear in Dalloz, supra) who cites a judgment of 1663, although that latter judgment would seem to be based on *"incertitude"* and not ignorance), it would seem that the point was by no means as settled as he would wish it to be. It seems clear that the issue was being approached in a way which incurred the disapproval of the author, who then produced what may perhaps be described as a polemic pressing his views.

Mr. Pallot produced passages from three further authors. The first was Baudry-Lacantinerie: "Précis de Droit Civil", Tome Premier (11th Ed'n) (Paris, 1912); again, it is necessary to cite the passage at length at p.833:

> *"1449. La prescription court contre toutes personnes, à moins, qu'elles ne soient dans quelque exception établie par une loi. Ainsi s'exprime l'art. 2251.*
>
> *Dans notre ancien droit, les causes de suspension de la prescription n'étaient pas limitativement déterminées. Tout état laissé à l'arbitraire du juge, qui n'avait d'autre guide en cette matière que la maxime: Contra non valentem agere non currit praescriptio. La règle consacrée par cette maxime parait fort sage, au premier abord. Celui qui est menacé par la prescription doit agir pour la conjurer, c'est-à-dire accomplir un acte interruptif; il paraît donc logique de ne pas faire courir la prescription contre lui, s'il est dans l'impossiblilité d'agir. - Mais avec un peu de bonne volonté, le juge, qui veut restituer un propriétaire contre les effets de la prescription, parce que la cause lui paraît favorable, trouvera presque toujours quelque impossibilité d'agir: l'absence, l'ignorance de son droit, l'altération des facultés intellectuelles..., et les dispositions de la loi sur la prescription demeureront ainsi lettre morte, quoiqu'elles aient pour fondement les plus puissantes considérations d'intérêt social. C'est bien ainsi à peu près que les choses se passaient dans notre ancien droit. Le législateur de 1804 le savait, et c'est précisément pour empêcher le renouvellement de ces abus qu'il a formulé le principe écrit en l'art. 2251, principe qui équivaut à ceci: Il n'ya pas d'autres causes de suspension que celles admises par la loi. Ainsi, à défaut de texte, la prescription n'est pas suspendue pendent la tutelle au profit du tuteur, à raison des actions qu'il peut avoir contre son pupille. En sens contraire, Nîmes, 18 nov. 1892, D., 93. 2. 150.*

1450. Cependant telle est la force de la tradition, que les tribunaux n'ont pas pu se résoudre à appliquer franchement la loi. Chose triste à dire! ils ont été encouragés dans cette voie par un parti important dans la doctrine: le jurisconsulte est moins excusable que le juge, quand il se laisse aller à violer la loi, parce qu'il est débarrassé de la préoccupation des faits, qui assiège si souvent l'esprit du juge. A entendre les échos répétés du Palais, il semble que la maxime Contra non valentem agere non currit praescriptio soit encore en pleine vigueur. Nancy, 16 nov. 1889, S., 91. 2. 161. La jurisprudence en a fait deux applications principales.

La première est relative au cas où celui contre lequel la prescription court a été empêché de l'interrompre par quelque événement de force majeure, tel que la guerre ou tout autre fléau qui a momentanément arrêté le cours de la justice. On décide que la prescription a été suspendue pendant tout le temps qu'a duré l'impossibilité d'agir. Cpr. Caen, 4 juin 1891, S., 92. 2. 193.

A notre avis, cette solution est nettement condamnée par le décret du 9 septembre 1870 et par la loi du 26 mai 1871, qui ont suspendu les prescriptions en matière civile pendant la durée de la guerre franco-allemande. Voyez aussi la loi du 20 décembre 1879. Ces dispositions législatives seraient d'une inutilité manifeste, si la règle était que la guerre est une cause de suspension de la prescription quand elle arrête le cours de la justice.

La deuxième application concerne le cas où celui à qui la prescription est opposée avait une juste cause d'ignorer son droit. La cour de cassation pose en principe, que la prescription ne court point "toutes les fois que le propriétaire peut raisonablement, et aux yeux de la loi, ignorer l'existence du fait qui donne naissance à son droit et à son intérêt, et, par suite, ouverture à son action". Il est palpable que cette exception tend à détruire en grande partie la règle. En général, ce ne sont pas ceux qui ont connaisance de leur droit qui le laissent prescrire, ce sont ceux qui l'ignorent, et, avec quelque bonne volonté, on peut presque toujours trouver une juste cause à leur ignorance; d'autant plus que la notion de la juste cause est ici nécessairement arbitraire, puisque la loi ne l'a pas définie et qu'elle n'en parle même pas. Que deviendra, dans de pareilles conditions, le principe tutélaire de la prescription?

Ainsi notre législateur écrit un texte tout exprès pour proscrire la règle Contra non valentem agere non currit praescriptio, qu'il considère avec raison comme mettant en péril l'institution même de la prescription, nécessaire au

maintien de l'ordre social, et la jurisprudence consacre deux des applications les plus importantes de cette vieille maxime. Nous verrons sous l'art. 2257 qu'elle en admet, à tort également, une troisième, dont il serait prématuré de parler ici.

1451. On demandera, sans doute, pourquoi la jurisprudence n'a pas fait un pas de plus, pourquoi elle n'a pas consacré aussi les autres applications de la règle admises dans notre ancien droit, notamment celle relative à l'absence du propriétaire, et à son état d'aliénation mentale. C'est que la jurisprudence a sa manière à elle d'interpréter l'art. 2251. Argumentant judaiquement des termes de ce texte qui dispose que: "La prescription court contre toutes personnes, à moins qu'elles ne soient dans quelque exception établis par une loi", la jurisprudence dit: Les causes de suspension de la prescription sont limitativement déterminées par le législateur, en tant qu'elles sont fondées sur des considérations relatives à la personne de celui contre lequel la prescription court; mais le code civil ne détermine pas limitativement les autres causes de suspension, celles qui sont étrangères à la personne. Si donc on ne peut admettre, sans violer la loi, une cause de suspension relative à la personne qui ne résulte pas d'un texte formel, par exemple l'absence, on peut, au contraire, sans encourir le même reproche, admettre par des raisons d'équité une cause de suspension étrangère à la considération de la personne, par exemple celle résultant de la suspension du cours de la justice par suite de la guerre.

Cette interprétation nous paraît inadmissible. La distinction adoptée par la jurisprudence ne ressort nullement des termes de l'art. 2251. En définitive, toute prescription court contre une personne: et, quand le législateur vient nous dire: "La prescription court contre toutes personnes, à moins qu'elles ne soient dans quelque exception établie par une loi", cela signifie tout simplement, qu'il n'y a pas d'autres causes de suspension que celles établies par la loi.

D'ailleurs, en supposant fondée l'interprétation que nous venons de combattre, comment se fait-il que la jurisprudence rejette la cause de suspension résultant de l'absence de celui contre lequel la prescription court, et qu'elle admette celle résultant de l'ignorance où il se trouve de son droit? Est-ce que, dans l'un comme dans l'autre cas, la cause de suspension n'est pas relative à la personne?

Enfin, en théorie, comment expliquer que la loi ait éprouvé le besoin de déterminer limitativement les causes

de suspension fondées sur des considérations personnelles à celui que la prescription menace, et qu'elle ait donné une énumération non limitative des autres causes de suspension?

La jurisprudence a encore un autre argument pour justifier les applications qu'elle fait de la règle Contra non valentem agere non currit praescriptio. Il se réduit en substance à ceci: Les dispositions du code civil, qui déterminent les cas de suspension de la prescription, ne font que consacrer des applications particulières de l'ancienne maxime: ce qui suppose que le législateur la considère comme étant encore en vigueur. L'interprète doit donc, développant la pensée qui a dicté les dispositions des art. 2252 et suivants, admettre d'autres applications dans les cas analogues à ceux prévus par la loi. - Singulière argumentation! En supposant que le législateur ait consacré, comme on le prétend, quelques applications de la règle traditionnelle, les autres devraient de cela même être écartées, puisque l'art. 2251 nous dit que les dispositions de la loi sont limitatives sur ce point: admettre certaines applications seulement de la règle, c'est exclure manifestement les autres. Mais il y a plus: nous verrons bientôt que les diverses dispositions, relatives à la suspension de la prescription, ne doivent pas être considérées comme des applications de la règle traditionnelle; le législateur l'a donc rejetée d'une manière absolue.

1452. Sans aller aussi loin que la jurisprudence, Aubry et Rau ont proposé à ce sujet une distinction assez rationnelle, mais qui, il faut bien le reconnaître, est sans base dans les textes. La règle Contra non valentem agere non currit praescriptio, disent ces auteurs, ne peut pas recevoir d'application en l'absence d'un texte, lorsque l'obstacle qui a empêché l'interruption de la prescription est un obstacle de fait, tel que l'absence de celui contre qui la prescription court, l'ignorance où il se trouve de l'existence de son droit, la suspension du cours de la justice, résultant de la guerre: mais il en est autrement, si c'est un obstacle de droit, un obstacle légal."

Once again the learned author makes the position crystal clear. Despite what would appear to be the clear terms of Art. 2251 of the Code Civil, the Courts have continued unabated their reliance on the previous maxim. It is equally clear once again that the suspension of prescription operated *"toutes les fois que le propriétaire peut raisonnablement, et aux yeux de la loi, ignorer l'existence du fait qui donne naissance à son droit et à son intérêt, et par suite, ouverture à son action".*

Mr. Pallot then went back a century to Dunod & Laporte: Traité des Prescriptions, (Paris, 1810) Chapter XII, p.105:

"CHAPITRE XII.

De l'Absence et de l'Ignorance.

La prescription court sans distinction contre les absens. Cependant les lois romaines exceptaient plusieurs cas.

.....

Les docteurs ajoutent, que l'absent à cause d'un bannissement, d'un exil, d'une excommunication, d'un emprisonnement, de toute détention violente; ou pour se défendre dans un procès, pour se faire traiter d'une maladie, pour l'exécution d'un voeu qui n'a pas été fait par affectation, et pour rapporter des marchandises utiles à sa province, peut être restitué contre la prescription.

Dans notre Droit, ces exceptions n'ont lieu qu'à l'égard des personnes et dans les cas expressément prévus par nos lois.

Il est hors de doute que la prescription court contre ceux qui n'en sont pas informés: Nullâ scientiâ vel ignorantiâ expectandâ; ne altera dubitationis inextricabilis oriatur occasio. Nous n'admettons pas l'opinion des docteurs qui soutiennent néanmoins qu'ils peuvent être restitués, et qui se fondent sur les termes de l'édit du Préteur: Item si qua alia justa causa mihi videbitur, in integrum restituam. En effet, cette opinion n'a aucun fondement, ni en raison ni en droit.

1. Les lois décident que la prescription court contre celui qui l'ignore, et aucune ne dit qu'il sera restitué contre elle, quoiqu'elles autorisent expressément le restitution en plusieurs cas d'absence. Celle qu'on accorde en cas d'ignorance, n'est donc qu'une invention des docteurs dans un cas non prévu par la loi, et auquel cependant elle n'a pas voulu pourvoir en y admettant la restitution.

2. Le motif des lois est d'éviter les procès que la discussion de l'ignorance et de la connaissance ferait naître: Nullâ scientiâ vel ignorantiâ expectandâ; ne altera dubitationis inextricabilis oriatur occasio."

Writing as he was, so soon after the Code Civil of 1804, this view appears perfectly firm. In further passages on pp. 108 *et seq* he develops this view:

"4. Les auteurs qui autorisent la restitution pour cause d'ignorance, n'ont considéré que l'intérêt de quelques particuliers, auquel la certitude des propriétés et la tranquillité publique sont sans doute préférables. Ils ont quitté la thèse pour l'hypothèse. C'est cependant la tranquillité publique et la thèse en général que les lois ont eu en vue en autorisant la prescription, puisqu'elles ont passé, par cette considération, sur l'injustice qu'il paraissait y avoir d'enricher l'un aux dépens de l'autre, et de priver le maître de sa propriété malgré lui.

5. Ce serait faire illusion aux lois qui établissent la prescription et les rendre inutiles, que d'admettre ce moyen, parce qu'il arrive souvent que la prescription court contre des personnes qui l'ignorent, et que ceux même qui l'ont su ne manqueraient pas de prétextes pour dire qu'ils l'ont ignorée. Ce serait du moins charger d'une preuve trop difficile ceux qui ont prescrit, que de les obliger à faire voir que les intéressés ont connu la prescription; car les docteurs prétendent que l'ignorance est présumée dans les cas auxquels la science ne l'est pas.

6. La loi veut que la prescription donne une sureté pleine et entière. C'est le langage uniforme de l'un et de l'autre droit. Or, comment aurait-on cette sureté, si après la prescription acquise, on pouvait encore être inquiété, par une restitution sous prétexte d'ignorance? Or, il n'y en a point qui le permette au cas de l'ignorance en matière de prescription. Si l'on objecte qu'il suffit qu'elles ne le défendent pas, pour qu'on doive le faire quand l'equité le demande, ils répliquent qu'elles le défendent du moins tacitement, quand elles décident que la prescription courra contre l'ignorant, et qu'elles ne lui accordent la restitution en aucun cas; que l'on ne doit pas s'écarter, sous prétexte d'équité et sans une loi formelle, d'une règle aussi importante que celle des prescriptions qui sont introduites pour le bien public; que leur temps est assez long pour que chacun puisse s'informer de ses droits et de ce qui se fait à son préjudice; qu'il a été prorogé et étendu dans ce dessein; que si on ne s'en informe pas, on doit imputer à sa négligence ou à sa mauvaise fortune le mal qui pourra en suivre; que ce n'est pas seulement en punition de la négligence que la prescription a lieu, mais principalement pour assurer le repos des familles par la certitude des propriétés, et pour éviter les procès que les discussions sur l'ignorance entraîneraient infailliblement....

Cette opinion est la plus équitable et la plus régulière. Il en est de même de l'absence; elle ne peut

rien opérer contre la prescription; Non absentia, non militia, contra eam defendenda....

D'Argentrée atteste que les restitutions contre la prescription pour cause d'absence et d'ignorance, ont été généralement rejetées, parce qu'elles troublaient la jurisprudence, et ne laissaient rien d'assuré dans les fortunes des particuliers; que les dernières lois de Justinien les ont abolies; et que l'usage en était devenu pernicieux par le trop d'étendue que la subtilité de la scolastique leur avait donné: Censendum, igitur, legitimo tempore praescriptionum quarumvis decurso, in totum restitutiones excludi, quâvis ex causâ, quae nulla tanta esse potest, ut jus bono publico repertum violetur."

It is clear that those commentators, in general, held firmly to the view that ignorance should not be a ground on which the running of prescription should be suspended. It is equally clear, though, that the practice of the Courts had been, in what they considered to be proper cases, to allow such a suspension, almost it would seem regardless, or in defiance, of the terms of Art. 2251.

For this to be the case, it would seem to follow that the use of the rule to suspend the operation of prescription on grounds of ignorance, was well entrenched in France before the Revolution: and that it has continued to be applied thereafter. From the passages cited, absence does not appear to be have been a necessary ingredient.

However, Mr. Pallot, quite properly, at this point reminded the Court that what it must consider was the application of the *coûtume* in Jersey.

In his submission, the point had been raised, and decided, in the Island.

In support of his argument he cited Huelin v. Luce [1939] 240 Ex. 477.

In this action the Plaintiff's aunt had been left the usufruct of the property in 1911 and had died in October, 1937. The reversioner, or rather one of them who had taken over the property, obtained possession from the tenant on 24th June, 1938, and having ascertained that the property was in poor repair sent the bill to his aunt's executor, who refused to pay. The nephew sued, and was clearly (although it is not in the report) met with the plea that he was out of time.

He then replied claiming:

"Qu'il est de principe incontestable tant en droit qu'en équité qu'à qui ne peut agir la prescription ne court point. Que dans l'espèce l'acteur ne put faire valoir ses droits ledit jour 5 Octobre, 1937, jour du décès de ladite Dlle Lucille de Gruchy Journeaux."

After setting out the circumstances he went on to claim:

"Qu'il s'ensuit que l'Acteur n'avait aucun droit légal de s'ingérer sur lesdites prémisses pour en faire l'examen jusqu'à l'expiration de ladite période d'avertissement et en fait l'Acteur n'avait aucune connaissance de l'état déplorable dans laquelle ladite usufruitière avait laissé tomber ladite propriété avant le moment où il se trouvait en pleine liberté d'en faire tel examen. Qu'il résulte donc de ces circonstances que l'Acteur n'était nullement dans la position de faire valoir sa réclamation ni d'intenter aucun procès relatif à cette réclamation avant ledit jour 24 juin 1938.

The Defendant replied, claiming that the action was prescribed after the passing of a year and a day from the aunt's death and then went on to plead that the Plaintiff sought to invoke:

"...la maxime "contre qui ne peut agir la prescription ne court point". Que cependant l'Acteur ne peut être reçu à invoquer dans l'espèce une maxime de droit qui ne s'applique qu'à une personne qui se trouve, pour cause légale, dans l'impossibilité de poursuivre ses droits, par exemple à un mineur dépourvu de Tuteur."

This pleading on its face seems to narrow down in a quite extraordinary manner the passage in, for example, Poingdestre (*v. supra*).

The decision of the Court merely announced that the Court *"accueillant la prétention emise par le défendeur...." "a jugé que le droit d'action - est prescrit".*

Mr. Pallot submitted that this was clear authority for the proposition that this must shut out any suspension on the ground of "ignorance". There must be a legal impediment preventing the Plaintiff from acting (in the absence, of course, of fraud and so forth *(v. supra)*.

On the pleadings the Court must have considered "ignorance" given the pleadings of the Plaintiff and that the only application of the maxim was for a *"cause légale"* which he equated with *"un empêchement de droit".*

Mr. Le Quesne dealt with this in summary fashion. In his submission the Judgment was based on a false hypothesis and was *per incuriam*.

To be of value in this case, where the facts are so very different, one would need a reasoned judgment and a reference to the authorities which were before the Court. As these are not known, the Court now can only advance on the basis of hypothesis.

There is merit in this submission, but it is neither proper nor possible to proceed in such a cavalier fashion. Many of the cases which were decided before *"jugements motivés"* became the fashion, are extremely helpful, and assist greatly in an understanding of the law. In many cases this understanding is gained from a careful perusal of the pleadings which were customarily detailed and to which considerable thought normally was given.

On a careful reading, however, of the Plaintiff's pleading, he is claiming that he had no legal right to make an examination and that in fact he had no knowledge of the condition of the premises.

He does not claim that he was unaware and effectively and without negligence could not have been aware, (which is the Plaintiff's case in the present proceedings) merely that he was not, the main thrust being that he had no legal right of entry.

There was, as it seems to the Court, no substance in this plea: a reversioner is entitled to call for an inspection of premises (Ross-v-Ross [1980] Ex 147) and if he had not pursued this course of action, he was guilty of negligence if he suffered damage.

In these circumstances, it falls to examine the pleading, given that *"empêchement de fait"* (in the sense of "ignorance") could not feasibly be argued. Although Ross was decided in 1980 the arguments in that case were based on existing principles, and there was no reason to believe that the Court would have found differently in, say, 1938.

If, as seems likely, the pleader was dealing with the *"droit légal de s'ingérer sur les premisses"* the pleading causes little difficulty, for the pleader says that in the circumstances *("dans l'espèce")* the maxim cannot be invoked (which is correct) and if *"cause légale"* is equated to *empêchement de droit"* then clearly there was nothing at any time (Ross) to prevent the Plaintiff from gaining access.

A further difficulty arises with *"cause légale"* insofar as Mr. Pallot relies on those words. If the pleader had relied on *"empêchement de droit"* he would presumably have said so. The

example is just that i.e. an example, and one of several. It is difficult to see why some of the examples given by Poingdestre albeit of an equitable nature are not by adoption into the framework of law *"causes légales"*.

In addition, the facts which were before the Court in 1939 were quite different from those which are before the Court today. In 1939 the Plaintiff had simply neglected his interest; in this case the claim is that the Plaintiff did not and could not know of his injury.

The 1939 case was, it is abundantly clear, correctly decided on its facts, but the Court is not persuaded that it is so much on all fours with the present case as to serve as authority for such a narrowing of the maxim as is contended for by Mr. Pallot.

The Court therefore makes a distinction between the present action and the decision in Huelin v. Luce and does not feel bound, on the authority of that case, to narrow down the grounds on which a party may claim a suspension of the prescription as is contended by Mr. Pallot.

Finally, Mr. Pallot cited a passage from Bérault, Godefroy, et d'Aviron: "Commentaires sur la Coûtume de Normandie" (Paris, 1776), Tome Second, where Godefroy gives, at 481, absence as a ***"cause légitime de restitution contre les prescriptions"*** but he excludes *inter alia* ***"absence volontaire"***.

Taking all these into consideration, to summarise his case, Mr. Pallot, having first submitted that the Court was bound by Huelin v. Luce *(v. supra)*, second contended that ignorance, even without negligence was not *per se* such an *empêchement"* as would cause a suspension of prescription. It was not to be equated with "absence" - whether justifiable or not - as that would be a quantum leap of which the coûtume was not capable.

In his submission, the French authors were right. In cases such as the present failure to ensure certainty of title could lead to injustice and a whole *"pépinerie"* of actions. It would be to stretch the maxim beyond its limit, beyond its intended limit and beyond any justifiable limit to suspend prescription in the present case.

In answer, Mr. Le Quesne submitted that Article 2(2) of the 1960 Law had simply left the law, on this point, where it was before.

In his submission the passage from Poingdestre demonstrated a clear intention to give equitable relief from the law on prescription.

Two of the exceptions - minority and madness - are clearly cases where the state has an interest; but the remaining examples are those resulting from principles of fairness.

So far as Poingdestre's third principle (at p.49) is concerned, he pointed out that where a man was *"empêché d'agir"* and not guilty of any negligence, there was no reason to punish to a person for a *"faute supposée"*. Prescription was there to punish negligence.

The hindrance or impediment (empêchement) must of course be *légitime* or non negligent. If medical checks were required and not undergone, this might well, depending on the facts, amount to negligence.

So far as Poingdestre's fourth rule (at p.50) was concerned he submitted that although the passage began with *"absence"* - accompanied by *"juste à légitime ignorance"* - Poingdestre goes on to say that the Jurists (of his age at any rate) agree that it applies to an *"absent ou ignorant"*. It does not say that ingorance is an exception; it is the impediment which causes the exception, and one of these is legitimate ignorance.

In his submission, given the wording of the passage, absence of knowledge today of a latent defect without negligence is in the same category - on the assumption that it is not already included - as was absence (in similar circumstances) then. As the passage makes clear as it continues there were never fixed and finite categories of exceptions.

The Court is grateful to both counsel for the very great amount of detailed research which they have presented to the Court.

Certain points are quite clear. As noted above, it was agreed that the maxim *"Non valenti agere non currit praescriptio"* - whether in that form or the other - formed part of the law of the Island, the argument being as to the extent of the maxim.

In the view of the Court, the starting point has, in the circumstances, to be the passage from Terrien, where the *Ordonnance Royale* uses the words *"autre cause légitime empeschant de droit ou de faict"* the gloss on which envisages a suspension in certain circumstances of absence.

The passage, as so often, is very short but despite the terms in which the Ordonnance Royale is couched, this absence nonetheless is still in certain circumstances considered an impediment.

The next author, and one whose view of the state of the law in the Island carries very considerable weight is, of course, Poingdestre.

Now, it is quite clear that the Court is not being asked to deal with an empêchement de droit, and questions of fraud duress and so forth do not arise. At all times the Plaintiff has had a legal right to sue. Prescription will only be suspended if he can show that he is suffering from an *"empêchement de fait"* within the ambit of the maxim.

In the view of the Court, there are solid grounds for supposing (see the fourth rule) that Poingdestre considered ignorance to be on the same plane as absence as he considers them disjunctively.

Even if the Court is wrong in this assumption, it would by analogy extend ignorance of an unknown concealed latent defect to the lack of knowledge of an absentee in the conditions of the Seventeenth Century.

If, as the Court conceives, the rule were there to protect a claimant who could not properly obtain information, it must extend to someone who, even if not physically absent, is nonetheless in the same state of mental ingorance as a Seventeenth Century traveller, shipwrecked or detained, in a far country.

Mr. Pallot cited the note from Le Geyt, and although this would appear to exclude absence, except in particular circumstances, it is a general heading, without a gloss. In the view of the Court, the much longer and more reasoned article by Poingdestre, who as is usual offers a view which is clear, ought to be the interpretation followed by the Court. Given the two passages and the respective authors the Court has no hesitation in making this choice.

The question of impediment was, of course, dealt with in the Guernsey case of Vaudin v. Hamon [1974] AC 569 by their Lordships, although it does not appear to have been the main point in issue. With respect, it does not appear to be a decision which should bind the Courts of this Island. The Jersey authorities, perhaps not surprisingly, were not before the Court; the passage of Pothier cited in this hearing equally does not appear to have been before the Court; and although the passage, which is very short, from Jurat Carey's *essai* appears to be clear, it relates to the law of Guernsey and not of Jersey. It may cover only an *empêchement de droit*, and it certainly narrows down, without any attempt at explanation, both the remarks in Terrien, and the rationale supplied by Poingdestre. Furthermore, Smith v. Harvey (1981) Court of Appeal of Guernsey serves as authority that the development of the law in Guernsey is not a sufficiently safe guide (at p.14).

Given that distinction, the next step was to go forward through the commentators to see if any guidance could be gleaned from their views.

In this respect, the Court has particular regard to the view of Pothier at pp.196-197 cited above. Where a person is able to inform himself of the position, prescription runs. However where *"un absent a été dans une véritable unpuissance, et lorsgue cela est evidement justifié"* prescription will be suspended.

Although, as Mr. Pallot submitted, he does not consider "ignorance" as such, it appears to the Court that given the circumstances as they have evolved today, with latent and undetectable illnesses, the reasoning behind the statement confirms the view of Poingdestre.

There then followed the submissions on the various other commentaries cited. It appears to the Court that regardless of the views of the authors (and it would seem, possibly, Art. 2251 of the Code Civil) the Courts in France and not least the Cour de Cassation, have indeed, both before and after the Revolution, extended the principle, if indeed it needed extending, in favour of a suspension of prescription on grounds of ignorance where there is no negligence. In the view of the Court this amounts to a strong statement of support for the view which the Court has formed on the authorities.

Having formed this view the Court had of necessity to consider very carefully whether it was bound by the decision in Huelin v. Luce. For the reasons set out above, it has come to the conclusion that it is not so bound.

The Court therefore finds in favour of the Plaintiff and dismisses the contentions of the Defendant on this point. If there is a latent physical defect of which the claimant is ignorant without negligence on his part, the maxim will apply and prescription will be suspended until his ignorance ceases, or at any rate ought to cease. This point is of course a matter of fact in each case and is, as it must be, remitted for evidence to be heard; as must equally be the date on which the cause of action accrued in tort or the date of the breach of contract, should these be of relevance for the finding.

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