

Determination as to the nature and extent of a right of way existing over the Defendant's land in favour of access to the Plaintiffs' land.

[2021]GRC001

**IN THE ROYAL COURT OF GUERNSEY  
(ORDINARY DIVISION)**

**Between:**

**FREDERICK JOHN KILPATRICK  
EDNA JOYCE KILPATRICK**

**Plaintiffs**

**-and-**

**PETER JOHN ENGLISH**

**Defendant**

**Hearing date: 24 October 2019**

**Judgment handed down: 22 February 2021**

**Before: Richard James McMahon, Esq., Bailiff**

**Counsel for the Plaintiffs: Advocate P T R Ferbrache  
Counsel for the Defendant: Advocate T Crawford**

**Cases, texts & legislation referred to:**

*Singleton v Le Noury* (unreported, 5 June 1990)

*Russell and Caine v Gillespie and Ford* (unreported, 2 April 2003)

*Poulding v Elliott* (unreported, 19 June 2014)

Pardessus, *Traité des Servitudes*

*Fallaize v Gaudion* (unreported, 25 June 1987)

Basnage, *Commentaires sur la Coutume de Normandie*, 4th ed. (1778)

*Smith v Slawther* (1998) 26.GLJ.79

*Duquemin and Duquemin v Dunstan Investments Limited* [2003-04] GLR 537

*Colesberg Hotel (1972) Limited v Alton Hotel Limited* 2003 JLR 176

*Loi relative aux Automobiles* (registered 25 September 1915)

The Conveyancing (Guernsey) Law, 1969

The Conveyancing Order, 1969

Codes of Instruction and specimen forms of Conveyances approved by members of the Bar ("The Blue Book")

**Introduction**

1. The Plaintiffs, Frederick and Edna Kilpatrick, own a parcel of land on which a dwelling house sits and which is adjacent to a parcel of land owned by the Defendant, Peter English, on which some garages sit. There is a dispute between the parties as to the nature of the right of way that is acknowledged to exist in favour of the owners of the Plaintiffs' land over the Defendant's land, where the Defendant's land comprises the means of access to the rear of the Plaintiffs' property and to the rear of some of the other properties situate at Rouge Huis Avenue.
2. The Cause in this matter was tabled on 16 March 2018. Concern was raised that the Defendant had parked a vehicle blocking the Plaintiffs' means of access. The primary relief sought is a declaration to the effect that the Plaintiffs enjoy a full right of way over the part of the Defendant's land in accordance with what had been granted in 1916. It also sought injunctive relief, damages, costs and interest. Defences were tabled on 27 April 2018. A year later, the parties agreed, and the Court accepted, that the issue of the extent of the right of way that exists in favour of the Plaintiffs' property over the lane and passageway to Rouge Huis Avenue should be determined as a preliminary issue, and as a matter of law. Accordingly, this issue has been dealt with in accordance with the timetable agreed and by me sitting unaccompanied by the Jurats.
3. The oral argument took place on 24 October 2019 at which time I reserved my judgment. Events thereafter have meant that I have not managed to prepare this judgment in the timeframe that would normally be expected. I understand, however, that the status quo, by which access is being facilitated to the rear of the Plaintiffs' property, is being preserved by virtue of the Defendant having undertaken not to park any vehicle in the position in which a vehicle had been parked by him previously. That said, the parties should have had this decision much sooner than now and the lengthy delay is something for which I can only apologise by referencing the pandemic and the pressures of other matters that have dominated what has happened during the past year or so.

## **Facts**

4. The parties helpfully prepared a Statement of Agreed Facts prior to the hearing of this preliminary issue, from which I have extracted the following details.
5. The Plaintiffs purchased the dwelling house known as "Colwin" situate at Rouge Huis Avenue in St Peter Port ("the Plaintiffs' Property") from Courtland House (Guernsey) Limited by way of conveyance registered on 23 May 2017.
6. The Defendant, together with his late wife, purchased premises comprising fifteen garages, land, part of a passageway and a lane ("the Lane") and a small passage leading to La Gibauderie, all situate at Rouge Huis Avenue ("the Defendant's Property") from Dennis and Mary McCarthy by way of conveyance registered on 28 July 1998.
7. Both the Plaintiffs' Property and the Defendant's Property together with other property forming part of the erstwhile Rouge Huis Estate were previously in common ownership of Hubert and Company Limited.
8. By way of conveyance registered on 27 January 1916 between Hubert and Company Limited and Francis John Hubert, the Plaintiffs' Property was split from the Rouge Huis Estate which then still included the Defendant's Property ("the 1916 Conveyance"). The western boundary of the Plaintiffs' Property borders what was to become the eastern boundary of the Defendant's Property.
9. By means of the 1916 Conveyance, a right of way was granted over the Lane for the benefit of the Plaintiffs' Property in these terms:

*“... droit de passage de pied de cheval de charrue et de Charrette par dessus la dite route dite “Rouge Huis Avenue” et par dessus la ruelle en Commun entre les propriétaires des premisses y joignant et riverains ...”.*

10. When the Plaintiffs purchased this Property, the conveyance of 23 May 2017 references this right of way in the following terms:

*“THAT as heretofore granted or reserved the Purchaser shall have the benefit of the rights and covenants and shall be subject to the servitudes and covenants contained and/or referred to in the Conveyance by Hubert and Company Limited to Francis John Hubert registered on the 27<sup>th</sup> January, 1916”.*

11. Turning to the Defendant’s Property, by conveyance registered on 11 August 1927 a section of the Rouge Huis Estate belonging to Hubert and Company Limited (including the Lane and what became the Defendant’s Property) was sold to Frank William and Caroline Rogers Hubert. The right of way over the Lane for the benefit of what included the Plaintiffs’ Property was recited as follows:

*“... Auxquels ainsi qu’à leurs successeurs les propriétaires respectifs des dits maisons et jardins les dits preneurs souffriront comme par le passé tant droit de passage pour aller et venir toutes fois et quants leurs propriétés respectives à la dite Avenue de Rouge Huis ...”.*

12. The section of the Rouge Huis Estate belonging to Francis and Caroline Hubert (it being accepted that Frank and Francis is the same person) was subsequently split by way of three conveyances registered on 30 November 1929. The property conveyed to Walter Nicholas Langlois and his wife (Marguerite), which eventually came to be the Defendant’s Property, recites the rights of way over the Lane (including the right of way for the benefit of the Plaintiffs’ Property) as follows:

*“... droit de passage de pied, de cheval, d’automobile et d’autre véhicule sur la ruelle et le chemin de ce bail aux ... tous propriétaires des maisons et jardins construits sur l’heritage de Rouge Huis et qui bordent la route dite “Brock Road” la côté oeust de la dite Avenue de Rouge Huis ou la Rue dite “Elm Grove” leurs successeurs propriétaires et ayants cause pour aller et venir toutefois et quants de leurs jardins par le chemin de la ruelle de ce bail à la dite Avenue de Rouge Huis ...”.*

13. Copies of plans associated with these transactions were lodged at the Greffe. Plan 630 relates to the conveyance registered on 30 November 1929 to Walter Langlois and his wife (on which the Plaintiffs’ Property at that time is shown as belonging to A. W. Hodder), and indicates the right of way across the Lane, including using a dashed line and the wording “RIGHT OF WAY”.

14. The conveyance registered on 28 July 1998 by which the Defendant and his late wife purchased the Defendant’s Property states that:

*“the Purchasers shall have all such rights as heretofore granted or reserved and shall be subject to all such servitudes as heretofore granted or reserved insofar as such rights and servitudes may subsist and in particular as respects those contained or referred to in (i) the Conveyances to the Vendors hereinafter mentioned ...”.*

There is then reference to a conveyance registered on 15 December 1987 from Gwendoline Marguerite McCave (née Langlois), widow of Thomas Theasby McCave, which recites the right of way as follows:

*“THAT as heretofore granted or reserved, the Purchasers shall:- ... (2) allow ... all the proprietors of the dwellinghouses and land which formerly formed part of the said Rouge Huis Estate and which border Brock Road, the western side of Rouge Huis Avenue or the road called “Elm Grove”, and their respective successors in title, right of way on foot and with animals and vehicles over that part of the driveway hereby conveyed, to come and go at all times from their respective premises and Rouge Huis Avenue ...”.*

15. The Statement of Agreed Facts also provides some further factual background, even though this is of less relevance to the construction point with which this preliminary issue is concerned. The Defendant lets parking spaces along the Lane bordering the rear of the boundaries of the dwelling houses on Rouge Huis Avenue, including at the rear of the Plaintiffs’ Property. On 13 February 2017, the Plaintiffs were retrospectively granted full planning permission to demolish a section of the wall at the rear of their property, as it borders the Lane. This enabled them to create a car parking area and driveway. Later in 2017, vehicles were parked on the Lane alongside the area where the Plaintiffs’ wall had stood. Some of the wall was rebuilt, but there remained the gap to the garage that had previously existed. This gap provides access to the new parking area. After the Plaintiffs’ Cause was tabled, the Defendant agreed that the vehicle parked on the Lane at the back of the Plaintiffs’ Property would be removed and no further vehicle has been parked there since.

### **The parties’ arguments**

16. Unsurprisingly, there has been a degree of common ground between the parties’ Advocates as to the general applicable principles in relation to servitudes. Where they differ is in respect of whether the right of way that exists extends to cars and other vehicles and also whether the limited user for which the Defendant contends is further limited to a route that leads only to the means of access that previously existed to the Plaintiffs’ Property rather than the whole of the rear. There is a further issue relating to whether any of the limited user for which the Defendant contends from the original grant in 1916 has been lost because it has not been exercised for 20 years or more, although the Plaintiffs submit that that cannot be resolved in the absence of the Jurats.
17. The customary law origins of servitudes mean that the maxim “*nul servitude sans titre*” applies. That position has been confirmed by the Court of Appeal in *Singleton v Le Noury* (unreported, 5 June 1990). This is not contentious in the present case because it is recognised that there has been the grant of a right of way that now runs with the land over which it was created for the benefit of successors in title enjoying it. As the Plaintiffs point out, this arises because the right of way enjoyed to the Plaintiffs’ Property is a *servitude réelle*.
18. The Plaintiffs rely upon *Russell and Caine v Gillespie and Ford* (unreported, 2 April 2003) as explaining the consequences of such a servitude, in which it was said:

*“If a right of way is to benefit successors in title then it is important not only that a servitude réelle should be enforceable against any subsequent owner of the servient land but also that it should be enforceable by any subsequent owner of the dominant land. Not only must the burden “run with” the servient land but also the benefit must “run with” the dominant land.”*

(I also cited this passage at para. 18 of my decision in *Poulding v Elliott* (unreported, 19 June 2014), to which I will turn in more detail shortly.) Subsequently, the Court cited a passage from Tome I of Pardessus, *Traité des Servitudes* (at page 155):

*“Le propriétaire du fonds assujéti est obligé de souffrir l’usage de la servitude et de ne rien entreprendre qui puisse en diminuer les avantages et la rendre incommode ou illusoire. Il ne peut, en conséquence, rien changé à l’ancien état des lieux, ni modifier ce qui est nécessaire pour l’exercice de la change dont il est grevé.”*

19. On behalf of the Defendant, Advocate Crawford has referred to the explanation given by this Court in *Fallaize v Gaudion* (unreported, 25 June 1987). In particular, the Bailiff, Sir Charles Frossard, referred to how Basnage had put it in the 4th ed. of his commentary on the customary law, published in 1778 (*Commentaires sur la Coûtume de Normandie*), which the Bailiff loosely translated as:

*“A servitude of Right of Way in the same way as others can only be due or can only be granted or exercised under a title and when by this title the conditions and the manner in which one must use it are set out you must use them in that manner and not seek to extend them.”*

Shortly thereafter, the Bailiff also added that:

*“Generally when a right of way is created it starts with land in common ownership and a part of the land is sold and in the deed of sale the right of way is created over property so that it is not completely enclosed”*

(although Advocate Crawford did not refer to those final seven words). Advocate Crawford submits that this was the position under the 1916 Conveyance.

20. Advocate Crawford further submitted that a servitude cannot be acquired or enhanced by prescription under Guernsey law, referring to the Court of Appeal’s decision in *Smith v Slawther* (1998) 26.GLJ.79. This principle was also mentioned in *Russell and Caine v Gillespie and Ford* as being a long established one. That is not, though, the case advanced by the Plaintiffs. It is not being suggested that the right to pass over the right of way in vehicles has arisen through user over the years, but rather as a matter of construing the grant that has since run with the land.
21. In *Poulding v Elliott*, to which Advocate Crawford, who also appeared in that case, has referred quite extensively, at para. 30 I cited a passage from para. 18 of *Duquemin and Duquemin v Dunstan Investments Limited* [2003-04] GLR 537, in turn quoting from an earlier edition of Basnage’s work:

*“Si par le titre de la constitution de la servitude l’on n’a point déclaré de quelle maniere l’on pourra passer, ni désigné le lieu par lequel l’on doit souffrir le passage, ni sa largeur, ni si c’est pour y passer à pied, à cheval, ou avec chevaux & charettes, comment sera-t’il permis d’en user? Il semble que l’on peut passer par tout, parce que l’heritage entier est sujet à cette servitude, & le propriétaire n’y peut rien faire que empêche l’usage. Il n’est pas juste néanmoins de souffrir que celui à qui le passage est dû en puisse abuser, le propriétaire peut lui désigner un chemin, dont il doit se contenter, pourvû qu’il soit accessible, quoi que ce ne soit pas l’endroit le plus commode, parce que les servitudes ne s’étendent point, & qu’il lui doit suffire d’avoir un passage commode, bien qu’il le pût être davantage en un autre lieu: Que s’il n’est point fait mention de la largeur du passage, ni de la maniere que l’on s’en pourra servir, l’on doit examiner quelle a été l’intention vrai-semblable des contractans, & la fin pour laquelle le chemin a été stipulé & promis; que si ces circonstances ne donnent point assés de lumiere, il faut en cette obscurité favoriser le fonds servant, quod minimum sequendum est, & ne donner qu’en simple chemin à pied. Toutes ces difficultés sont décidées en la loi ...”*

He also refers to the short passage quoted from the Jersey Court of Appeal's decision in *Colesberg Hotel (1972) Limited v Alton Hotel Limited* 2003 JLR 176 (at para. 33) identifying that the task of construing the grant of a servitude is to determine "*what must have been in the contemplation of the parties ... having regard to the terms [of the grant]. The relative positions of the properties and the nature of the roadway over which the right of way was granted*".

22. Although Advocate Crawford submits that there is no need in this case to consider the intentions of the parties at the time of the original grant, he points out that, by 1916, the States had legislated in respect of automobiles, referring to the *Loi relative aux Automobiles* registered on the Records on 25 September 1915, and yet the parties did not include any reference to motorised vehicles in the 1916 Conveyance. Accordingly, the title creating the servitude now enjoyed by the Plaintiffs' Property falls to be construed as narrowly as it needs to be and the Defendant argues for a strict construction of the words actually used.
23. On behalf of the Plaintiffs, Advocate Ferbrache points to the way that the same wording as in the 1916 Conveyance fell to be construed in *Singleton v Le Noury*. The Deputy Bailiff in this Court had added to his summing-up to the Jurats:

*"A right to pass "de pied, de cheval, de charrué et de charette toutes fois et quants", means today a full right of passage. Unless it is qualified in some way, it, like any other real property right can be exploited for whatever purpose the property can be lawfully used for."*

Whilst Advocate Loveridge in that case acknowledged that this form of servitude was in the widest form to be expected in 1832, he also submitted, similarly to the submissions of Advocate Crawford in the present case, that the user of the right of way had to be limited to the use that was appropriate at the time of the grant. However, the Court of Appeal rejected the argument that there was some implicit limitation of a right of way that did not expressly limit the use for some particular purpose, meaning that the grant in that case was not limited to use for agricultural purposes. Although the Court reversed the Deputy Bailiff's ruling that a servitude could be acquired by prescription, the appellate court did not interfere with the Deputy Bailiff's ruling that the words of the grant constitute a full right of way.

24. Advocate Ferbrache supports this submission by reference to the way in which words in conveyances written in French were transposed into English once use of the English language was permitted in 1969. Section 1(2) of the Conveyancing (Guernsey) Law, 1969 provides:

*"For the purpose of facilitating the use of the English language in a scheduled document and the construction of a scheduled document drawn up wholly or in part in English, the Royal Court may from time to time by order prescribe that any expression in the English language specified in the order shall be deemed to have the same meaning as such expression in the French language as shall be specified in the order, being an expression commonly used in a scheduled document before the commencement of this Law; and a scheduled document drawn up wholly or partly in the English language shall be construed accordingly."*

The Conveyancing Order, 1969 did not deal expressly with the wording found in the 1916 Conveyance. However, in a booklet prepared by a small committee of Advocates under the chairmanship of the Deputy Bailiff approved specimen forms for conveyances, and codes of instruction for conveyancing in English, are found. This booklet is commonly referred to as "The Blue Book".

25. Section H in the Blue Book deals with the narration of existing servitudes. Against the French wording "*.... aura droit de passage de pied de cheval de charrue et de charrette ...*" the approved English version is "*... shall have such right of way on foot and with animals and*

*vehicles as heretofore granted or reserved ...*". The explanation on the preceding page puts this into context:

*"The fundamental principle is that the servitude exists to the extent expressed in its original grant unless it has been lost by prescription. References to it in subsequent documents are merely by way of narration and they do not add to or detract from the right originally granted.*

*It is of practical convenience to narrate the right in subsequent documents.*

*It is of practical importance that the narration shall be as accurate as possible. It would of course be grave negligence to narrate the right in terms which would be misleading when compared with the original. But provided there is no misleading, some variation in the translation of the original words is permissible.*

*Certain French terms are, by their form or substance, anachronistic and cannot be conveniently expressed in English. We recommend that there shall be reasonably free translation of those old forms but with the words "as heretofore granted or reserved" signifying that the new narration does not purport to vary the existing right. To insert French words in parenthesis is permissible and may be justified.*

*Where there is a doubt as to the continued existence of a servitude, the words "in so far as the same may subsist" may be added, but those words should only be used where there is such a doubt and not in all cases.*

*It is not necessary, or possible, to lay down obligatory forms. Suggested convenient forms of narrating certain common servitudes are set out opposite."*

## **Analysis**

26. I agree with the approach that was taken in *Singleton v Le Noury* in relation to a similarly worded grant of a servitude. What was granted in the 1916 Conveyance is to be construed as a full right of passage. In other words, although there is no express mention of cars or other motor vehicles, the proper manner to construe the grant is that it was, and in principle remains, as broad as it can be. Although an earlier decision of this Court is not binding, I am prepared to accord the highest respect to the ruling of the Deputy Bailiff in that case. It came at a time when the majority of the Bar had been in practice through the changes brought about by the 1969 Law.
27. There is further support for that conclusion in the approach described in The Blue Book. I have particularly noted the eminence of those who formed the committee that came up with the equivalent in English of the French wording. I strongly suspect that the Deputy Bailiff in *Singleton v Le Noury* fully appreciated that the older style of French wording was regularly being construed as a full right of passage, as he described it, and the English equivalent referring to vehicles was the way by which grants that did not reference automobiles or other words describing mechanically propelled vehicles were commonly understood. The Defendant's attempt to limit the right of way to the Plaintiffs' Property as excluding gaining access by a car or other vehicle is, in my view, also contrary to the reality of the situation.
28. When the Defendant and his late wife purchased their property, it was expressly "*subject to all such servitudes as heretofore granted or reserved and in particular as respects those contained or referred to in (i) the Conveyance to the Vendors hereinafter mentioned*". The conveyance to which reference is being made is the conveyance registered on 15 December 1987, which expressly refers allowing all the proprietors of dwellinghouses and land which formerly formed part of the Rouge Huis Estate (and this includes the Plaintiffs' Property) "*right of way on foot*

*and with animals and vehicles over that part of the driveway hereby conveyed, to come and go at all times from their respective premises and Rouge Huis Avenue*". As a result, I do not think it can be said of the Defendant that it came as a surprise to him that the predecessors in title to the Plaintiffs and their neighbours used the right of way as a full right of way.

29. I do not accept that there has been any misdescription of the right of way, which was a submission made on behalf of the Defendant by Advocate Crawford. Reverting to the language used in the original grant in the 1916 Conveyance, it was acknowledged then as it is today that this was the grant of a full right of way. Even if one were to start with what the position was in the 1920s when the Defendant's Property was originally created from land retained by Hubert and Company Limited, the conveyance registered on 11 August 1927 refers to suffering as heretofore "*tant droit de passage par dessus les prémisses de ce bail pour aller et venir toutes fois et quants de leurs propriétés respectives à la dite Avenue do Rouge Huis*". Save for the reference to "*comme par le passé*", there was no other qualification to the exercise of the right of way to which the purchase was made subject. A couple of years later, when the land was conveyed to Walter Langlois and his wife, the conveyance registered on 30 November 1929 expressly recited the right of way as being "*de pied, de cheval, d'automobile et d'autre véhicule*". This style, in my view, reflects the full right of way that had been acknowledged as having been granted over the land by the 1916 Conveyance.
30. The position is mirrored when looking at the conveyances of the Plaintiffs' Property that followed the 1916 Conveyance. When Albert Hodder and his wife purchased the property from Francis Hubert by a conveyance registered on 30 December 1919, the right of way was recited as being "*droit de passage de pied de cheval de charrue et de charrette pardessus la ruelle en commun entre les proprietaries des prémisses y joignant et riverains*". Nearly 20 years later, the Hodders sold the Plaintiffs' Property to Henry Collins and his wife, by which time the right of way was recited in the conveyance registered on 17 August 1939 as being "*droit de passage de pied, de cheval, d'automobile et d'autre véhicule par dessus le dit chemin ou passage appartenant aux dits Walter Nicholas Langlois et femme ... pour aller et retour toutes fois et quants des prémisses de ce bail à la dite Route dite "Rouge Huis Avenue" et en ce payant leur proportion des frais du maintien et entretien du dit chemin at passage comme par le passé*". By this time, there was a coincidence in the manner of setting out the full right of way that had been granted by the 1916 Conveyance and this continued to be the position up to the preparation of The Blue Book, which confirmed that understanding of how to construe the original grant.
31. For these reasons, I am satisfied that the submissions on behalf of the Plaintiffs are to be preferred to those on behalf of the Defendant. I am, therefore, able to give this ruling which has the same effect as if the declaration in the prayer to the Plaintiffs' Cause were being granted, namely that the Plaintiffs have a full right of way over that part of the Defendant's Property as per the 1916 Conveyance.
32. In giving this ruling, granting the relief of making that declaration, I can deal briefly with one further aspect raised by Advocate Crawford on behalf of the Defendant, which relates to the geographic extent of the right of way to the Plaintiffs' Property. He submits that the user of the right of way must not be such as to render the burden for the Defendant's servient land more inconvenient and more onerous than it needs to be and the right of way must be exercised *civiliter*. These are principles with which I dealt in *Poulding v Elliott*. As a result, it means that the means of access to the Plaintiffs' Property is restricted to reaching the point of entry where a pedestrian access way and the garage that had been erected already existed. In particular, it does not operate to enable the Plaintiffs to gain entry through the area where the portion of the wall that they got permission to remove used to exist and where the Defendant had marked out a parking space to let. The Plaintiffs submit that the right of way enjoyed to the Plaintiffs' Property cannot be restricted in the manner suggested by the Defendant and letting a parking space to the rear of the Plaintiffs' Property on what is shown on Plan 630 as the right of way constitutes an unlawful restriction on the user of the right of way.

33. In my view, the reference to what is shown on Plan 630 is particularly relevant. The right of way is shown along the back of the properties, including that owned in 1929 by the Hodders and it shows the garage block across the Lane from the back of the Plaintiffs' Property. The whole of the Lane is coloured, implying that the occupants of the Plaintiffs' Property (and their neighbours) enjoyed the ability to pass and repass across the whole of it. There is nothing on Plan 630 that indicates that the Hodders could only gain access to their land at any given point or points. The wording of the grant refers only to the premises being conveyed, again without qualification. Other conveyances refer to "*maisons et jardins*", where the rear wall bordering the Lane belongs to the owners of the dwellinghouse concerned. In those circumstances, if an owner chose to do what the Plaintiffs have done, demolishing some or all of the wall (with the necessary planning permissions) the right of way enjoyed enables them to access the rear of their property from the Lane using the route over the Lane they enjoy. I am not, therefore, persuaded that the Defendant has any entitlement to let out a parking space that would block what would otherwise be a means of access to the Plaintiffs' Property using, for example, a vehicle that is able to pass over the Lane and then enter the Plaintiffs' Property. As in *Poulding v Elliott*, there may well be vehicles that simply could not get around the angle in the Lane, for example a coach or even a longer lorry, which means that the full right of way to which I have referred does not mean that it must be useable by every vehicle that could travel along Rouge Huis Avenue, but I am satisfied that, where there is space to enter the Plaintiffs' Property across a wider gap than before, the Defendant cannot insist that the Plaintiffs only gain access through a part of that gap. It is important to remember that the Defendant has agreed to allow those enjoying the right of way to pass and repass over the Lane for the purpose of effecting entry to the rear of their properties and that he should not hinder the Plaintiffs (or indeed their neighbours) from exercising the rights they enjoy.
34. The final issue raised on behalf of the Defendant relates to his argument that there has been a loss of certain elements of the right of way to the Plaintiffs' Property through non-user. In particular, he asserts that the Plaintiffs and their predecessors in title have not used the right of way by horse, cart and plough for at least the last 20 years. In relation to this issue, I agree with the Plaintiffs that it will fall to be determined by the Jurats if the Defendant wishes to pursue the point. Unlike the issues on which I have just given my judgment, this is not something that can be determined by me as a matter of law, and so it does not fall within the terms of the agreed preliminary issue. That said, it strikes me that what has been found to be a full right of way, adopting the approach from *Singleton v Le Noury*, is something that no one has suggested has not been exercised regularly in recent times, even if the nature of the user might not cover all the component elements specified in the terms of the original grant. It will, of course, be a matter for the Defendant as to whether he wishes to advance his contentions on this issue in due course.

## Conclusion

35. My decision on the preliminary issue raised in this action is that the "*droit de passage de pied de cheval de charrue et de Charrette*" set out in the 1916 Conveyance in favour of the owners from time to time of the Plaintiffs' Property is a full right of way. In particular, that means that it can be exercised by using cars and other mechanically propelled vehicles. It is not limited to pedestrians, those on horseback, ploughs and carts as if it were to be strictly and narrowly construed. The route over which the right of way exists is the whole Lane and it enables the Plaintiffs to gain access to their property across the entire width of the rear of their land adjoining the Lane; it is not restricted to a narrower gap at the rear of their property. This means that the Defendant is not permitted to obstruct the means of access to the any part of the rear of the Plaintiffs' Property. For the reasons I have given, the Plaintiffs are, in my judgment, entitled to the declaration they seek in their Cause.

36. As regards the costs of this preliminary issue, it seems to me that they should follow the event, by which it means that I am inclined to order that the Defendant pay the Plaintiffs' costs on the recoverable basis. I hope that outcome can be agreed but, if it cannot be, then either party is permitted to seek a different order when the matter returns to the Court to determine the other relief sought by the Plaintiffs, if that is to be pursued, or the Defendant progresses his assertion that certain aspects of the servitude have been lost through non-use.