

GUERNSEY LAW JOURNAL

ISSUE 2

JULY — DECEMBER 1985

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GUERNSEY LAW JOURNAL

SECOND ISSUE

Introduction

The Editorial Committee are grateful for the comments that they have received since publication of the First Issue of the Guernsey Law Journal in July 1985. The Editorial Committee would like to draw attention to what was said in the introduction to the First Issue and particularly remind readers that original texts of legislation or judgments that are digested are available at the Greffe.

The Editorial Committee are particularly pleased to be able to publish in this Issue the first article that has been contributed. They thank Mr. P. R. Collas for agreeing to share his research on the subject of "Set-off" with readers of the Journal. They hope that this scholarly contribution will be followed by others of equal significance.

Whilst due care has been taken in recording the material published herein no responsibility is accepted in law for the contents of this issue or its accuracy.

Citation

In this and further Issues references to the First Issue of the Guernsey Law Journal will be cited using the figure and letters "1GLJ" followed by the paragraph number. References to this Issue will be cited using "2GLJ" etc.

Editorial Committee

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Compiled by members of the Editorial Committee and the Legislative Draftsmen at St. James Chambers from sources including all Orders in Council, Ordinances, Projets de Loi and subordinate legislation and selected cases and other relevant material which became available during the months July to December, 1985.

1st April, 1986.

Address of the Editorial Committee:
St. James Chambers,
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GUERNSEY

AGRICULTURE AND ANIMALS

Animal Diseases

1. Ordinance: The Foot and Mouth and other Animal Diseases (Amendment) (No. 2) Ordinance, 1985. - Adds various diseases of horses and sheep to the list of diseases to which the Foot and Mouth and Other Animal Diseases Ordinances 1950-1985 apply, namely dourine, equine infectious anaemia, equine encephalomyelitis, African horse-sickness, epizootic lymphangitis, glanders or farcy, and sheep scab or psoroptic mange; empowers the Committee for Agriculture to prescribe the dipping of sheep; and provides that the maximum compensation payable in respect of the slaughter of a diseased horse shall be £1,000.

In force 25.9.85. (No. XXX of 1985).

Breeding of livestock

2. Order: The Bovine Semen (Importation) Order, 1985. - Permits the Committee for Agriculture to import the semen of Aberdeen Angus, Charollais, Hereford and Limousin cattle notwithstanding the general restriction imposed by the Bovine Semen and Artificial Insemination Ordinance, 1957, as amended.

In force 1.12.85. (S.I. No. 22 of 1985).

Import and export

3. Order: The Animal Products Importation Order, 1985, made by the Committee for Agriculture under section 10, Animals and Animal Products (Import and Export) Ordinance, 1952. - Adds Zimbabwe to the list of countries from which it is permitted to import, via the United Kingdom or the Republic of Ireland, boneless beef excluding offal.

In force 1.1.86. (S.I. No. 24 of 1985).

ARBITRATION

4. Projet de Loi: The Arbitration (Amendment) (Guernsey) Law, 1985. - See 1.GLJ.5. Approved by the States on 25.9.1985. Awaiting Royal Sanction.

AVIATION AND AIRPORTS

5. Order: The Rules of the Air and Air Traffic Control (Guernsey) Regulations 1985. Repeals and re-enacts Regulations made in 1967 with modifications to take account of recent changes in corresponding United Kingdom Regulations.

In force 21.11.85. (S.I. No. 23 of 1985).

6. Order: The Air Navigation (Restriction of Flying) (Guernsey) Regulations 1985. - Repeals and re-enacts Regulations made in 1971 restricting aircraft from flying over Sark at a height below 2,000 feet without permission of Board of Administration.

In force 12.11.85. (S.I. No. 21 of 1985.)

BANKING INSURANCE AND FINANCE INDUSTRIES

Bank Mergers and Re-organisations

7. Order in Council: The Royal Bank of Scotland (Guernsey) Law, 1985. - See 1.GLJ.8.

Registered and in force 30.9.1985. (No. IX of 1985).

8. Ordinance: The Royal Bank of Scotland (Guernsey) Law, 1985 (Appointed Day) Ordinance, 1985. - Prescribes the appointed day for the purposes of the Royal Bank of Scotland (Guernsey) Law, 1985, as 30.9.1985.

(No. XXXIV of 1985).

9. Order in Council: The Trustee Savings Banks Act 1985 (Channel Islands) Order 1985. - Applies to the Channel Islands with modifications the United Kingdom Act dealing with the reorganisation of the Trustee Savings Banks.

In force 25.9.85.

Protection of Depositors

10. Ordinance: The Protection of Depositors (Amendment) (Bailiwick of Guernsey) Ordinance, 1985. - Makes extensive amendments to the Protection of Depositors Ordinance, 1971.

The requirements as to the accounts which registered deposit takers must produce to the Advisory and Finance Committee and make available to depositors and prospective depositors are modified (section 1(d)): the accounting requirements applicable to locally incorporated institutions are extended to those which, though incorporated elsewhere, do not accept deposits in their countries of incorporation, and audited accounts must now be produced at intervals not exceeding 15 months but such institutions will now satisfy the requirements as to availability of accounts to actual and prospective depositors and shareholders by making available approved abridged accounts, as subsidiaries of "recognised banks" have been permitted to do in the past.

Branches of recognised banks are no longer exempt from the accounting requirements or from liability to pay a registration fee (section 1(j)). The general accounting requirements of these and all other non-locally incorporated institutions which accept deposits in their countries of incorporation are, however, limited to producing their usual audited accounts to the Committee, making them available at their local places of business and providing such further information as the Committee may reasonably require. These modifications are subject to transitional provisions (section 3).

Other changes in the accounting requirements are effected so as to clarify the extent of the Committee's rights to require information from registered persons (section 1(c)) and the circumstances in which group accounts must be produced (section 1(1)(iii)); to extend the directors' statement concerning indebtedness of directors and officers to include sums owed by directors and officers of "associated" companies (section 1(1)(ii)); and to enable the authorisation by the Committee, to act as an auditor, of a person with "foreign" qualifications equivalent to membership of one of the United Kingdom professional bodies (section 1(k)(ii)).

A new section is introduced into the 1971 Ordinance (by section 1(b)) prohibiting the issue of advertisements on behalf of persons not registered as deposit takers except with, and in accordance with the terms of, the Committee's written permission, but this does not apply (section 1(k)(i)) to advertisements issued abroad whose appearance in the Bailiwick is incidental. Also a new requirement in relation to advertisements on behalf of registered persons is that the fact of registration must be stated (section 1(n)).

Section 13 of the 1971 Ordinance is replaced (section 1(g)) by a provision setting out with more precision the Committee's duties in relation to publication of information.

Other reforms introduced by the Ordinance are:

building societies, friendly societies and industrial and provident societies are no longer exempt from registration; but exemption is given to the United Kingdom National Girobank (section 1(b));

a registered person is required to display his certificate of registration at his main place of business (section 1(e)) and the penalty for failure to do so (£250) is also made applicable to failure to deliver up a registration certificate upon ceasing to be registered or when required by the Committee (section 1(f));

the section dealing with liability for offences committed by bodies corporate is modified and a general "due diligence" defence is included (section 1(i)).

In force 1.8.85. (No. XXVII of 1985).

CHILDREN AND YOUNG PERSONS

See COURTS: The Magistrate's Court (Juvenile Cases) (Procedure) Rules, 1985 (paragraph 19).

See CRIMINAL LAW: The Protection of Children (Bailiwick of Guernsey) Law, 1985 (paragraph 23).

11. Projet de Loi: The Children and Young Persons (Amendment) (Guernsey) Law, 1985. - Provides that solvent abuse becomes one of the conditions which, if a court is satisfied concerning a child's or a young person's abuse, and if also satisfied that the child or young person is in need of care protection and control, the court may then make a care order in respect of the child. Approved by the States 25.9.85. Awaiting Royal Sanction.

COMPANIES

Change of Name

12. Case:

Company - Application for order to change name - Principles on which Court acts

Bugatti Fashions Ltd. (P), an English company which had been engaged in retailing menswear for over 10 years, actioned Bugatti Ltd. (D), a company registered in Guernsey on 17.1.85, pursuant to Article XIV of the Companies (Guernsey) Law, 1908, to see 'P' apply to the Royal Court sitting as an Ordinary Court for an order that 'D' change its name, on the ground that 'D's designation was of such a nature as to induce the public to confound 'D' with 'P'. 'D' was also engaged in retailing menswear; 'P' was well known in London and had customers in the Bailiwick, and alleged that its business and credit rating would be prejudiced by 'D's choice of designation.

THE COURT was referred to -

Palmer's Company Law, 23rd Edition, Vol. I at p.91.

Hendriks v. Montagu (1881) 17 Ch.D.638.

Palmer's Company Precedents, 17th Edition at p.258.

THE COURT ORDERED 'D' to change its name within the period of one month, subject to a penalty of £20 per day thereafter, and awarded costs in favour of 'P' having been DIRECTED by the BAILIFF as follows:-

- (i) that the fact that 'P' had registered the Trade Mark 'Bugatti' in respect of menswear both in England and in Guernsey was irrelevant. The fact of registration might be relied upon in a Trade Mark action or a passing off action under the customary law, but not in the present action brought under the Law of 1908;
- (ii) that the principles to be applied were those set out in Palmer's Company Law (loc. cit.). The Court did not require to be convinced that there was fraud, or a deliberate intention to confuse, or that the public had been misled. It was sufficient to show that the name of the company was 'calculated' to mislead, the word 'calculated' carrying no hint of intention but meaning, in effect, little more than 'morally certain'.

[Bugatti Fashions Ltd. v. Bugatti Ltd. 1985 Plaids de Meubles 112.]

CONSTITUTIONAL LAW

Electoral Roll

13. Order in Council: The Reform (Amendment) (Guernsey) Law, 1985. - See 1GLJ.14.

Registered and in force 30.9.85. (No. VIII of 1985).

Review Board System

14. States Resolution of 30.10.85. - Directing preparation of legislation to create a Review Board System to consider complaints against certain decisions, acts or omissions of a States Committee.

States Committees

15. Projet de Loi: The States Committees (Special Provisions) (Amendment) (Guernsey) Law, 1985 is intended, by the repeal of subsection (2) of section 2 of the Law of 1950, to bring back into effect any provision of an enactment which provides that the successor of a President of a States Committee ceasing to hold office otherwise than by effluxion of time is to hold office only for the unexpired period of office of the President to be replaced. Approved by the States on 27.11.85. Awaiting Royal Section.
16. Order in Council: The President of the States Insurance Authority (Validation) (Guernsey) Law, 1985. - Retrospectively validates acts of the States Insurance Authority and of Conseiller R. M. Chilcott as the Authority's President between 30.4.82 and 29.4.85 notwithstanding any defect in his election. See 1GLJ.15.

In force 3.12.85. (No. X of 1985).

COURTS

Court of Appeal

17. Case:

Court of Appeal (Criminal Division) - Jurisdiction - Application for leave to appeal from dismissal by Royal Court of Appeal from Magistrate's Court - Leave refused

'A' was convicted by the Magistrate's Court of driving a motor vehicle under the influence of drink or drugs and driving a motor vehicle in a manner dangerous to the public. His appeal to the Royal Court was dismissed and he applied for leave to appeal to the Court of Appeal and for leave to call numerous additional witnesses.

THE COURT OF APPEAL (Criminal Division), dismissing the applications for want of jurisdiction, HELD:-

- (i) that the Court of Appeal was established by the Court of Appeal (Guernsey) Law, 1961 and its jurisdiction was delimited by that statute;
- (ii) that the jurisdiction of the Court in criminal matters was set out in section 24 which provided as follows:-
"A person convicted on indictment or summarily convicted in the Royal Court sitting as a Full Court may appeal under this part of this Law to the Court of Appeal.";
- (iii) that 'A' had been neither "convicted on indictment" nor "summarily convicted in the Royal Court";
- (iv) that with regard to the request by 'A' for an investigation at large, 'A' had been unable to draw the Court's attention to any authority or statute or legal power outside section 24 which would enable the Court to entertain the matters he wished to ventilate.

[In re Kirk's Appeal - Court of Appeal 11.7.85.]

Note: The Appellant's Petition for special leave to appeal to Her Majesty against the aforementioned conviction was dismissed by the Judicial Committee of the Privy Council on 23rd October, 1985.

Magistrate's Court

18. Order in Council: The Restriction of Vexatious Legal Proceedings (Guernsey) Law, 1985. - Provides for the control by the Royal Court of vexatious proceedings in the Petty Debts Court.

Registered and in force 30.9.85. (No. VII of 1985).

19. Rules: The Magistrate's Court (Juvenile Cases) (Procedure) Rules, 1985. - Amends and repeals the 1956 Rules of the same name, providing a clearer framework for court proceedings in criminal matters involving juveniles.

Made and in force 19.11.85. (O.R.C. No. 2 of 1985.)

CRIMINAL LAW

Disorderly Conduct

20. Case:

Evidence to support conviction

On 8.7.85 'A' was convicted by the Magistrate's Court of, inter alia, behaving in a disorderly manner, contrary to section 1 of the Summary Offences (Bailiwick of Guernsey) Law, 1982. 'A' appealed to the Royal Court on the ground that there was no, or no sufficient, evidence before the Magistrate to establish the offence of behaving in a disorderly manner.

THE DEPUTY BAILIFF held as a matter of law that the evidence before the Magistrate was sufficient to establish the offence of behaving in a disorderly manner. He summarised the evidence as follows:

"Briefly one has the facts that there was a situation where there were a number of young people in an area. A number of them had been drinking. A number of them were described disparagingly as to their appearance and the Appellant threw an empty lager tin up into the air. When approached by the police he first of all denied having done it, and when asked by the police to say what his name was, he gave a flippant answer."

Appeal dismissed unanimously.

[In re Le Page's Appeal - Criminal Appeals from the Magistrate's Court 30.10.85.]

Jurisdiction

21. Projet de Loi: The Criminal Jurisdiction (Guernsey) Law, 1985. - Provides that where a death occurs outside the Bailiwick following an assault or other criminal act in the Bailiwick then the matter can be investigated and tried in the Bailiwick. Similarly, if a death occurs in the Bailiwick following a criminal act outside the Bailiwick, proceedings can take place here.

Approved by the States on 30.10.85. Awaiting Royal Sanction.

Obscene Publications

22. Order in Council: The Obscene Publications (Bailiwick of Guernsey) Law, 1985. See 1GLJ.21.

Registered and in force 3.12.85. (No. XI of 1985).

Prescription

See PRACTICE AND PROCEDURE: Case: (paragraph 58).

Protection of Children

23. Order in Council: The Protection of Children (Bailiwick of Guernsey) Law, 1985. - See 1GLJ.21.

Registered and in force 3.12.85. (No. XII of 1985).

DIVORCE AND MATRIMONIAL CAUSES

24. Case:

Judicial separation - Appeal from the Court of the Seneschal of Sark - Additional evidence - Order varied relating to access to children - Personal effects to be restored to the owner - Any dispute as to ownership to be resolved by the Seneschal

Both parties to a marriage applied to the Court of the Seneschal of Sark for a Judicial Separation. The actions were heard together and on 26.10.84 the Seneschal pronounced a Judicial Separation, providing, inter alia, that sole custody of the minor children of the marriage be granted to 'H', with 'W' to have access at all reasonable times. 'W' was given leave to appeal. 'W' applied to the Seneschal for variation and/or clarification of the order made on 26.10.84 and on 28.12.84 the Seneschal made a further order specifying arrangements for access. 'W' was again given leave to appeal. 'W' appealed to the Royal Court sitting as an Ordinary Court.

THE DEPUTY BAILIFF, sitting alone, HELD:-

- (i) that an appellate court would not lightly interfere with findings of fact in the court below and would not interfere with decisions of quantum unless such decision appeared to be seriously in error;
- (ii) that the Court of the Seneschal had correctly understood its duty to make an order having regard to the best interests of the children, but that that Court would have made a different order had it had the benefit of seeing social enquiry reports prepared prior to the appeal on the direction of the Deputy Bailiff;
- (iii) that there was no reason why the Court of the Seneschal should not have followed the usual practice in matrimonial cases of ordering that personal effects be put into the possession of the owner;

AND ALLOWED the appeal to the extent that the detailed provisions for access by 'W' to the children were varied and the personal effects in dispute were to be put into the possession of the owner, with any dispute as to ownership to be determined by the Court of the Seneschal.

NO ORDER was made as to costs.

[L. v. L. 1985 Requête 190.]

ELECTRICITY

Standing Charges

25. Projet de Loi: The Electricity (Amendment) (Guernsey) Law, 1985. - Empowers the States Electricity Board to levy standing charges in respect of electricity meters. Approved by the States on the 30.10.85. Awaiting Royal Sanction.

EMPLOYMENT

Conditions of Employment

26. Order in Council: The Conditions of Employment (Guernsey) Law, 1985. - Prescribes the written particulars of terms of employment which an employer must give to an employee.

Registered 30.9.85. In force 1.12.85. (No. VI of 1985).

EUROPEAN COMMUNITIES

Accession of Spain and Portugal

27. Order in Council: The European Communities (Amendment) (Bailiwick of Guernsey) Law, 1985. - Amends the European Communities (Bailiwick of Guernsey) Law, 1973 so as to take account of the accession of Spain and Portugal to the Communities.

Approved by Her Majesty in Council 18.12.85.

GAMBLING

28. Ordinance: The Gambling (Betting) (Amendment) Ordinance, 1985. - Increases fees under the Gambling (Betting) Ordinances.

In force 25.9.85. (No. XXXI of 1985).

HARBOURS AND MOORINGS

Harbour dues and charges

29. Ordinance: The Harbour Dues Ordinance, 1985. - Substitutes a new Schedule to the Harbour Dues (Saint Peter Port and Saint Sampson) Law, 1957 so as to increase the dues payable in respect of vessels entering or leaving the harbours, or performing an act of trade in the roadstead, by approximately 7.1/3% on average.

In force 1.1.86. (No. XLII of 1985).

30. Ordinance: The Harbour Facilities (Charges) (Amendment) Ordinance, 1985. - Increases charges payable for the use of harbour facilities by approximately 7½% on average.

In force 1.1.86. (No. XLIII of 1985).

Moorings

31. Ordinance: The Parish of St. Saviour (Control of Moorings) Ordinance, 1985. - Provides a system of control of moorings by Parochial Authorities on the coast of St. Saviours.

In force 1.8.85. (No. XXVI of 1985).

Note: The enactment of this Ordinance completes a process approved by the States in 1972 whereby legislation for controlling mooring is now in force for all the Parishes bordering the sea.

Pilotage

32. Ordinance: The Pilotage (Amendment) Ordinance, 1985. - See SHIPPING, paragraph 70.

HEALTH AND MEDICINE

Health Service (Pharmaceutical)

33. Ordinance: The Health Service (Pharmaceutical) (Prescription Charges) (Guernsey) Ordinance, 1985. See 1.GLJ.32.

In force 1.9.85. (No. XXIII of 1985).

34. Ordinance: The Alderney (Application of Legislation) (Health Service) (Pharmaceutical) (Prescription Charges) Ordinance, 1985. - Provides that the Health Service (Pharmaceutical) (Prescription Charges) (Guernsey) Ordinance, 1985, shall have effect in the Island of Alderney as it has effect in the Islands of Guernsey, Herm and Jethou.

In force 1.9.85. (No. XXIV of 1985).

Notifiable diseases

35. Order: The Public Health (Notifiable Diseases) Order, 1985. - Made by the Board of Health under Article VI section 1(1)(b), Public Health Ordinance, 1936 - adds the disease "acquired immune deficiency syndrome" (AIDS) to the list of infectious or contagious diseases which are notifiable diseases for the purposes of the Public Health Ordinances, 1936 to 1973.

In force 7.10.85. (S.I. No. 20 of 1985).

HEALTH AND SAFETY AT WORK

36. States Resolution of 31.7.85. - Directing preparation of legislation to place duties on employees, self employed persons, employees, manufacturers and importers with regard to safety at work, granting powers to the Labour and Welfare Committee to issue notices regarding work practices and to approve codes of practice relating to safety at work.

HORTICULTURE

Tomato Marketing

37. Projet de Loi: The Tomato Marketing (Removal of Compulsion) (Guernsey) Law, 1985. - Removes the exclusive right of the Guernsey Tomato Marketing Board to export tomatoes.

Approved by the States on 27.11.85. Awaiting Royal Sanction.

HOUSING

Control of Occupation

38. Projet de Loi: The Housing (Control of Occupation) (Amendment) (Guernsey) Law, 1985. - Introduces new controls over registered dwellings in multiple occupation by establishing two new parts of the Housing Register into which nursing homes, residential homes and lodging houses are to be inscribed and for the occupation of which persons other than the owner's family will require a housing licence.

Enables the Housing Authority to provide an authoritative declaration that a dwelling is inscribed in a particular Part of the Housing Register and affords rights of appeal in relation to such declarations.

Amends the residential qualification provisions so that spouses of all qualified residents fall to be similarly treated and being born outside the Island through some inevitable circumstance does not prejudice a person's status.

Effects a number of minor and technical alterations to the 1982 Law.

Approved by the States on 11.12.85. Awaiting Royal Sanction.

INDIRECT TAXATION

39. States Resolution of 11.12.85. - Directing preparation of legislation to provide that the rate of duty chargeable under the Laws relating to the Impôts on goods on paraffin and fuel oil shall be nil with effect from 1.2.86.

LIQUOR

40. Ordinance: The Liquor Licensing Amendment (No. 2) Ordinance, 1985. - Repeals provisions giving right of a licensee to pay fees in instalments and allowing abatement of fees where licence is held for less than a year. Amends section 26(2) relating to deposit of plans with H.M. Greffier when making application for exercise of licence in annexe or self catering accommodation.

In force 11.12.85. (No. XLV of 1985).

MILK

41. **Projet de Loi: The Sale of Milk by Imperial Measure Law of 1919 (Repeal) (Guernsey) Law, 1985.** - Repeals the Law entitled "Loi relative à la vente de Lait" of the 13.12.19, so as to remove the prohibition which makes it an offence to sell milk other than by Imperial measure. Approved by the States on 25.9.85. Awaiting Royal Sanction.

NUCLEAR INSTALLATIONS

42. **Conventions: 1982 Protocols to the Paris and Brussels Conventions on Third-Party Liability in the Field of Nuclear Energy.**

Registered 15.10.85.

43. **Order in Council: The Nuclear Installations (Guernsey) (Variation) Order 1985.** - Varies the Nuclear Installations (Guernsey) Order 1978 -

1. so that Bailiwick law will reflect amendments made to the United Kingdom's Nuclear Installations Act 1969 to give effect to two Protocols of 1982 respectively amending the Paris and Brussels Conventions on Third-Party Liability in the Field of Nuclear Energy (1.GLJ 39 and 40). The main effects of the amendments are to increase the total sum made available to meet damages claims arising out of breaches of the duty of persons responsible for nuclear installations (now expressed in terms of special drawing rights as defined by the International Monetary Fund); to increase correspondingly the limits placed on the liability of nuclear operators; and to permit future increases in these limits by order of the Lieutenant Governor with the approval of the Secretary of State.
2. by extending to the Bailiwick those provisions of the United Kingdom Congenital Disabilities (Civil Liability) Act 1976 which stipulate the circumstances in which the provisions of the Nuclear Installations Act 1965 relating to compensation apply to a child who is born disabled as a result of injuries to either parent occasioned by breach of a duty imposed by the 1965 Act.

In force 21.11.85.

POLICE

44. **Mutual Assistance**

States Resolution of 27.11.85. - Directing preparation of legislation giving authority to the Police Committee, with the Bailiff's approval, to seek outside police assistance in the event of a major incident, emergency or special situation occurring in the Island, and to provide that officers of outside forces present in the Island by reason of such emergency shall possess the powers privileges and protection afforded to Island police officers without the need to be formally appointed as Guernsey police officers.

Special Constabulary

45. **Ordinance: The Special Constabulary (Amendment) Ordinance, 1985.** - See 1GLJ.42.

In force 25.9.85. (No. XXVIII of 1985).

POST OFFICE

46. Order: The Post Office (Inland Post) (Amendment) (No. 2) Order, 1985. - Increases the postal rate on inland parcels.
- In force 4.11.85. (S.I. 1985 No. 12).
47. Order: The Post Office (Overseas Letter Post) (Amendment) Order, 1985. - Increases the postal rate on overseas letters.
- In force 4.11.85. (S.I. 1985 No. 13).
48. Order: The Post Office (Postal Order) (Amendment) Order, 1985. - Increases the poundage payable on postal orders.
- In force 4.11.85. (S.I. 1985 No. 14).

PRACTICE AND PROCEDURE

Judgments (Interest)

49. Projet de Loi: The Judgments (Interest) (Bailiwick of Guernsey) Law, 1985. - 1GLJ.47. Approved by the States of Guernsey on 24.4.85, by the States of Alderney on 3.7.85 and by the Chief Pleas of Sark on 2.10.85. Awaiting Royal Sanction.

Vexatious Litigants:

See COURTS: Paragraph 18.

50. Case:

Arrêt de biens - Péremption - Action by arresting creditor to confirm and counter action to set aside arrest - Admiralty jurisdiction - Administration of Justice Act 1956 - Action in rem against vessel in pursuance of action in personam against beneficial owner - Forum conveniens - Affidavit desirable to support Advocate's instructions

On 12.11.82 the Deputy Bailiff granted an arrest order to Volkmar Baeume ("the Charterer") in relation to a motor vessel "The Baltyski" owned by Javelin Trading S.A. ("the Owners") to secure payment of DM15,000. On 18.11.82 the Deputy Bailiff reviewed the arrest order inter partes and

- (1) REFUSED an application by the Charterer to increase the sum secured to DM45,906; and
- (2) GRANTED an application by the Owners for the arrest to be lifted upon the sum of DM16,000 being lodged with H.M. Sheriff. This sum was duly lodged and the vessel released.

The Deputy Bailiff remarked, obiter, that it was desirable that such applications should be supported by evidence by way of affidavit, and not simply by an affidavit by an advocate based on his client's instructions.

The Charterer subsequently brought an action against the Owner claiming the sum of DM15,000; the Owner brought a counter action for the release of the sum of DM16,000, alleging that no action had been commenced to confirm the original arrest within the statutory period of one year. Exceptions de Fond were pleaded by both parties and were heard on 4.6.85.

THE DEPUTY BAILIFF, sitting alone, HELD:-

- (i) that although the Charterer's cause did not express the object of confirmation of arrest, the cause was so closely tied to the original action that the Owners could not pretend not to know what the real object was, nor could they claim to be embarrassed by this technical omission;
- (ii) that as the action was only justiciable in Guernsey under the Administration of Justice Act 1956, as extended to Guernsey by Order in Council registered on 3.10.66, the remedies conferred by that Act in relation to the duration of an arrest in the United Kingdom by necessary implication must apply in Guernsey also; the arrest would therefore last until further order or until the action was prescribed or dismissed;
- (iii) that the real Defendant was the master of the vessel, who had chartered it to the Charterer, and the Admiralty jurisdiction of the Royal Court could not be invoked in these circumstances as section 3(4) of the 1956 Act provided, inter alia, that where a claim arose in connection with a ship with a person who would be liable to a claim in personam, that jurisdiction might only be invoked by an action in rem against the ship if at the time when the action was brought the ship was beneficially owned as respects all the shares therein by that person;
- (iv) that even if the Royal Court had jurisdiction to hear the action, it would decline to do so. The Guernsey element was entirely fortuitous and the Guernsey Court had no merits as a forum which were lacking on the Continent;

AND ORDERED:-

- (a) that the monies lodged with H.M. Sheriff be released to the Owners;
- (b) that their release be delayed pending the expiry of the period during which an appeal might be lodged; and
- (c) that the Charterer pay the costs of these proceedings.

[Volkmar Baeume v. Javelin Trading S.A. 1982 Plaids de Meubles 843 and 848; 1985 Plaids de Meubles 1006.]

51. Case:

Judgment debt - Action to confirm arrest and permit sale of shares - whether shares beneficially owned by Defendant - Alleged transfer to Defendant's wife - Device to frustrate execution of judgment - Burden of proof on Defendant

On 4.2.85 in the Royal Court 'P' was awarded judgment in the sum of £21,184.43 with costs, and with permission to distrain on the effects of 'D'. In execution of that judgment H.M. Sheriff arrested, inter alia, shares beneficially owned by 'D' in four Guernsey registered companies, Willowe Ltd., North Leasing Ltd., Seaview Estate Agency Ltd. and Seaview Builders Ltd. In accordance with the usual practice, 'P' brought an action against 'D' to see him apply to the Court to confirm the arrest and permit the sale of the shares arrested. There was no dispute as to the beneficial ownership of the shares in Willowe Ltd. and North Leasing Ltd., and the

arrest was confirmed with permission to sell. It was also agreed that Seaview Builders Ltd. was a subsidiary of Seaview Estate Agency Ltd.

THE COURT CONFIRMED the arrest of the shares in Seaview Estate Agency beneficially owned by 'D' with costs, having been DIRECTED by the BAILIFF as follows:-

- (i) that the task of the Court was to decide whether the shares in Seaview Estate Agency Ltd. belonged beneficially to 'D's wife, as he alleged, or whether they were held by her for 'D' as a device to frustrate 'P' in satisfying his judgment;
- (ii) that the burden of proof was on 'D' to show that the shares belonged not to him but to his wife, and that the standard of proof was the balance of probabilities. If this were not so, any debtor could frustrate justice by denying ownership when H.M. Sheriff attempted to execute an arrest;
- (iii) that 'P' was alleging bad faith on the part of 'D' in making the transfer of the shares. Good faith was always to be presumed, and the burden was on he who alleged bad faith to prove it;
- (iv) that under the Customary Law of Guernsey the gift of things or chattels did not necessarily imply that the donee was responsible for the debts of the donor, but if at the time of the gift the donor knew or should have known that he was not solvent, or because of the donation there was not left to him sufficient to satisfy his creditors, then those who were defrauded by this gift could revoke by an action the gift that was made, even if the donee had no knowledge of the fraud of the donor. ['D' had alleged that the transfer to his wife was not a gift but was in consideration for her taking over liability for a loan.];
- (v) that under the Common Law of England, "the fact that the transferor was at the time of the conveyance or the transfer indebted to a considerable extent, though not amounting to insolvency, especially if by the conveyance he rendered himself unable to meet his then existing liabilities furnished very strong evidence of an intent to defraud his creditors, but such evidence is not conclusive, and a voluntary transfer of property is voidable at the instance of anyone prejudiced by it".

On 25.7.85 the Court granted permission to sell the shares arrested in Seaview Estate Agency Ltd., an adjournment of one week having been granted to enable 'D' to consider an appeal.

[Morgan v. Donaldson 1985 Plaid de Meubles 393, 93 and 111.]

52. Case:

Civil action - Exceptions de Forme - Further and better particulars

'P' brought an action against 'DD', partners in a firm of chartered surveyors, alleging negligence in carrying out a survey of a dwelling. 'DD' filed defences, including 15 Exceptions de Forme, alleging that 'P's cause was insufficiently clear and precise and seeking further and better particulars.

Counsel for both parties were agreed that the following English Authorities, although not binding, would help as guidelines in considering the matter:-

Bullen & Leake & Jacob, 'Precedents of Pleadings in the Queen's Bench Division of the High Court of Justice', 12th Ed. 1975, Chapters 4 and 10.

Rules of the Supreme Court - Order 18 Rule 12(2) and Order 18 Rule 12(29).

THE BAILIFF, sitting alone, HELD

- (i) that the guiding principle which had been adopted in the Royal Court was that a Defendant was entitled to adequate details to enable him to prepare his case;
- (ii) that although he was aware of and approved the practice referred to by Counsel for 'P' of supplying further details of the alleged damages nearer to date of trial, in this instance the details supplied to 'DD' were totally inadequate to enable them to prepare their defences; and

ALLOWED the Exceptions de Forme in part and ORDERED that the further and better particulars be incorporated in a schedule to be attached to the cause.

[Chadwick v. Lovell, Ozanne et al. 1985 Plaids de Meubles 376.]

53. Case:

Civil action - Summonses for discovery of documents - Discretion of the Court

'P' brought an action for damages against four Defendants, alleging the wrongful detention of hotel furniture, furnishings and effects subsequently destroyed in a fire. Prior to the hearing of the action 'P' summoned the third and fourth Defendants pursuant to 'l'Ordonnance relative à la Production de Pièces, 1860' (Tome III at p.424) to produce insurance documentation relating to the hotel fire and claims submitted by the defendants to their insurers.

THE DEPUTY BAILIFF, sitting alone,

- (i) HELD that the Ordinance of 1860 not only empowered the Court to order the production of inter-party documents but also in its final paragraph gave the Court a wider power to order the production of documents either of its own motion or on the motion of a party. It was a matter for the discretion of the Court as to what extent the power should be exercised in any particular case;
- (ii) GRANTED an order for disclosure limited to documents exchanged between the third and fourth Defendants and the Insurance Company so far as they disclosed what assets were insured in the name of 'P' or indicate any title of 'P', to the exclusion of documents showing ownership in the name of the Defendants or anyone else and of documents or parts of documents showing the quantum of the claim; the whole without prejudice to the right of the Defendants, having produced those documents to 'P', to argue their admissibility or relevance; and
- (iii) upon the application of 'P', leave was granted to 'P' to file an amended cause and to the Defendants to file amended defences.

[Le Marquand v. L.C. Holdings et al. 1985 Plaids de Meubles 372.]

54. Case:

Civil appeal from the Magistrate's Court - Petty debt - Defendant's Counsel failed to appear - Judgment by default - Remitted to court below for hearing on the merits.

'P' brought an action before the Magistrate's Court for the recovery of the sum of £610.99 and costs. 'D' instructed counsel that he wished to defend the action, which was set down for hearing on 22.1.85. 'D' was not informed by his advocate of this date, and counsel failed to appear in the Magistrate's Court on 'D's behalf. Judgment by default was awarded against 'D'. From this decision 'D' appealed to the Royal Court sitting as an Ordinary Court, pursuant to section 14 of the Magistrate's Court (Guernsey) Law, 1954.

THE COURT ALLOWED the appeal and REMITTED the action to the Magistrate's Court for hearing on the merits. 'D' was ORDERED to pay the costs of the proceedings to date.

[Head v. Arculon Builders Ltd. - Requête 11.7.85.]

55. Case:

Civil appeal from the Magistrate's Court - Petty debt - Defendant's daughter appeared and admitted liability - Judgment by default against Defendant - Remitted to Court below for hearing on the merits - Arrest of wages stayed

'P' brought an action before the Magistrate's Court on 18.9.85 for the recovery of the sum of £242.70 and costs. 'D' did not appear; however his daughter attended Court and admitted she was personally liable for the sum claimed. She produced a letter from 'D' confirming this and denying his liability. 'P' resisted an adjournment. Judgment by default was awarded against 'D' and from this decision he appealed to the Royal Court sitting as an Ordinary Court.

THE BAILIFF, sitting alone,

- (i) HELD that although 'D' had not obeyed the summons, he had sent his daughter on his behalf to indicate that he wished to defend the action; there had been no proper hearing of the facts and the Magistrate erred in not adjourning the matter for at least an hour or two to enable the daughter to ask 'D' to attend Court, given that it appeared that there was a defence;
- (ii) FURTHER HELD that discrepancies in the spelling of 'D's surname to which 'P' had drawn his attention were not relevant; the point had not been taken before the Magistrate's Court and both parties were present at the appeal hearing;
- (iii) ALLOWED the appeal and REMITTED the action to the Magistrate's Court for hearing on the merits;
- (iv) GRANTED a stay of execution of the arrest of wages order in favour of 'P' made on 9.10.85, pending the hearing of the action by the Magistrate's Court; and
- (v) awarded costs in favour of 'P'.

[Sansom v. Kirk - Requête 21.11.85.]

56. Case:

Civil appeal from the Magistrate's Court - Petty debt - By mistake Defendant failed to appear to defend action - Judgment by default - Remitted to court below for hearing on the merits

'P' brought an action before the Magistrate's Court for the recovery of the sum of £396.88 and costs. 'D' appeared in response to the summons on 10.4.85 and denied liability. The action was thereupon adjourned to 18.6.85 for hearing. 'D' did not appear on that day and judgment was entered against him by default. 'D' appealed to the Royal Court sitting as an Ordinary Court on the ground that he had been under the mistaken impression that the hearing had been adjourned to 19.6.85.

THE BAILIFF, sitting alone,

- (i) HELD that there had been a mistake on both sides. He accepted that 'D' was in good faith and had been mistaken as to the date fixed for the hearing. On the other hand counsel for 'P' had apparently undertaken, at the hearing on 10.4.85, to supply 'D' with details of the claim and this had not been done;
- (ii) ALLOWED the appeal and REMITTED the action to the Magistrate's Court for hearing on the merits; and
- (iii) MADE NO ORDER as to costs.

[Le Cheminant v. G.E. Roussel & Son Ltd. - Requête 21.11.85.]

57. Case:

Civil appeal from the Court of Alderney - Appeal from finding of fact - Test to be applied by Appellate Court

On 12.9.83 'RR', Respondents in these proceedings, registered with the Clerk of the Court of Alderney a Clameur de Haro alleging that a wall owned by 'RR' was being damaged by their neighbour 'A', Appellant in these proceedings. 'RR' then brought an action against 'A' to confirm the Clameur de Haro, together with a claim for damages in the sum of £3,610.10 with costs. By agreement between the parties the Court of Alderney considered the issue of ownership of the wall as a preliminary point and on 20.9.84 found that ownership of the said wall was vested in 'RR'. The claim for damages and costs was adjourned sine die. 'A' appealed to the Royal Court sitting as an Ordinary Court. On 25.1.85 the Bailiff, sitting alone, granted leave to 'A' to file an amended notice of appeal and refused an application by 'RR' for security for costs.

THE COURT DISMISSED the appeal, with costs, having been DIRECTED by the BAILIFF that the Court should approach the findings of the Court of Alderney on a question of fact in the same way as the Court of Appeal in England would approach the findings of a jury in an appeal in a civil case. The Court would not interfere with the findings of fact made by the court below unless it was satisfied that there was no evidence before that court upon which it could reasonably have arrived at those findings or that for any other reasons the findings of fact of the court below were perverse. (The test in Guille v. Mackay, Court of Appeal 14.6.67, was applied.)

[Hawkins v. Greenwood - Requête 20.5.85.]

58. Case:

Criminal proceedings - Prescription pleaded - Held no longer applicable against the Crown in criminal matters - Mutability of Norman and Guernsey Customary Law

On 14.8.85 'A' was convicted by the Magistrate's Court of the offences of driving a motor vehicle while suspended and without third-party insurance. 'A' appealed against conviction on the ground that the offences were prescribed by lapse of time. The offences took place on 9.8.84; during the ensuing twelve months summonses were issued and the hearing took place on 14.8.85.

THE COURT was referred to:-

Terrien - 'Commentaires du Droit Civil tant public que privé observé au Pays et Duché de Normandie (Paris 1574) at p.502.

Le Marchant - 'Remarques et Animadversions sur L'Approbation des Lois' (Guernsey 1826) Tome II at p.209.

Second Report of the Commissioners appointed to enquire into the state of the Criminal Law in the Channel Islands - Guernsey. (London 1848) at pp.18, 48-49, 52, 62, 69, 70-77, 229-33.

Carey - 'Essai sur les Institutions, Lois et Coûtumes de l'île de Guernesey' (Guernesey 1889) at p.210.

Smith v. Harvey - Court of Appeal (Civil Division) 14.5.1981 at p.11.

THE DEPUTY BAILIFF DISMISSED the appeal, having held:-

- (i) that prescription of one year and a day could not be an issue in this case because the running of prescription was interrupted and re-started by the issue of the summons for the hearing within that period;
- (ii) that to be a successful defence prescription must be expressly pleaded and raised as a preliminary point; in the instant case it was not, and the appeal therefore failed on that ground also;
- (iii) that it was clear from the authorities that, at any rate up to that time of the Commissioners' Report of 1848, it was settled law that serious crime such as murder was prescribed by the lapse of twenty years and that lesser offences, dealt with by way of 'Causes en adjonction', combined civil and criminal actions, were prescribed by the lapse of a year and a day. After the abolition of Causes en adjonction, which was purely a procedural matter, the civil element continued to be limited by the prescriptive period of a year and a day but the criminal element was no longer limited by the civil element's restrictive period;
- (iv) that criminal prescription had been absent from consideration for very many years. Norman and Guernsey Customary Law was mutable in circumstances where change was reasonable; such change had come about. The loss of criminal prescription as a defence enured to the benefit of the public at large and met the above criteria. Prescription now had no application against the Crown or the Law Officers in criminal matters;

- (v) that the Courts have power to dismiss offences where they are prosecuted in circumstances of vexatious delay and individuals are thereby protected from abuse of court process.

[In re Clemens' Appeal - Criminal Appeals from the Magistrate's Court
12.12.85.]

59. Case:

Requête Civile - Default judgment in absentee proceedings - Petition granted
and judgment set aside

Absentee proceedings were commenced against the Petitioner before the Ordinary Division of the Royal Court. On 5.2.85 H.M. Sergeant, in his capacity as Judicial Attorney, wrote to the Petitioner by recorded delivery at an address in Jersey which had been temporarily occupied by the Petitioner during 1982. The letter was returned marked "undelivered". The Petitioner first became aware of the proceedings on 21.3.85 when he received a letter from the Advocates acting for the Judgment Creditor informing him that judgment by default in the sum of £8,000 with costs had been awarded against him on 21.2.85.

On 3.10.85 upon the application of the Petitioner under Rule 15 of the Court of Appeal (Civil Division) (Guernsey) Rules, 1964, the Deputy Bailiff, as presiding judge of the court below, granted a stay of execution of the said judgment upon the condition that the amount of the judgment, together with the sum of £500 as security for costs, be deposited by the Petitioner in a bank account in the joint names of counsel for the Petitioner and the Judgment Creditor. The stay was originally granted for a period of three weeks, and was extended for a further six weeks on 18.10.85 to enable the Petitioner to apply to a single judge of the Court of Appeal for leave to appeal out of time. The Petitioner then elected to proceed by way of Requête Civile.

THE COURT, with the consent of counsel for the Judgment Creditor GRANTED the Requête, SET ASIDE the judgment taken on 21.2.85 and RESERVED the question of costs until the conclusion of the hearing of the merits, the Petitioner having, at the request of the Judgment Creditor, given an address for service in this Island.

(See '1'Ordonnance portant Règlement aux Requêtes Civiles', made on 26.10.1731 (Tome I at p.259) and Gallienne, 'Traité de la Renonciation par Loi Outrée et de la Garantie' 1845 at p.19.)

[Baines v. Willey 1985 Requêtes 19.11.85.]

PUBLIC ASSISTANCE

60. Regulations: The Central Outdoor Assistance Board (Amendment) Regulations, 1985. - Provides that the Public Assistance "Wage Stop" prescribed in paragraph 2(2) of the Schedule to the Central Outdoor Assistance Board Regulations, 1963, as amended, shall be increased from £66 to £70.

In force 28.11.85. (No. XL of 1985).

61. Ordinance: The Central Outdoor Assistance Board Regulations (Amendment) Ordinance, 1985. - Approves the Central Outdoor Assistance Board (Amendment) Regulations, 1985.

In force 27.11.85. (No. XL of 1985).

ROAD TRAFFIC

62. Case:

Construction and Use of Motor Vehicles - Dangerous farm implement

The Respondent was stopped by a police officer on 24.4.84 at St. Peter-in-the Wood when driving a tractor on a public highway which had, attached to the rear thereof, a 'buck rake' consisting of 9 metal prongs approximately 2'6" long sticking straight out from the rear. The prongs were 3' above the road surface. The Respondent was charged with using a motor vehicle (the tractor) on a public highway when an accessory thereto namely the buck rake was in such condition that danger or damage was likely to be caused to any person in or on the vehicle, or on a public highway, or to property, contrary to section 6(a) of the Road Traffic (Construction and Use of Motor Vehicles) Ordinance, 1970, as amended. On 23.7.84 the Respondent pleaded not guilty (other motoring offences being admitted and dealt with by the court) and the Magistrate held that ... "the specific paragraph of the Ordinance related to the condition of the accessory and in my view we have had no evidence as to the condition of the accessory in this case ..." and accordingly dismissed the charge.

The Prosecution pursuant to section 4 of the Police Court Appeals Law, 1939, appealed on the grounds that (i) the facts given in evidence conclusively established that the agricultural accessory in question ... was a potential danger to other road users; (ii) those facts being so established the learned Magistrate misdirected himself in law as to the meaning of the word "condition" in section 6(a) of the ... Ordinance of 1970, as amended.

THE COURT was referred to:

O'Neill v. Brown [1961] 1 Q.B. p.420.

Reeve v. Webb [1973] Crim. L.R. p.120.

O'Connell v. Murphy [1981] Crim. L.R. p.25.

THE BAILIFF in summing up to the Jurats indicated that there was no dispute as to the position in law and referred to the judgment of Winn J. in O'Neill v. Brown [1961] 1 Q.B. 420 at page 430. The Bailiff further indicated that the question to be answered was whether the condition of the article (the buck rake) was such that danger would be caused to persons on the road.

Appeal allowed (by majority of 6-3) and the case was remitted to the Magistrate's Court for a conviction to be recorded and for the appropriate sentence to be passed.

[Law Officers of the Crown v. Jean Le Messurier de Garis - Criminal Appeals from the Magistrate's Court 29.11.85.]

[N.B. On 3.1.86, a conviction was recorded by the Magistrate against the Respondent on the charge but no order was made arising from such conviction in view of the "inconvenience" suffered by the Respondent.]

Crash helmets

63. Order: The Motor Cyclists' Protective Helmets Order, 1985, made by the Island Police Committee under section 1, Motor Vehicles (Miscellaneous Provisions) Ordinance, 1962. - Prescribes the helmets to be worn by motor cyclists in order to comply with section 3 of the Motor Vehicles (Miscellaneous Provisions) Ordinance, 1962 as amended.

From 1.8.85 until 31.7.86 a helmet must normally comply with one of a number of British Standards mentioned; after 31.7.86 only helmets complying with British Standard 5361: 1976 or 2495: 1977 (as from time to time amended) will normally be permitted. In either case, however, a purpose-made helmet which can be shown by its wearer, to the Police Committee's satisfaction, to afford similar or greater protection may be worn.

Helmets with chin cups must have an additional strap and all helmets must be securely fastened.

Failure by a driver or passenger on a motor cycle to wear a helmet of prescribed type is an offence under section 3(2) of the 1962 Ordinance.

In force 1.8.85. (S.I. No. 11 of 1985).

64. Ordinance: The Motor Vehicles (Miscellaneous Provisions) (Amendment) Ordinance, 1985. - Amends further the law as to the compulsory wearing of crash helmets so that any person driving or being carried as a passenger on a motorcycle (whether on a pillion or not) must now wear an approved helmet.

In force 1.12.85. (No. XXXV of 1985.)

Driving under influence of Drink or Drugs

65. States Resolution of 27.11.85. - Directing legislation to make it an offence to drive, attempt to drive or be in charge of motor vehicles on roads when either unfit through drink or drugs or when having consumed alcohol in such a quantity that the level in the blood or urine is over the prescribed limit: and to provide for ancillary matters relating thereto.

International Circulation

66. Ordinance: The Motor Vehicles (International Circulation) (Amendment) Ordinance, 1985. - Increases the fee payable on the issue of an international driving permit from £2 to £2.50.

In force 1.10.85. (No. XXIX of 1985).

Parking Places

67. Order: The Parking Places (Amendment) Order, 1985. - Amends the Parking Places Order, 1984 in respect of the following areas:-

South Esplanade, Hirzel Street, Hospital Lane, Paris Street, Victoria Road, Victoria Terrace, Pedvin Street and La Vallette in St. Peter Port and Les Genats Estate, Castel.

In force 4.7.85. (S.I. No. 10 of 1985).

68. Speed Limits

Ordinance: The Road Traffic (Speed Limits and General Provisions) (Amendment) Ordinance, 1985. - Introduce a "summer only" (1st June - 30th September) 25 m.p.h. speed limit on part of the coast road at Rocquaine.

In force 1.8.85. (No. XXV of 1985).

Third-Party Insurance

69. Case:

Driving without Third-Party Insurance - Mandatory suspension - 'Special reasons' to be established by evidence on oath - Appeal against - Leave to abandon - Appeal from Magistrate's Court

On 9.8.85 in the Magistrate's Court 'A' pleaded guilty to one count of driving a motor vehicle while not being covered by third-party insurance contrary to Article 2(1) of the Road Traffic (Compulsory Third-Party Insurance) (Guernsey) Law, 1936. He was sentenced to pay a fine of £100 with the alternative of 20 days imprisonment, and his driving licence suspended for the period of one year in all categories except Category 6. From this sentence 'A' appealed to the Royal Court sitting as a Full Court on the ground that it was manifestly excessive and inappropriate in the circumstances. On 15.10.85 the Court refused an application by 'A' for leave to abandon the appeal, the Deputy Bailiff having drawn attention to the fact that the transcript of proceedings before the court below indicated that no 'special reasons' within the meaning of Article 2(2) of the Law of 1936 had been advanced on oath before the Court below to enable the Magistrate to exercise his discretion not to impose the mandatory suspension of one year in all categories. The hearing of the appeal was adjourned for three weeks to enable counsel to consider this point.

THE COURT GRANTED LEAVE to abandon the appeal, having been DIRECTED by the DEPUTY BAILIFF as follows:-

- (i) that a report by the Law Officers of the Crown furnished at his request during the adjournment had confirmed 'A's unsworn statement before the court below that he had driven his vehicle with the mistaken but none the less genuine approval of a police officer;
- (ii) that although that authorisation did not amount to anything in law, it could constitute a special reason enabling the Magistrate to impose less than the mandatory suspension stipulated by the Law of 1936.

[In re Langlois Appeal - Criminal Appeals from the Magistrate's Court 5.11.85.]

SHIPPING

Pilotage

70. Ordinance: The Pilotage (Amendment) Ordinance, 1985. - Amends the Pilotage Ordinance, 1967 so as to

- (i) increase pilotage dues generally by about 7.7%;
- (ii) increase the amount payable in respect of acts of pilotage performed by a special pilot from 11% to 12% of the rate of general pilotage dues;
- (iii) increase the pilots' examination fee from £25 to £200.

In force 1.1.86. (No. XLIV of 1985).

SOCIAL SECURITY

71. Attendance and Invalid Care Allowances

Ordinance: The Attendance and Invalid Care Allowances (Guernsey) Law, 1984 (Commencement) Ordinance, 1985. - Brings the Attendance and Invalid Care Allowances (Guernsey) Law, 1984 into force on 6.1.86.

In force 6.1.86. (No. XXXVI of 1985).

72. Ordinance: The Attendance and Invalid Care Allowances (Guernsey) Ordinance, 1985. - Implements certain provisions relating to Attendance and Invalid Care Allowances.

In force 6.1.86. (No. XXXVII of 1985).

73. Rules of Court: The Attendance and Invalid Care Allowances (Appeals and References) (Guernsey) Order 1986. Made by the Royal Court.

In force 6.1.86.

74. States Resolution of 27.11.85. - Directing preparation of legislation to amend section 2(3) of the Attendance and Invalid Care Allowances (Guernsey) Law, 1984, so as to entitle a person to receive an Invalid Care Allowance in addition to an Old Age Pension with retrospective effect to 6.1.86, being the day on which the Law of 1984 came into force.

Social Insurance

75. Order in Council: The Social Insurance (Amendment) (Guernsey) Law, 1985. - See 1GLJ.57.

Registered and in force 20.8.85. (No. IV of 1985).

76. Ordinance: The Social Insurance (Rates of Contributions and Benefits, etc.) (Guernsey) Ordinance, 1985. See 1GLJ.58.

In force - certain provisions on 11.11.85, other provisions on 1.1.86. (No. XX of 1985).

77. Projet de Loi: The Social Insurance (Amendment) (No. 2) (Guernsey) Law, 1985. - Amends section 100(2) of the Social Insurance (Guernsey) Law, 1978, by providing expressly that monies which may be paid out of the Guernsey Insurance Fund shall include the payment of salaries and the provisions of equipment and accommodation in connection therewith. Approved by the States on 30.10.85. Awaiting Royal Sanction.

78. Order: The Social Insurance (Benefits) (Miscellaneous Provisions) (Guernsey) Regulations, 1985. - Repeal the definition of the expression "free in-patient" in the principal Regulations and have the effect of removing the adjustment which was applied to certain benefits where the beneficiary or a dependant of the beneficiary was an in-patient in the Castel Hospital.

In force 14.10.85. (S.I. No. 15 of 1985).

79. Order: The Social Insurance (Classification) (Amendment) (Guernsey) Regulations, 1985. - Further amend the Regulations of 1978, so as to provide that an insured person who is employed under a contract of service from which he derives weekly earnings of less than seventeen pounds or monthly earnings of less than seventy-three pounds and sixty-seven pence shall be treated as a non-employed person.

In force 1.1.86. (S.I. No. 16 of 1985).

80. Order: The Social Insurance (Contributions) (Amendment) (Guernsey) Regulations, 1985. - Specify the lower earnings limits for the contribution year 1986.

In force 1.1.86. (S.I. No. 17 of 1985).

81. Order: The Social Insurance (Increase of Benefit) (Guernsey) Regulations, 1985. - Increase the reduced rates of widow's benefits, old age pension, unemployment benefit, sickness benefit, invalidity benefit and maternity allowance payable under the Social Insurance (Guernsey) Law, 1978, in order to bring them into line with the higher standard rates of such benefits approved by the States on the 26.6.85; increase the reduced amounts of death grant payable under that Law in order to bring them into line with the higher standard amount of death grant approved by the States as aforesaid and revise the rates of increase of industrial disablement benefit where constant attendance is required.

In force 1.1.86. (S.I. No. 18 of 1985).

Supplementary Benefit

82. Ordinance: The Supplementary Benefit (Implementation) (Amendment) Ordinance, 1985. - See 1.GLJ.58.

In force 15.11.85. (No. XXI of 1985).

83. Ordinance: The Alderney (Application of Legislation) (Supplementary Benefit) Ordinance, 1985. - Provides that the Supplementary Benefit (Implementation) (Amendment) Ordinance, 1985, shall have effect in the Island of Alderney as it has effect in the Islands of Guernsey, Herm and Jethou.

In force 15.11.85. (No. XXII of 1985).

84. Ordinance: The Supplementary Benefit (Implementation) (Amendment) (No. 2) Ordinance, 1985. - Amends Part III of the First Schedule to the Supplementary Benefit (Implementation) Ordinance, 1971, to make provision for Attendance and Invalid Care Allowances.

In force 6.1.86. (No. XXXVIII of 1985).

85. Ordinance: The Alderney (Application of Legislation) (Supplementary Benefit) (No. 2) Ordinance, 1985. - Provides that the Supplementary Benefit (Implementation) (Amendment) (No. 2) Ordinance, 1985, shall have effect in the Island of Alderney as it has effect in the Islands of Guernsey, Herm and Jethou.

In force 6.1.86. (No. XXXIX of 1985).

STATES OF DELIBERATION

Rules of Procedure

86. Amendment of the Rules of Procedure made on 28.7.82 (31.7.85).

VIDEO LICENSING

87. Order in Council: The Video Licensing (Guernsey) Law, 1985. - Enables the States by Resolution to establish a Video Works Licensing Authority whose duties are, inter alia to ensure that businesses who offer video works for hire or purchase do so in an acceptable manner. There is also power to provide by Ordinance for a number of matters connected with such business.

Registered 3.12.85. To be brought into force by Ordinance.

WATER

Increase in charges

88. Ordinance: The Water Charges (Amendment) Ordinance, 1985. - Increases fixed quarterly charges, charges for metered water and some meter rents.

In force 1.1.86. (No. XLI of 1985).

ALDERNEY

(See also paragraphs 5, 9, 10, 21-23, 27, 33-35, 42, 43, 46-49, 57 and 82-85).

ARBITRATION

89. Projet de Loi: The Arbitration (Amendment) (Alderney) Law, 1985. - See 1.GLJ.5. Approved by the States of Alderney on 9.10.85. Awaiting Royal Sanction.

BUILDING AND DEVELOPMENT CONTROL

90. Ordinance: Commencement of Law: The Building and Development Control (Amendment) (No. 2) (Alderney) Law, 1985 (Commencement) Ordinance, 1985. - Brings the Law of 1985 (1GLJ.63) into force on 4.7.85.

LAND AND PROPERTY

Compulsory Purchase

91. Projet de Loi: The Compulsory Purchase (Alderney) Law, 1985. - Provides a new legislative framework for the compulsory acquisition of land in Alderney. Two noteworthy features of the new Law are:
- (a) the States will be able to acquire a sufficient interest or right in land (e.g. a wayleave) to serve the public purpose concerned without necessarily having to buy the land itself; and
 - (b) the difficulty which the States have hitherto faced through being unable to have much idea what price a valuer or arbitrator will put on a parcel of land is to be removed by permitting them to withdraw from a proposed purchase if the valuers' price, or even, if matters proceed so far, the arbitrator's award, proves to be too high for the public purse to afford. The safeguards which such a system clearly requires are provided (as well as by obliging the States to hear and consider objections initially) by provisions requiring the payment of compensation if the States withdraw and by outlawing any repeated compulsory purchase attempt within 3 years.

Approved by the States of Alderney on 13.12.85. Awaiting Royal Sanction.

PRACTICE AND PROCEDURE

92. Case: Appeal from Court of Alderney (see paragraph 57).

WATER

Increase in charges

93. Ordinance: The States Water Supply (Rates of Charge) (Alderney) Ordinance, 1985. - Increases the rates payable in respect of the supply of water in Alderney.
- In force 30.9.85.

SARK

(See also paragraphs 5, 6, 9, 10, 21-24, 27, 42, 43 and 46-49).

COURTS

94. Order in Council: The Court of the Seneschal (Increase of Jurisdiction and Transfer of Prisoners) (Amendment) Law, 1985. See 1GLJ.68.
- Registered and in force 20.8.85. (No. V of 1985).

DIVORCE AND MATRIMONIAL CAUSES

95. Appeal from Court of Seneschal.
- Case: See paragraph 24.

SET-OFF

(by P. R. Collas, Advocate of the Royal Court 1946-1983)

1. This Study is an attempt to ascertain what was the Guernsey **coutume** in regard to set-off and to arrive at a clear and proper understanding of the significance of section 1 of the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979 when applied to modern banking operations.
2. I had understood that the 1979 Law was enacted in response to severe pressure from merchant bankers who were concerned at the, perhaps, rather qualified advices which they were being given as to the enforceability in Guernsey of certain transactions which could constitute an important part of their operations. There was a time when I, as a merchant bank adviser, thought that section 1 of that Law might have been more helpfully drafted, and I gather that such thoughts may have been shared by others. This Study is an attempt to get to the bottom of it.
3. I will be examining set-off in the **coutume**, looking very briefly at set-off in English law, considering set-off by Contract, and applying what I have found to two quite normal, run-of-the-mill, banking situations, pre-1979 and post-1979.

(1) The Clearing Bank Multiple Account Situation

4. A bank customer may have more than one account. One or more of them may be deposits, repayable by the bank to the customer at the expiration of a given period of notice, or on the expiration of the specified term. In addition, the customer may have one or more current accounts with facility to overdraw. The balance day by day on current account, whether it be a credit repayable to the customer, or a debit repayable to the bank, is normally a debt immediately due and payable. There may also be one or more contingent liabilities, as where the customer has guaranteed the payment to the bank on demand of the overdraft of someone else. When Her Majesty's Sheriff calls at the bank to serve an arrest of all moneys owed to the customer, or whatever are the actual words of the arrest, how much of those moneys will have to be delivered up by the bank in due course of proceedings?

(2) A Merchant Bank Back-to-Back Situation

5. Company A, incorporated and trading in, say, England, has a subsidiary, or associated, company B, incorporated and making profits outside England. A does not wish those profits to be directly introduced into England, but it could use the money in England. The whole matter might be set up so that:-

- (a) A borrows from its London bank;
- (b) A Guernsey bank guarantees that lending by the London bank to A;
- (c) B gives a counter-indemnity to that Guernsey bank for whatever it may have to pay under that guarantee;
- (d) B deposits, out of its own funds, in the Guernsey bank, a sum sufficient to cover the counter-indemnity, to hold for so long as there is liability under the guarantee, and with power for the Guernsey bank to draw on the deposit for the amount which will be demanded from the Guernsey bank under the guarantee.

What is the position of that Guernsey bank when Her Majesty's Sheriff serves an arrest of all moneys owed to B, or whatever are the actual words of the arrest?

SET-OFF IN THE COUTUME

6. The **coutumes** of France knew set-off as **compensation**, from early times.

7. Pothier(a) defined **compensation** as the extinction of two debts of which two persons are reciprocally debtors the one to the other by the claims for which they are reciprocally creditors the one of the other. As justification of **compensation**, Pothier said "The equity of **compensation** is evident; it is based on the common interest to set-off, rather than to have to draw from his pocket in order to pay and then take proceedings to be paid back what is due back to him."

8. Houard(b) defined **compensation** as "the payment which a debtor makes of his debts by the release which he gives of the debt for which his creditor is indebted to him".

9. I have only seen one reference to **compensation** in Terrien. It is in the Chapter dealing with assignment of debts, rights and actions(c). I will quote the passage in full because it is especially pertinent to this Study:

"Consequently it is to be inferred that one is permitted to cede and assign debts, rights and actions to whomever it may be; and that the assignee may sue in the jurisdiction of the debtor or defendant, not only for the price paid but for the whole amount But it is to be noted that the debtor may oppose it to set-off a debt which was due to him by the assignor at the time of the assignment. Because the assignee represents the assignor; and since the assignor was indebted, he could not demand payment of the debt due to him; consequently he could not assign it without being subject to the said set-off. It was so held by the Parlement of Grenoble."

Bérault says that that Grenoble judgment was given in 1461, and that it was followed in Dijon in 1545(d). This is interesting as to the antiquity of the rule and as to how widespread was its application. Basnage, too, mentioned the rule as to set-off in assignment, without saying where it came from(e).

10. The commentators on the **Coutume Reformée** all made passing references to **compensation** here and there. But they are not very well indexed, and nowhere did they attempt to expound **compensation** as a topic in its entirety.

11. Bérault(f) and Godefroy(g) both quoted as being also good in Norman **coutume** the rule of the **coutume** of Paris that in **retrait** (the procedure by which when there had been a sale of realty, one of the kin of the vendor could demand that the realty be vested in him subject to reimbursing the divested purchaser), the **retrayant**, by way or as part of that reimbursement, could set-off an amount due to him by the purchaser, provided it was a liquidated sum.

(a) Pothier Vol. II, para.623.

(b) Houard Vol. I, p.314.

(c) Terrien Book VII, Chap.VI p.234.

(d) Bérault Vol. I, p.99.

(e) Basnage Vol. I, p.82.2.

(f) Bérault Vol. II, p.308.2.

(g) Bérault Vol. II, p.312.1.

12. The principal features of **compensation** in the **coutume** were:-

- (1) that there were two debts between two parties in respect of which they were reciprocally creditors and debtors the one of the other(h);
- (2) that the two parties were creditor and debtor in the same right, i.e. a party indebted personally could not set-off against it a sum due to him as agent or trustee of another(i);
- (3) both debts must be **certaines** and **liquides**. A disputed claim could not be set-off against a certain debt. Nor could a claim for an unliquidated sum be used in set-off(j);
- (4) both debts must be presently due. As Pothier put it:

"**Compensation** is a reciprocal payment which the parties make to each other; so the debtor of a debt which by its term for payment has not yet fallen due, not being yet liable to pay, is not yet bound to allow it to be set-off against what is due to him"(k).

- (5) **compensation** occurred "ipso facto", **de plein droit**, i.e., automatically, when the above features were present. This meant that when A was indebted to B for an amount bearing interest, as from the date that B became indebted to A on an interest free debt, B could claim interest only on the balance of A's debt still outstanding from that date(l).

SET-OFF IN GUERNSEY

13. I have seen no reference to **compensation** in the works of Guernsey writers. The Approbation and Le Marchant are silent and curiously unhelpful.

14. The Chapter of Terrien (Book VII Chapter VI), from which I quoted in paragraph 9, was not approved by the Royal Court in the Approbation:

"As to the sixth chapter, the assignment of **obligations** and other debts does not occur by way of sale, gift or otherwise, and no party is heard to sue the debtor or for the debt of another except by valid power of attorney".

Whilst these words would appear clearly to deny power in Guernsey for a creditor to assign his rights to a third-party, they cannot be extended to say that set-off was equally unknown in Guernsey. The Court's disapproval of the assignment of a claim meant only, in regard to set-off, that there would not be any occasion for a debtor to invoke set-off in an assignment situation.

- (h) Houard Vol. I, p.314; Pothier Vol. II, para.623.
- (i) Pesnelle Vol. I, p.43; Houard Vol. I, p.314; Pothier Vol. II, paras.625 and 632; Bérault Vol. I p.99.
- (j) Basnage Vol. I, p.81.2; Bérault Vol. I, p.99; Bérault Vol. II, pp.308.2 and 312.1; Houard Vol. I, p.314; Pothier Vol. II, para.624.
- (k) Pesnelle Vol. I p.43; Pothier Vol. II, para.627.
- (l) Basnage Vol. I, p.81.2; Pesnelle Vol. I, p.43; Pothier Vol. II, para.635.

15. What is curious is that it was not many years after the Approbation that the assignment of rights, obligations and actions became practised and accepted in Guernsey as legitimate. Le Marchant(m) referred to the practice of allowing assignments as "cet usage erroné, puis peu introduit." (He was writing perhaps about 70 years after the Approbation). He took the Court severely to task for allowing the practice, but he accepted that it was by then well established in spite of the terms of the Approbation. Le Marchant made no reference to compensation in his Remarks on that Chapter of Terrien.

16. My own conclusion is that compensation, having been such a widespread and long-established feature in all the coutumes, including in particular that of Normandy, the Guernsey Court could not refuse to accept that it was part of the coutume of Guernsey, unless there was very clear authority for so holding. I know of no authority for saying that compensation was not known in Guernsey.

SET-OFF IN ENGLAND

17. I will only mention very briefly what Halsbury says as to the origin of set-off in English law - for comparison with what there was in the French coutume, and with a couple of paragraphs from Halsbury as to set-off in banking.

18. In England, set-off at law was the creature of two Statutes early in the eighteenth century designed to prevent the imprisonment of a person not truly indebted because there was a mutual debt owing to him by the creditor(n). The right so conferred was a right to set-off mutual debts arising from transactions of a different nature which could be ascertained with certainty at the time of pleading. Set-off at law operated as a defence(o).

19. Prior to the Judicature Acts, courts of equity admitted cross-complaints by way of defence in actions proceeding in Chancery and could also restrain a plaintiff in an action at law from proceeding or levying execution where there was an equity which went to impeach the title to the legal demand(p). The nature of the right in equity was that where a cross-complaint was so closely connected with the claim that it went to impeach the plaintiff's title to be paid and raised an equity in the defendant, making it unfair that he should pay the plaintiff without deduction, the general rule was that the defendant could deduct with impunity the amount of the cross-complaint, or raise it by way of equitable defence when sued(q).

20. In the section on Banking, Halsbury has two paragraphs of some interest in this Study(r):

"78. The general banker's lien is part of the law merchant as judicially recognised; it connotes the right of a banker to retain the subject matter of the lien until an indebtedness of the customer is paid or discharged. It attaches to all securities deposited . . . , and to money held to the account of a customer, unless there is an express or implied contract between the banker and the customer which is

(m) Le Marchant Vol. I, p.250.

(n) Halsbury's Laws of England Fourth Ed. Vol. 42, para.420.

(o) id. para. 421.

(p) id. para. 424.

(q) id. para. 425.

(r) Halsbury's Laws of England Fourth Ed. Vol. 3, paras.78 and 79.

inconsistent with the lien. In the case of money, the banker's right is often a right of set-off; it arises only in relation to the customer's money and does not apply to money paid in under a mistake of fact".

"79. As regards money, the so-called lien is rather a right of set-off, and where under agreement money is in the hands of a banker for a definite period, there can be no set-off until that period expires."

SET-OFF BY CONTRACT

21. The set-off thus described as having existed in the *coutume* as well as in England, is completely non-contractual. It is the rules recognised by the Courts of France and by the Court of Chancery in providing relief to the person who by inadvertence, co-incidence, or otherwise fortuitously, finds himself in trouble to the extent of having now to pay what he owes, and then having to hope, pray, or even sue, for the return of the money or, worse still, only a dividend, in payment of what was due to him at the time he paid. The provision of such rules to assist the party who had not taken precautions to avoid ever getting into such trouble, does not have to mean that it was not possible for him to have taken effective precautions had he thought of it at the proper time. Although I have found no reference to set-off by contract in the commentaries on the *coutume*, I contend that there is no reason to say that set-off by contract was not permitted under the *coutume*.

22. In regard to set-off by contract in England, Halsbury says:-

"A right of set-off may be created by agreement, and on this ground there may be a set-off of a debt which could not otherwise be so pleaded. Set-off by agreement is allowed even though the evidence of the agreement is slight, but there must be some evidence on which the court can find an agreement, express or implied. A course of dealing between the parties by which mutual debts have been set-off is evidence from which the courts will imply such an agreement, but a set-off cannot be based on a custom of which the plaintiff is not aware. Set-off by agreement is not allowed if there is no consideration to support the agreement."(s)

23. Terrien did not mention set-off by agreement, but in regard to enforceable promises, he said:-

"No-one becomes a debtor for a promise which he makes unless there was *droite cause* for the promise; and unless there be proved the *cause* for which the promise was made."(t)

Terrien did not define what was meant by *droite cause*. From my student days I remember "*la Theorie de la Cause*" as one of the more obscure things in *Droit Civil*, and one which the average student expected not to comprehend. I have survived many years in practice in Guernsey by using the English doctrine of consideration as a substitute for *la Théorie de la Cause*, and I still believe that it would require highly abstruse argument to show that there was any substantial error in having thus proceeded.

(s) Halsbury's Laws of England Fourth Ed. Vol. 42, para.430.

(t) Terrien p.233; Le Marchant Vol. I, p.248.

24. Accordingly I conclude that set-off by contract was permissible in Guernsey, and that the paragraph from Halsbury quoted in my para.22 should have been as acceptable to the Guernsey court as it is to an English court, and subject only, if someone wishes to be really pedantic, to substituting the words "droite cause" for the word "consideration" in the last sentence of it.

SET-OFF IN BANKING IN GUERNSEY

Pre-1979

The Clearing Bank Multiple Account Situation

25. It is unlikely, but just possible, that a clearing bank would have allowed a customer to have more than one account, with the facility to overdraw on at least one of them, without some agreement that the bank could set-off the overdraft against the credit balance. In the unlikely event that there had, indeed, been no such agreement, when, at the instance of some other creditor, the customer's money in the bank was arrested, the bank would, prior to 1979, have had to rely solely on its right to set-off under the *coutume*.

26. I suggest that it was, and still is, beyond doubt that, in that unlikely event, the bank would have been able to plead customary set-off so far as the rules of *coutume* permitted, and under the principles underlying the Grenoble judgment(u). Those principles were that set-off operated *de plein droit* as soon as the circumstances necessary to make a debt susceptible of set-off were present. So, if a creditor, whose debtor had acquired some right of set-off, purported to assign the whole of his claim, the assignee could only take the assignment subject to the set-off.

27. An arresting creditor is not exactly an assignee, but he is not very different from one. His position is that, by order of the court, and under the supervision of the court, he is seizing the assets of the debtor so that they may be realised and the proceeds distributed as the court shall direct.

28. The arresting creditor is thus some sort of judicial assignee, and he can only be seizing and realising the debtor's assets in the state in which they are at the time of the arrest - warts and all. As regards bank balances, "warts" must include whatever right of set-off the bank had when the arrest was served on it.

29. So, by the rules of the *coutume*, when Her Majesty's Sheriff notified the bank of the arrest of A's moneys, the key question was: Are there, at this time, mutual debts between the bank and 'A' presently due and presently payable?(v) It was as simple as that. If the answer was "Yes", there was set-off, ipso facto and *de plein droit*. If the answer was "No" there was no set-off.

30. In practice this would have meant:-

- (1) if 'A' had a deposit of £5,000 presently payable, and an overdraft on current account of £1,000 presently payable, there was set-off, and the arrest was good for only £4,000;

(u) Supra, para. 9.

(v) Supra, para.12(4).

"I agree with Lord Denning M.R. and Buckley L.J. that a debtor cannot sensibly be said to have a lien on his own indebtedness to his creditor."(y)

33. The Natwest v. Halesowen case was concerned essentially with provisions of English statutes which have no counterpart in Guernsey law. But such statements as "No man can have a lien on his own property" and "a debtor cannot sensibly be said to have a lien on his own indebtedness to his creditor" should have as much force in Guernsey law as in English law.

34. In that set-off under customary rules, the bank could only have pleaded to set-off debts existing, **certaine** and **liquide**, at the time of the arrest. If the customer had had a credit balance of £5,000 and a contingent liability of £1,000 under his guarantee of his son's overdraft, and the bank had not yet called for payment under that guarantee, the bank could not have pleaded to set-off that contingent liability. It would have, in due course, had to deliver up the full £5,000.

35. There remains, in this pre-1979 situation, the question of whether, by prior agreement with the customer, the bank could have pleaded to set-off debts which could not be pleaded under the customary rules. At paragraph 24 above I have expressed the view that there could have been such an agreement, so that the bank could have pleaded such further set-off as it could prove to be within the agreement. How far that view was open to doubt must be a matter of personal opinion. Further, a bank's legal adviser would no doubt have spelled out the extent to which his advice was a matter of his own opinion, and how far it was unsupported by statute or precedent.

The Merchant Bank Back-to-Back Situation

36. Whilst it was possible, even though unlikely, that a clearing bank would allow a customer to have a credit balance and a debit balance without an agreement to set-off, that possibility cannot exist in relation to the back-to-back operation I have described. That back-to-back operation was necessarily the result of an elaborate and deliberate agreement to ensure the bank's right to draw on the moneys deposited by company B for what might become due under B's counter-indemnity. Under the ordinary rules of contract, that contractual set-off should have been good.

Post 1979

37. Section 1 of the 1979 Law relates solely to contractual set-off. It in no way affects set-off by **coutume**. It opens with the words "It is hereby declared for the removal of doubt that ... where there is ... an agreement ...". It does not purport to revoke, repeal, amend or add to, the existing law.

38. It proceeds to declare that where there is an agreement by two parties that an account may be taken of mutual dealings between them so that any debt due from one shall be set-off against the debt due by the other, the party to whom the balance of the account is due may claim it, in competition with other creditors of that debtor, *pari passu*, and even in an insolvent situation. The agreement can be written or oral, express or implied. There are provisions to avoid the agreement which would give a fraudulent preference over other creditors. Finally, (subsection (5)), it defines "debt" in very wide terms:

(y) 1972 A.C. p.810.

- (2) if 'A' had a deposit of £5,000 presently payable, and an overdraft on current account of £6,000 presently payable, there was set-off. There was nothing to arrest and the bank could claim £1,000 from 'A's other assets in competition with other creditors, *pari passu*;
- (3) if 'A' had a deposit of £5,000 presently payable, and a debt due but repayable at some future date, no matter what was the amount of that debt, it did not qualify to be set-off, and the whole £5,000 was arrested;
- (4) if 'A' had a deposit of £5,000 repayable on one month's notice, or any other future date, no matter how much was owed by 'A' or when it was repayable, there could not be set-off, and the £5,000 due by the bank was under arrest and would have to be delivered up when it matured.

31. That reasoning is on the basis of saying that the arresting creditor is a sort of judicial assignee. It is worth quoting here a paragraph from a modern English text-book as to set-off in assignments(w):

"Problems of priorities can arise where the borrower assigns the deposit held with the bank before the loan matures due. The rule in England is that the assignee can take the deposit free of the set-off if he gives notice to the bank before the set-off arises. For this purpose the set-off arises when the loan owing to the bank becomes due. Because of this rule a bank is unsafe in relying upon a set-off merely because it has a deposit which has a maturity extending beyond the maturity of the loan."

Although set-off in English law, because of the manner of its original conception, and its subsequent statutory modification or adaptation, may be in many ways quite different from our set-off by the *coutume*, it is interesting to see that what is said in that paragraph applies equally to set-off as we knew it in Guernsey.

32. Faced with the conclusion that a deposit account repayable at a future date did not qualify for set-off by the *coutume*, I wondered whether there was anything by way of banker's lien, rather vaguely referred to in what I quoted from Halsbury in my paragraph 20, which might assist. The question of a banker's lien as the basis for combining accounts or setting off one against another was considered in *National Westminster Bank Ltd. v. Halesowen Presswork*, a case which ended in the House of Lords. In his judgment, Lord Dilhorne quoted with approval what Buckley, L.J. had said in the Court of Appeal:

"The money or credit which the bank obtained as a result of clearing the cheque became the property of the bank, not the property of the company. No man can have a lien on his own property and consequently no lien can have arisen affecting that money or that credit."(x)

Lord Dilhorne said that if the bank was entitled to set-off one account against another, it could not be in the exercise of any lien, it would have to be on some other grounds. Lord Cross of Chelsea said:

- (w) Philip Wood. *Law and Practice of International Finance*. Sweet and Maxwell. 1980.
- (x) 1972 A.C. p.802.

"In this section "debt includes all debts and liabilities, present or future, certain or contingent, but does not include demands in the nature of unliquidated damages arising otherwise than by reason of contract or breach of trust".

39. I think now that the reason why I had at first thought that this might have been more helpfully drafted is that, at first sight, it appears to be removing doubt from one particular aspect of a larger subject, and the reader was left with whatever doubts he might have had on other aspects of the subject completely unresolved.

40. But further thought led to the conclusion that the stage of claiming for the balance, in competition with other creditors, and from a debtor who cannot pay in full, is in fact the ultimate test of the legal recognition of the contractual set-off. If the contractual set-off is good at that, the ultimate, stage, it must be equally good at every intermediate stage on the way. The statute which allows the creditor to claim for the balance of the account is necessarily recognising that the account has been taken and that the creditor has already had the benefit of such debts as by the terms of the agreement could be set-off.

41. At paragraph 21 I had contended "that there is no reason to say that set-off by contract was not permitted under the *coutume*". Section 1 of the 1979 Law removes whatever doubt anyone might have entertained, and declares that set-off by agreement will be given the fullest possible effect provided only that it does not involve fraudulent preference.

42. The present position for the Guernsey banker, be he a clearing banker or a merchant banker, is therefore that:

- (1) he can claim, if there has been no agreement, the limited set-off provided by the rules of the *coutume*; and
- (2) he can, by agreement, arrange to be able to plead to set-off liabilities due by his customer which would not have been susceptible of customary set-off. All that remains is for the banker to be able to prove the agreement, and that what he wants to set-off is within those agreed terms.

43. As the final comment on section 1 of the 1979 Law it is perhaps worth reminding the banker that the words "oral" and "implied", so helpfully inserted in that section, cut both ways and can be a mixed blessing. Where it is a straight loan, they may raise no problem. Such a loan was probably clearly discussed and documented when it was made, and it could be difficult to persuade the court that later conversations between the banker and his customer amounted to oral or implied variation of those terms, unless both sides agree that there was variation. But a facility to overdraw is a much more flexible instrument. The court may hear two versions of some of the discussions down through the years, including as to how to accommodate a particular operation or particular difficulties, as and when they arose. If those two versions differ, the court will have to make its own decision as to what was the final state of the agreement, "written or oral, express or implied", between the parties. The court could hold that it ended up in different terms, oral or implied, from how it started.

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