

# GUERNSEY LAW JOURNAL

ISSUE 7

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GUERNSEY LAW JOURNAL

SEVENTH ISSUE

Introduction

This edition covers the six month period from 1st January, 1989 to 30th June, 1989. The Editorial Committee is pleased to be able to report that it has been able to bring publication of the Journal up to schedule again. This results mainly from Advocate Victoria Ogier having joined the staff of St. James' Chambers in May of this year. She is now responsible for collation of the various contributions that come in for inclusion in the Journal and for the preparation of case reports. The Editorial Committee is grateful to members of the judiciary and others who assist in the preparation of this publication.

We are publishing in this edition a paper on the subject of legislative drafting in small jurisdictions which was presented at the first conference of Law Officers of small Commonwealth jurisdictions in the Isle of Man in 1983. We would like to feel that it is a small memorial to its author Edmund Lenfestey who for many years served as a legislative draftsman in St. James' Chambers before undertaking tours of duty in similar posts in Fiji and the Turks and Caicos Islands. Shortly after his return to Guernsey in 1986 he became ill and died a year later at the age of 57.

It is hoped to produce a cumulative index and tables of cases and Orders in Council to cover the years 1985 to 1989.

The original texts of legislation and judgments that are digested are available at the Greffe.

Whilst 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:

References to this issue and future issues will be cited using the figure and letters 7.GLJ followed by the paragraph number.

Editorial Committee

H.M. Procureur (de V. G. Carey, Esq., Q.C.), Advocate J. N. van Leuven, Advocate V. C. Ogier, H.M. Greffier (K. H. Tough, Esq.).

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 January to June 1989.

1st December, 1989.

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Extract from a letter to the Reverend Matthew Gallienne from his father, Matthew Gallienne, the Ecrivain.

Guernsey, February 1853

"I write this at the Court while the bell is being rung to call the hurrying lawyers together, and the poor clients to hear their doom. We are warmed by a good fire provided by Her Majesty the Queen and the court looks bright, for the Advocates are wearing their new black gowns for the first time." (c.f. Recueil d'Ordonnances Tome III, p.276).

[We are grateful to Mrs. May Morley of Jersey who has supplied us with this extract from the Gallienne family correspondence which she is hoping to publish].

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## ASSOCIATIONS

1. Order in Council: The Guernsey Southern Agricultural and Horticultural Society (Incorporation) (Guernsey) Law, 1988. - See 6.GLJ.12.  
  
Registered and in force 6.6.89. (No. XII of 1989).
2. Order in Council: The Northern Agricultural and Horticultural Society (Incorporation) (Guernsey) Law, 1988. - See 6.GLJ.13.  
  
Registered and in force 6.6.89. (No. X of 1989).
3. Order in Council: The West United Agricultural and Horticultural Society (Incorporation) (Guernsey) Law, 1988. - See 6.GLJ.14.  
  
Registered and in force 6.6.89. (No. XI of 1989).
4. Projet de Loi: The Guernsey Society for the Prevention of Cruelty to Animals (Incorporation) (Guernsey) Law, 1989. - Incorporates and confers legal personality upon the society called the Guernsey Society for the Prevention of Cruelty to Animals.  
  
Approved by the States 28.6.89. Awaiting Royal Sanction.

## BANKING, INSURANCE AND FINANCE INDUSTRIES

### Bank holidays

5. Ordinance: The Bank Holidays (Amendment) (Guernsey) Ordinance, 1989. - Prescribes an additional bank holiday on 23rd May, 1989 (the occasion of the Queen's visit).  
  
In force 29.3.89. (No. III of 1989).

### Investment business

6. Agreement: Agreement between H.M. Government and Yemen Arab Republic for the Promotion and Protection of Investments.  
  
Registered 6.6.89.

### Taxation of offshore insurers

7. Order in Council: The Income Tax (Amendment) (Guernsey) Law, 1989. - See paragraph 50.

## BANKRUPTCY AND INSOLVENCY

8. Bankruptcy adjudicated in England - request by High Court for order for private examination of local witness - powers of Royal Court

'A' was the trustee of the property of a person declared bankrupt in England. By an order under section 122 of the Bankruptcy Act 1914 the High Court requested the Royal Court to act in aid of and be auxiliary to the High Court for the purpose of examining a partner in a Guernsey firm of

accountants in connection with the affairs of the bankrupt. The Deputy Bailiff held that it would be a wrong exercise of his discretion to make an order for private examination against a person who did not consent where the United Kingdom Revenue was the largest, if not the sole, creditor in the bankruptcy. On appeal to the Court of Appeal, the questions for the Court were, firstly, whether the Deputy Bailiff was correct to regard the question as one which called for the exercise of his discretion; secondly, whether the general principle of public policy that a Court must refuse to entertain an action for the enforcement of a foreign revenue claim would override the Court's power or duty in such circumstances; and, thirdly, whether section 122 conferred on the Royal Court the jurisdiction, which it did not otherwise have, to make an order for the private examination of a third party in relation to the affairs of a bankrupt.

#### HELD

1. Section 122 of the Bankruptcy Act 1914, which forms part of the domestic law of Guernsey, imposes on the court to which a request for aid is made a duty, not a discretion, to act in aid of and be auxiliary to the High Court in the absence of some compelling reason to the contrary.
2. The principle recognised by the House of Lords in Government of India v. Taylor [1955] AC 491, which states that English Courts have no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state, is applicable in Guernsey and where that principle applies it deprives the Court of jurisdiction to make an order which will infringe it even if the parties consent to such jurisdiction being exercised. However, there is no place for the application of the rule of public policy which formed the basis for that decision in circumstances where a request for assistance has been made under an order in aid. The question whether or not an order in aid should be made is one for the discretion of the requesting court: the duty of the recipient court is to give effect to the request.
3. The effect of the second limb of section 122 was to confer on the Royal Court the same powers as the High Court would have in relation to a person who could be served within its jurisdiction. As the High Court had power by virtue of section 25(1) of the 1914 Act to summon any person whom it deemed capable of giving information respecting the debtor, his dealings or property, and to require him to produce any documents in his custody or power relating to the debtor, his dealings or property, the Royal Court had jurisdiction by virtue of section 122 to order the private examination requested.

The appeal would be allowed and the matter remitted to the Royal Court with a direction to give effect to the order for aid.

[In Re Tucker (A Bankrupt) - Court of Appeal 6.2.89].

#### BROADCASTING

9. Resolution of the States of 28.6.89: Directing the preparation of legislation to prohibit the manufacture, sale, possession and importation of disruptive wireless telegraphy apparatus so as to minimise interference with radio communications and air waves.

## BUILDING

### Bornements

10. Projet de Loi: The Bornements (Modification) (Guernsey) Law, 1989. - Amends the "Ordonnance ayant rapport à la Construction de Maisons, Salles Publiques et Bâtiments, et au Tracement de Routes et Chemins" of 25.4.31, as amended. Henceforth, buildings may not be erected within 9 metres (previously 30 feet) of a public road without a permit; fines are increased; applications for bornements must be accompanied by a fee prescribed by the Douzaine not exceeding £15; applications for building within 1.5 metres of a road must be referred to the Public Thoroughfares Committee; and the right of appeal to the Royal Court is extended to all refusals to grant bornements.

Approved by the States 28.6.89. Awaiting Royal Sanction.

### CLAMEUR DE HARO

11. Personal property - possession already lost - authority of records of previous registered Clameurs

'A' raised the Clameur de Haro at certain premises alleging trespass against and theft of drugs, equipment and other personalty. The Bailiff refused to endorse the declaration on the ground that, as in a previous Clameur raised by 'A' and adjudicated on by the Court of Appeal (see 1.GLJ.60) (whose judgment was subsequently confirmed by the Privy Council), 'A' had already lost possession of the property subject of the allegations and therefore the Clameur de Haro was not the appropriate remedy. 'A' appealed to the Court of Appeal, alleging (inter alia) that the present Clameur differed from the previous one in that it related only to personalty, citing a number of Clameurs registered since the Second World War and recorded in the Clameur Book.

HELD, as to the question whether Clameur could be used in relation to moveables only, the authorities produced by 'A' were themselves conflicting. However, even if 'A' were correct that Clameur was capable of legitimately being used in connection with personalty, the present Clameur had been improperly raised because 'A' had already lost possession of the personalty in question. The whole essence of the very special extra-curial remedy of the Clameur de Haro was that there was some imminent peril which justified the imposition of an immediate restraint on the activities of the defendant. Such a justification was not present where possession had been lost.

With regard to the citations from the Clameur Book, it was apparent that previous declarations had been registered virtually automatically without detailed consideration of their merits, which practice was not discontinued until the decision of the Deputy Bailiff in the aforementioned Clameur raised by 'A'. There were numerous cases in the Clameur Book many of which departed from the old traditions and rules as laid down in the authorities and which were never tested in subsequent proceedings and they could not therefore be regarded as valid precedents. The appeal would be dismissed.

[In re Kirk's Clameur de Haro (No. 2) - Court of Appeal 13.4.88].

## COMPANIES

### Applications for change of name

12. Order of the Royal Court: The Companies (Applications for change of name) Procedure Rules, 1989. - See paragraph 61.

## CONSTITUTIONAL LAW

13. Order in Council: The Reform (Amendment No. 2) (Guernsey) Law, 1988. - See 6.GLJ.47.

Registered and in force 14.2.89. (No. XIV of 1988).

## COURTS

### Juvenile Court

14. Order in Council: The Juvenile Court (Guernsey) Law, 1989. - See 6.GLJ.57.

Registered 18.4.89. In force on a day to be appointed. (No. VIII of 1989).

## CRIMINAL LAW AND PROCEDURE

15. Appeals - appeal from Magistrate's Court - notice of appeal - nomination of address for service

'A' appealed against his conviction in the Magistrate's Court of assault. The notice of appeal was recorded and 'A' was ordered to be remanded in custody pending his appeal. He subsequently applied successfully for open remand pending appeal on condition that he did not leave the island. A further application for permission to leave the island between certain dates was granted, 'A' having been required to give an address for service in Guernsey. Shortly before the day appointed for the hearing of the appeal the necessary documents were left at the address given and the summons marked with an 'A' certificate of service. 'A's appeal was dismissed in his absence. 'A' petitioned the Royal Court, alleging (inter alia) that he had not been aware that his appeal had been set down for hearing. His petition was dismissed for want of prosecution and he appealed to the Privy Council where the question at issue was the construction of section 4(2)(i) of the Police Court Appeals Law, 1939. 'A' contended that the wording of that section, viz. -

" (2) The Police Court shall not give such a direction as is mentioned in section 3 of this Law [that there was a question of law or of mixed law and fact which it would be proper and desirable to have decided by the Appellate Court] nor shall the giving of notice of appeal be effectual or be recorded unless and until the person applying for the giving of such a direction or giving notice of appeal has -

- (i) if so required by the Police Court, elected and named an address in this Island at which summonses and notices respecting such appeal may be validly served on him;"

rendered his nomination of an address for service ineffective because it had been made after his notice of appeal had been given and recorded and not in compliance with section 4(2)(i). Accordingly, the summons should have been served personally on him and service was invalid.

HELD, that the proper interpretation of section 4(2) was not, as 'A' contended, that none of the requirements in paragraphs (i), (ii) and (iii) (paragraphs (ii) and (iii) deal with security for costs, binding over to remain in the Island, attendance before the appellate court and interference with witnesses) could validly be carried out after notice of appeal had been recorded and become effectual: such an interpretation was unreasonably restrictive of the liberty of appellants pending appeal because the Magistrate's Court would be unable to impose any of the requirements as a condition for release granted subsequent to the notice of appeal. The preferable interpretation was that the words "be effectual" in section 4 must be taken to mean "be or remain effectual" and not "become effectual". Accordingly, the Magistrate was able properly to grant 'A's application to leave the island subject to the nomination of an address for service; his fulfilment of that requirement had the effect that his notice of appeal remained valid; and, his election being valid, service had validly been effected. The appeal would be dismissed.

[Sherry v. R. - Privy Council Appeal No. 3 of 1987 (20.2.89); [1989] 1 WLR 341].

16. Appeals - appeal to Court of Appeal - bail pending appeal - recognizances

Order of the Royal Court: The Court of Appeal (Criminal Division) (Amendment) (Guernsey) Rules, 1989. - Amend the principal Rules of 1964 so as to provide for recognizances entered into by an appellant admitted to bail to be taken before the Registrar of the Court.

In force 26.1.89. (Order No. V of 1989).

17. Appeals - appeal to Court of Appeal - powers of court

'AA' appealed against their convictions by the Royal Court on the grounds, inter alia, that the convictions were against the weight of the evidence and that the verdicts were unsafe and unsatisfactory. Giving leave to amend the grounds of appeal to conform with the wording of Article 25(1) of the Court of Appeal (Guernsey) Law, 1961, the Court of Appeal reviewed the English authorities before and after the Criminal Appeal Act 1968 which introduced into English law a ground (not contained in Article 25(1)) that the verdict should be set aside because it is "unsafe or unsatisfactory". That test gave a wide power to the Court of Appeal to quash a conviction because that Court had doubt as to its propriety. However, the position prior to 1968, which remained the position in Guernsey, was that an appeal should only be allowed if the verdict was unreasonable or could not be supported having regard to the evidence or should be set aside on the ground of a wrong decision of law or that there was a miscarriage of justice. Under that test, the English authorities demonstrated, it was not sufficient to allege that a verdict was against the weight of evidence nor sufficient to show that a case was a very weak one or that the appeal court felt some doubt as to the correctness of a verdict: a verdict would only be set aside in the rare cases where a verdict was obviously and palpably wrong.

[Law Officers of the Crown v. Ogier and Le Noury - Court of Appeal 6.4.89].  
(See also paragraphs 20 and 25).

## Criminal Justice Act, 1967

18. United Kingdom Statutory Instrument: The Criminal Justice Act 1987 (Guernsey) Order, 1989. - Extends to Guernsey, Alderney and Sark for a period of two years the provisions of section 2 of the Criminal Justice Act, 1987 thus enabling the Director of the Serious Fraud Office (through H.M. Procureur) to obtain relevant information from persons under investigation in Guernsey.

In force 18.5.89. (U.K. S.I. No. 674 of 1989).

## Day training centre

19. Order in Council: The Criminal Justice (Day Training Centre) (Guernsey) Law, 1988. - See 6.GLJ.62.

Registered 14.3.89. In force on a day to be appointed. (No. I of 1989).

20. Indictment - whether bad for duplicity - conduct intended to pervert the course of justice

On an appeal from convictions of "doing acts tending and intended to pervert the course of public justice" 'A' contended, inter alia, that the indictment was bad for duplicity in that it referred to several "acts" and did not specify which acts had a tendency to pervert the course of public justice nor which witnesses were interfered with. The Court of Appeal HELD, allowing the appeal on other grounds, that there was no merit in 'A's' argument. Conduct intended to pervert the course of justice, and having such a tendency, may involve more than one person. The Court was satisfied that no prejudice to the accused could arise from the acts complained of being covered by a single count; or from the failure of the prosecution to name witnesses, or to specify and charge in separate counts those who were not to attend as distinct from those who might be persuaded to give false evidence.

[Law Officers of the Crown v. Ogier and Le Noury - Court of Appeal 6.4.89].  
(See also paragraphs 17 and 25).

## Juvenile Court

21. Order in Council: The Juvenile Court (Guernsey) Law, 1989. - See paragraph 14.

## Misuse of drugs - drug trafficking

22. Order in Council: The Drug Trafficking Offences (Bailiwick of Guernsey) Law, 1988. - See 6.GLJ.72.

Registered 31.1.89. (No. XII of 1988). In force 1.4.89: The Drug Trafficking Offences (Bailiwick of Guernsey) Law, 1988 (Commencement) Ordinance, 1989. (No. II of 1989).

23. Order of the Royal Court: The Drug Trafficking Offences (Procedure) Rules, 1989. - Make provision for the procedures to be followed in making applications under the 1988 Law (see paragraph 22) including documents to be served and the modes of service thereof, relevant time limits and the contents of applications.

In force 3.4.89. (Order of the Royal Court No. III of 1989).

### Obscene publications

24. Projet de Loi: The Obscene Publications (Amendment) (Bailiwick of Guernsey) Law, 1989. - See 6.GLJ.74.

Approved by the States 26.1.89. Awaiting Royal Sanction.

25. Perverting the course of justice - offering to arrange non-attendance of prosecution witnesses - whether sufficient to constitute offence

'A', the complainant in a case of alleged assault, offered to drop the charges upon payment of a certain sum. Part of that sum was handed to 'B', receiving it on behalf of 'A', by the alleged assailant. 'A' and 'B' were convicted by the Royal Court on an indictment charging them with "doing acts tending and intended to pervert the course of public justice". 'A' and 'B' appealed on the ground, inter alia, that offering to arrange was not an act capable in itself of perverting the course of public justice without something more. HELD by the Court of Appeal, quoting (inter alia) Lord Lane C.J. in R. v. Murray [1982] 2 AER 225, that the Court must first decide whether the defendant had the intention to pervert the course of justice and then whether there was evidence that what he did had a tendency to have that effect, that is to say, that he had done enough for there to be a risk, without further action by him, that injustice would result. In the present case, the act complained of was the offer and was not sufficient without more to constitute the substantive offence charged although, if 'A' and 'B' had been charged with incitement, the indictment would have been properly drawn. The appeal would be allowed.

[Law Officers of the Crown v. Ogier and Le Noury - Court of Appeal 6.4.89].  
(See also paragraphs 17 and 20).

### Police - related offences

26. Projet de Loi: The Police Offences (Bailiwick of Guernsey) Law, 1989. - Creates offences of wasting police time by making false reports of offences or other matters to an officer of police, of impersonating an officer of police and of being in unlawful possession of any item of police uniform. Applies throughout the Bailiwick.

Approved by the States 29.3.89. Awaiting Royal Sanction.

### Post Office - offences

27. Resolution of the States of 23.2.89: see paragraph 58.

### Sentence - youth custody

28. States Resolution of 23.2.89: Directing the preparation of legislation to replace imprisonment for persons aged under 21 with a system of youth custody akin to that in the United Kingdom and to provide increased supervision for young offenders after release.

### Transcripts

29. Order of the Royal Court: The Shorthand Notes and Transcripts (Criminal Cases) (Amendment) (Guernsey) Rules, 1989. - Amend the principal Rules of

1964 so as to increase the fee per page for an official transcript from £3 to £5 and to impose a fee of £20 per hour on persons permitted to listen to the original tape recording of any proceedings.

In force 31.1.89. (Order No. I of 1989).

#### Uniform scale of fines

30. Order in Council: The Uniform Scale of Fines (Bailiwick of Guernsey) Law, 1989. - See 6.GLJ.82.

Royal Sanction 20.2.89. Registered 2.5.89. (No. V of 1989). In force 1.7.89: The Uniform Scale of Fines (Bailiwick of Guernsey) Law, 1989 (Commencement) Ordinance, 1989. (No. VII of 1989).

#### CUSTOMS

31. Statutory Instrument: The Customs and Excise (Bailiwick of Guernsey) (Personal Reliefs) (Amendment) Order, 1989. - Increases personal allowances for passengers.

In force 3.3.89. (S.I. No. 8 of 1989).

32. Statutory Instrument: The Customs and Excise (Bailiwick of Guernsey) (Personal Reliefs) (Amendment) Order, 1989. - Provides a personal importation allowance for certain paid crew members.

In force 6.3.89. (S.I. No. 9 of 1989).

33. Statutory Instrument: The Import and Export of Goods (Control) (Guernsey) (Amendment No. 8) Order, 1989. - Prohibits importation of specified offensive weapons.

In force 3.3.89. (S.I. No. 11 of 1989).

34. Statutory Instrument: The Import and Export of Goods (Control) (Guernsey) (Amendment No. 9) Order, 1989. - Prohibits the importation as "gifts" of specified articles.

In force 3.3.89. (S.I. No. 10 of 1989).

35. Statutory Instrument: The Open General Import Licence and Open General Export Licence (Revocation) Order, 1989. - Revokes the said open general licences. (Note - such licences shall henceforth be granted under the hand of the Chief Revenue Officer pursuant to the Import and Export of Goods (Control) (Guernsey) Order, 1978 and not by way of statutory instrument).

In force 24.2.89. (S.I. No. 12 of 1989).

36. Statutory Instrument: The Customs and Excise (Bailiwick of Guernsey) (Deferred Payment) Order, 1989. - Provides that the Chief Revenue Officer may permit the payment of import duty to be deferred if security for the outstanding duty is given by way of bankers' guarantee.

In force 1.4.89. (S.I. No. 13 of 1989).

## DIVORCE AND MATRIMONIAL CAUSES

37. Order in Council: The Domestic Proceedings and Magistrate's Court (Guernsey) Law, 1988. - See 6.GLJ.88.

Registered 14.2.89. In force on a day to be appointed. (No. XVI of 1988).

38. Projet de Loi: The Matrimonial Causes (Amendment) (Guernsey) Law, 1989. - Amends the Matrimonial Causes Law (Guernsey), 1939 by providing, for the removal of doubt -

(a) that the Matrimonial Causes Division can make orders as to the vesting/division of property not only following decrees of judicial separation by that Division but also following pronouncements thereof by the Ordinary Court; and

(b) that such orders can apply to property owned by one only of the parties to the marriage.

Approved by the States 28.6.89. Awaiting Royal Sanction.

## DWELLINGS PROFITS TAX

### Corporate-owned dwellings

39. Projet de Loi: The Dwellings Profits Tax (Amendment) (Guernsey) Law, 1989. - Modifies the Dwellings Profits Tax (Guernsey) Law, 1975 in two respects:

1. Places the individual occupier of a dwelling who holds a controlling interest in the dwelling's corporate owner in the same position - as respects exemption after 12 months' occupation - as an individual owner-occupier.

2. Replaces the usual "5 year ownership" exemption in the case of a person who acquires a controlling interest in a dwelling-owning company or a beneficial interest in a dwelling-owning trust on or after 10.3.89 with an exemption under which the 5 year period runs from the date when that interest was acquired. The amount of any chargeable profit, however, will be ascertained in accordance with special rules designed to ensure that the acquirer is given credit for expenditure incurred in relation to the dwelling by the corporate owner but derived from funds provided by him.

Approved by the States 31.5.89. Awaiting Royal Sanction.

## EDUCATION

40. Order in Council: The Education (Amendment) (Guernsey) Law, 1988. - See 6.GLJ.92.

Registered 14.2.89. In force 14.3.89. (No. XV of 1988).

## EMPLOYMENT

### Proof of housing status

41. Projet de Loi: The Right to Work (Limitation and Proof) (Guernsey) Law, 1989. - Makes it unlawful, subject to certain exceptions, to take up any employment (including self-employment), to employ another person, or to continue, or continue to employ another person, in employment which began after a certain date unless the person so employed is lawfully resident in a dwelling and holds a "right to work document" testifying to that fact. The relevant date will be 9th June 1988 unless the States substitute a later date by Ordinance. A "right to work document" is
- (a) a status declaration issued to a qualified resident;
  - (b) a housing licence (including a short-term housing licence, as to which see paragraph 46);
  - (c) a declaration of lawful residence issued to a person who is lawfully resident in "open market" accommodation or otherwise in such circumstances as not to require a housing licence;
  - (d) a tent-dweller's declaration issued to a person living in a tent for a specified period during the months of April to October at a specified address whilst employed by a specified employer in connection with horticulture or tourism;
  - (e) a document which may be issued under any system introduced by Ordinance in order to entitle people to work on vessels where they are residing; or
  - (f) a temporary exemption certificate valid for a maximum of three months.

All right to work documents will be issued by the Housing Authority, which is also empowered to make regulations as to the keeping of records and to appoint inspectors with specified powers, and which is given limited rights to obtain access to certain information held by the Insurance Authority.

Under the Projet a person is considered to be in employment in Guernsey whenever he does anything in connection with his employment whilst physically present in Guernsey but, as well as exempting all employment held continuously since 9.6.88 and certain Crown appointments, the Projet does not apply to employment during the course of a day visit or to employment by a non-resident for a limited period in any year.

Employment in contravention of the Law involves an offence by the employee and, subject to a "reasonable precautions" defence, his employer. There are also offences of obstruction and falsification of documents etc.

Approved by the States 27.4.89. Awaiting Royal Sanction.

## FIRE SERVICES

42. **Projet de Loi:** The Fire Services (Guernsey) Law, 1989. - Part I consolidates earlier legislation relating to the provision of a fire brigade by the Island Police Committee. Part II sets out the powers of the fire brigade and police officers in the event of fire to enter premises, close streets, fight fire, etc. Part III obliges the occupiers of controlled premises (that is, premises put to one of the designated uses specified in section 4(2)(a) - e.g. use as a place of work for ten or more persons) to provide premises with means of escape and other fire precautions (such as alarms and fire extinguishers). If the occupier fails to do so the Committee can serve a default notice; failure to comply is an offence. The Committee can also make regulations and codes of practice in relation to fire precautions.

The Chief Fire Officer can close down dangerous premises forthwith. Fire inspectors are given powers of entry and inquiry. A register of controlled premises is to be prepared.

Part IV contains general provisions (offences; appeals; civil actions for breach of statutory duty preserved; Royal Court empowered to modify leases to enable occupiers to undertake structural works to comply with the Law and to apportion the expenses of such works).

Approved by the States 25.1.89. Awaiting Royal Sanction.

## FOOD

### Food hazard emergencies

43. **Order in Council:** The Emergency Powers (Amendment) (Bailiwick of Guernsey) Law, 1988. - See 5.GLJ.38.

Registered and in force 14.2.89. (No. XIII of 1989).

## GUARDIANSHIP

### Guardianship of infirm persons ("curatelle")

44. **Rules:** The Curatelle Rules, 1989. - Provide new procedures for applications for appointment as guardian of persons unable to manage their affairs for reasons of infirmity of mind or body. Applications may be made by the guardian in person who must complete a prescribed form giving particulars of the patient and his property. Medical evidence may now be given by affidavit, also by means of a prescribed form.

In force 1.3.89. (Order of the Royal Court No. II of 1989).

## HEALTH AND MEDICINE

### Notifiable diseases

45. **Statutory Instrument:** The Public Health (Notifiable Diseases) Order, 1989. - Adds meningococcal septicaemia (without meningitis), mumps, rubella and

viral hepatitis 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 12.1.89. (S.I. No. 1 of 1989).

## HOUSING

### Control of occupation

46. Projet de Loi: The Housing (Control of Occupation) (Amendment) (Guernsey) Law, 1989. - Introduces "short-term housing licences" and "declarations of lawful residence":
1. A licence granted to a person who is to be employed on a temporary or seasonal basis is not to be valid for more than 9 months and may not be granted to anyone who has been physically in Guernsey in the previous 3 months. A licence granted to a person whose employment is not thought of sufficient long-term essentiality to merit a licence valid for more than 3 years cannot in general be granted to anybody who has been resident in Guernsey during the previous 3 years. By way of exception such a licence may be granted to follow immediately on a temporary (i.e. 9 month maximum) licence held by a person who is and will remain in staff accommodation.  
  
Spouses, members of the household and guests of short-term licence holders will no longer be automatically entitled to occupy "local market" accommodation with the licence holder as such.  
  
In considering applications for employment-related licences the Projet requires the Authority to take into account the number of lawful residents available to take the employment concerned and the number of current housing licences of the type concerned.
  2. The Projet requires the Authority to issue "declarations of lawful residence" to people lawfully resident in a dwelling otherwise than as qualified residents or licence holders (e.g. occupiers of "open market" and States-owned dwellings, spouses and members of the household of licence holders). These declarations will be required by such people if they take up employment by virtue of the Right to Work (Limitation and Proof) (Guernsey) Law, 1989 (see paragraph 41). They will have to be reviewed periodically.

The Projet de Loi also puts it beyond any residual doubt that the burden of proof on an appeal under the Housing Laws rests with the appellant and imposes a two month time limit on the institution of any appeal.

Approved by the States 27.4.89. Awaiting Royal Sanction.

47. Projet de Loi: The Right to Work (Limitation and Proof) (Guernsey) Law, 1989. - See paragraph 41.

48. Ordinance: The Housing (Control of Occupation) (Addition of Dwelling) Ordinance, 1989. - Adds one dwelling to the list in Schedule 1 to the Housing (Control of Occupation) (Guernsey) Law, 1982.

In force 31.5.89. (No. VIII of 1989).

#### IMMIGRATION

49. Statutory Instrument: The Immigration (Work Permit Fee) (Guernsey) Order, 1989. - Increases to £6 the fee for a work permit payable by the employer of a person without the right of abode.

In force 21.12.88. (S.I. No. 2 of 1989).

#### INCOME TAX

##### Taxation of offshore insurers

50. Order in Council: The Income Tax (Amendment) (Guernsey) Law, 1989. - Permits insurers which are registered under the Insurance Business (Guernsey) Law, 1986 and which accept no significant long-term or local risks to elect in respect of any year of charge from 1988 onwards to be assessed for income tax on a new basis. When an insurer so elects in respect of a year of charge:

- (a) it is not permitted to take account of expenses, allowances and other deductions for that year (though losses etc. from previous years can be carried forward); but
- (b) its income agreed by the Administrator to have arisen from underwriting activities is exempt from tax; and
- (c) the remainder of its non-Guernsey-source income is assessed on a sliding scale after the first £250,000, reducing ultimately to 0.1% on profits in excess of £3,000,000. (Income from Guernsey sources - other than money deposited with a registered or exempt bank - remains liable to tax at the standard rate).

Election may be made and withdrawn within 3 years after the end of the relevant year of charge.

Approved by the States 25.1.89. Royal Sanction 13.6.89. Awaiting registration.

#### LAND LAW

51. Servitudes - fonds enclavé - doctrine of destination de bon père de famille - appropriate remedy

The owners of certain land ('AA') applied for an injunction under the Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987 requiring the owners of adjacent land ('RR') to allow them access to certain tunnels the entrance to which was in 'RR's land and which were believed to extend under 'AA's

land. 'AA' wished to carry out a survey of any part of the tunnels which might be under their land to see whether further proceedings might be necessary. HELD by the Deputy Bailiff:

1. that the 1987 Law was not an appropriate instrument to use in the circumstances; and
2. that as the tunnels were exploitable land to which there was no practical access by 'AA' they were, in fact and in law, enclavé. Accordingly, the legal remedies available for relief of such land were available to 'AA'. During the German Occupation the German forces had exercised the rights of ownership over the land owned by 'AA' and 'RR' and therefore it would have been appropriate to apply the doctrine of destination de bon père de famille to the situation which arose after the Liberation when the tunnels were found to be enclavé. However, the rights of 'AA' under that doctrine had been lost by prescription. Applying Articles 682, 3 and 4 of the Code Civil, which is relevant as persuasive authority for the solution of Norman coutume (unlike English case law), 'AA' were entitled to access to the tunnels on their land through 'RR's tunnel which must be kept open for this purpose and 'RR' were entitled to be indemnified against any damage suffered by them in consequence.

[Craske et al v. Traisnel and Bougourd - Plaid de Meubles 17.4.89].

Servitudes - right of way - prescription - aggravation - whether defences available to persons other than owner of servient tenement

52. 'P', the owner of a garage, enjoyed a right of way over a strip of land adjacent to 'D's property. 'P' brought an action for an injunction restraining 'D' from obstructing its right of way. 'D' raised by way of Exception de Fonds (inter alia) the defences
- (1) that 'P's alleged vehicular right of way had been extinguished, the right not having been exercised for a period exceeding twenty years, and
  - (2) that 'P's intended use of the right of way for the purposes of its garage constituted an aggravation of the right.

HELD, by the Bailiff, that the defences of prescription and aggravation can only be raised in such a case by the owners of the servient tenement.

[Sarnia Car Hire Limited v. Mills - Plaid de Meubles 11.5.89].

LANDLORD AND TENANT

53. Statutory Instrument: The Rent Control (Variation) Order, 1989. - Increases variable items of recoverable rents of controlled dwellings by 12%.

In force 1.7.89. (S.I. No. 17 of 1989).

## LIQUOR

### Amendment to Ordinance of 1984

54. Ordinance: The Liquor Licensing (Amendment) Ordinance, 1989. - Makes a number of amendments to the 1984 Ordinance, the principal of which are the following:-
- (a) section 7, which deals with applications by bodies corporate, has been repealed and re-enacted. The principal change is to make it mandatory for notice of applications for the appointment of a new designated official to be published in La Gazette Officielle;
  - (b) the formalities to be completed prior to making applications for permission to make alterations to licensed premises (section 27) have been amended to require reports to be obtained from both the Police Committee and the Constables of the Parish and also, in the case of tourist premises, the Tourist Board. It is also now an offence to alter licensed premises without approval of the Court;
  - (c) the procedures for depositing plans at the Greffe have been clarified;
  - (d) four days' notice of applications to extend permitted hours etc. must now be given to the Chief Officer of Police;
  - (e) the control of young persons in bars has been extended to provide that persons under the age of 18 years may not be present on premises which are the subject of a public house licence or which are a designated public bar.

In force 1.2.89. (No. I of 1989).

## POST OFFICE

### Increase in fees

55. Statutory Instrument: The Post Office (Inland Post) (Amendment) Order, 1989. - Increases the postal rate for letters to the United Kingdom, Jersey and the Isle of Man.
- In force 3.4.89. (S.I. No. 6 of 1989).
56. Statutory Instrument: The Post Office (Overseas Parcel Post) (Amendment) Order, 1989. - Increases the postal rates for all air and surface parcels in conjunction with the U.K. Post Office.
- In force 2.5.89. (S.I. No. 15 of 1989).
57. Statutory Instrument: The Post Office (Postal Order) (Amendment) Order, 1989. - Increases the postal order fees and introduces new denominations available.
- In force 1.5.89. (S.I. No. 16 of 1989).

### Obscene and threatening material

58. Resolution of the States of 23.2.89: Directing the preparation of legislation to provide that the sending of dangerous, indecent or menacing postal packets be an offence and increasing certain penalties under the Post Office (Guernsey) Law, 1989.

### PRACTICE AND PROCEDURE (CIVIL)

#### Appeals - preparation of transcripts - Practice Direction

59. The following procedure will be followed in the preparation of transcripts for appeal purposes. As a general rule, speeches by counsel will no longer be transcribed. The appellate court may however, in any particular case, direct that additional parts of the proceedings be transcribed.

##### 1. Civil Appeals

The evidence only will be transcribed, together with the judgment of the court.

##### 2. Criminal Appeals

(i) On a guilty plea, the proceedings will be transcribed in full, with the exception of any plea in mitigation.

(ii) On a not guilty plea, the following will be transcribed:-

(a) the evidence;

(b) any submission on points of Law made during the course of the trial, and the decision of the court on such submissions;

(c) the Bailiff's summing-up and directions to the Jurats, or the decision of the Magistrate, as the case may be;

(d) evidence heard by way of mitigation;

(e) sentencing remarks of the Bailiff or the Magistrate, as the case may be.

The charge for transcripts commenced on or after 31st January, 1989 will be increased from £3 to £5 per page [by Order of the Royal Court: see paragraph 29].

[Practice Direction of 3.2.89].

#### Arrêt de biens - no assets in jurisdiction - application to lift arrest

60. In February 1988 the Deputy Bailiff granted 'R's application for an order arresting certain assets which had been transferred to a Guernsey bank account in 'A's name in July 1985. 'A' appealed to the Court of Appeal. 'A's evidence, which was uncontradicted, was that there were no funds in the account at the time the arrest order was granted. The question for the court was whether an arrest order could be made in the absence of assets within the jurisdiction of the court. 'R' contended, using as a parallel the recent developments in the Mareva jurisdiction in English law, that the mere existence of a bank account was enough, whether it was an overdraft or not.

HELD by the Court of Appeal that a distinction must be drawn between the effect of an arrest order (saisie conservatoire) in civil law, that is to say, an order to freeze and seize assets, and a Mareva injunction ordering the debtor or a third party not to deal with assets pending determination of the rights of the parties. Although the case of Derby & Co. Ltd. v. Weldon (The Times 26.12.88) had confirmed that the absence of assets within the jurisdiction was no bar to the granting of a Mareva injunction the authority for the present decision must be sought in the customary law of Guernsey. In Arab Monetary Fund v Hashim and another (1986) (see 3.GLJ.58) the Bailiff held that a total lack of assets within the jurisdiction was good cause to apply to the Court for an arrest order to be lifted, and in Management Services of Guernsey Ltd. v. P.C.W. Underwriting Agencies Ltd. (Plaid de Meubles 11.2.83) the Deputy Bailiff held that the action was justiciable in Guernsey only to the extent that assets are or were present in the Island. After quoting Thomas Le Marchant, Tome II at p.119, the Court of Appeal stated that the quintessential feature of an arrest order was the seizure of a tangible asset. The arrest order was a means to assist creditors to have available the fruits of their prospective judgment and not a device to achieve assistance, by way of injunctive relief, for plaintiffs pursuing claims against defendants. That gap in the arrest order system had subsequently been filled by section 1 of the Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1987 (see 6.GLJ.173) but that Law did not exist at the date of the Deputy Bailiff's order and therefore the appeal would be allowed.

[Achates Trust Limited v. Culture Farms Inc. and Activator Supply Company Inc. - Court of Appeal 17.5.89.]

#### Companies - applications for change of name

61. Order of the Royal Court: The Companies (Applications for change of name) Procedure Rules, 1989. - Provide that applications for the approval of a special resolution of the shareholders of a limited liability company to change the name of that company are to be made to the Royal Court by the tabling of a cause instead of by way of presentation of a petition.

In force 1.7.89. (No. IV of 1989).

#### Costs

62. Statutory Instrument: The Court of Appeal (Civil Division) (Costs and Fees) (Amendment) (Guernsey) Rules, 1989. - Amend the principal Rules of 1964 so as to impose a fee of £20 per hour on persons permitted to listen to the original tape recording of any proceedings.

In force 17.1.89. (S.I. No. 4 of 1989).

#### Court sittings - Practice Direction

63. As from the week beginning 3rd April, 1989, the Conveyancing Court will sit at 9.30 a.m. on Tuesdays and Thursdays and both the Full Court on the days listed on the Court Calendar and Ordinary Court on Thursdays will sit at 10.15 a.m.

[Practice Direction of 31.1.89].

#### Filing of documents and exchange of authorities - Practice Direction

64. In civil and criminal proceedings before the Magistrate's Court, the Royal Court and the Court of Appeal:-

1. There must be a full exchange between the parties of the authorities they propose to cite to the Court.
2. Parties must file a list of authorities with the Court at the earliest opportunity.

In addition, in respect of proceedings before the Court of Appeal, parties must file a photocopy of the relevant pages of text of any authority to be cited together with a copy of the title page of the volume from which the photocopy is taken.

[Practice Direction of 23.6.89].

#### Non-contentious applications

65. Order of the Royal Court: The Royal Court (Non-contentious Applications) (Amendment) Rules, 1989. - Amend the principal Rules of 1988 (see 6.GLJ.175) so as to add applications to register wills of realty and applications to limit prescription to the list of applications which may be made before the Bailiff in Chambers.

In force 1.7.89. (Order of the Royal Court No. V of 1989).

#### PUBLIC ASSISTANCE

66. Resolution of the States of 31.5.89: Directing the preparation of legislation to change the constitution and mandate of the States Public Assistance Authority.

#### ROAD TRAFFIC AND PUBLIC TRANSPORT

##### Penalties

67. Ordinance: The Traffic Offences (Fixed Penalties) Ordinance, 1989. - Consolidates the previous fixed penalty legislation and amends it as follows:
  1. The Chief Officer of Police is empowered to serve by post on the apparent owner of a vehicle in respect of which a fixed penalty notice has been issued a notice giving him 14 days in which to pay it or declare that either he was not the owner or had not consented to the vehicle's use at the relevant time. Proceedings are restrained during those 14 days in the same way as during the first 7 days after the original issue of the fixed penalty notice; but after the 14 day period has expired there is no further opportunity to pay the fixed penalty and in any proceedings for the offence the person served with the "notice to owner" is conclusively presumed to have been in charge of the vehicle when it was allegedly committed.
  2. The Police Committee is empowered to specify by Order the places where and manner in which fixed penalties may be paid.
  3. Several additional offences are brought within the ambit of the fixed penalty system.

4. The amount of the fixed penalty is increased to £10.

In force 1.5.89. (No. V of 1989).

68. Statutory Instrument: The Fixed Penalties Order, 1989 - Requires fixed penalties to be paid in cash or by cheque, postal order or money order, in person at, or by post (registered in the case of cash payment) to, the States Office.

In force 1.5.89. (S.I. No. 14 of 1989).

#### Prohibited and one-way streets

69. Ordinance: The Prohibited and One-Way Streets (Amendment) Ordinance, 1989. - Makes part of the Sausmarez Mill Estate Road one way from east to west.

In force 26.4.89. (No. VII of 1989).

#### Seat belts

70. Statutory Instrument: The Seat Belts (Exemption for Taxi Drivers) Order, 1989. - Exempts drivers of licensed taxis from the requirement to wear a seat belt whilst actually carrying passengers for hire or reward.

In force 20.2.89. (S.I. No. 7 of 1989).

#### Signs and signals

71. Ordinance: The Traffic Signs and Traffic Light Signals (Amendment) Ordinance, 1989. - Makes it an offence to disobey a temporary traffic sign.

In force 22.5.89. (No. IX of 1989).

#### Third-party insurance

72. Projet de Loi: The Road Traffic (Compulsory Third-Party Insurance) (Amendment) (Guernsey) Law, 1989. - Provides the legislative framework needed for adoption of the Second EC motor insurance Directive by requiring motor vehicle users to be insured against damage to third parties' property as well as death and bodily injury. Policies will not have to provide property damage cover in excess of £250,000 for any one accident or series of causally related accidents. Insurers will generally be bound to satisfy any judgment relating to a compulsorily insurable liability even if obtained against a person not insured by the policy, and provisions of policies restricting cover to the holders of driving licences will be disregarded, but they will have certain rights of recovery.

Approved by the States 26.4.89. Awaiting Royal Sanction.

#### Transfer of functions

73. Ordinance: The Road Traffic (Transfer of Functions) Ordinance, 1989. - Transfers the functions of the Chief Officer of Police in respect of temporary speed limits, and those of the Island Police Committee in respect of wide loads on vehicles, to the Island Traffic Committee or such other body as may be prescribed by Resolution.

In force 1.6.89. (No. VI of 1989).

## SHIPPING

### Passenger boats and hired boats

74. Order in Council: The Hired Boats and Passenger Boats (Guernsey) Law, 1988.  
- See 6.GLJ.206.

Royal Sanction 15.3.89. Registered 18.4.89. In force on a day or days to be appointed. (No. IV of 1989).

### Registration

75. States Resolution of 31.5.89. - Directing the preparation of legislation to extend the Board of Administration's powers under the Merchant Shipping (Registration) (Bailiwick of Guernsey) Law, 1987 (see 6.GLJ.208) so as to cover any register kept in accordance with the Merchant Shipping Act 1894.

### Tonnage measurement

76. Convention: The International Convention on the Tonnage Measurement of Ships, 1969.

Applied to the Bailiwick with effect from 1.1.89.

### Wreck and salvage

77. Statutory Instrument: The Wreck and Salvage (Vessels and Aircraft) (Bailiwick of Guernsey) Fees Order, 1989. - Prescribes the fees payable to the Receiver of Wreck for services ordered by him under the 1986 Law. - See 6.GLJ.75.

In force 1.6.89. (S.I. No. 18 of 1989).

## SOCIAL SECURITY

78. Statutory Instrument: The Social Insurance (Benefits) (Miscellaneous Provisions) (Amendment) (Guernsey) Regulations, 1989. - Replace Parts I and II of the Fourth Schedule to the principal Regulations of 1978 so as to provide revised forms of medical certificates.

In force 17.1.89. (S.I. No. 3 of 1989).

## TRADE AND INDUSTRY

### Hawkers and non-resident traders

79. Projet de Loi: The Hawkets and Non-Resident Traders (Amendment) (Guernsey) Law, 1989. - Amends the 1980 Law by transferring functions of the Advisory and Finance Committee as to the approval of trade fairs to the Board of Trade and Industry; by increasing fines; and by doubling licence fees.

Approved by the States 29.3.89. Awaiting Royal Sanction.

## TRUSTS

80. Order in Council: The Trusts (Guernsey) Law, 1989. - See 6.GLJ.236.  
Registered 21.3.89. In force 18.4.89. (No. II of 1989).
81. Order in Council: The Saint Peter's Church Hall (Trust) (Guernsey) Law, 1988. - See 6.GLJ.237.  
Registered and in force 18.4.89. (No. III of 1989).

### Constructive trust - application of equitable principles

82. A hotel-owning company ('P') and a company which owned a yacht marina ('D') were both beneficially owned by 'X'. Both properties were insured in the name of 'D'. The hotel suffered damage in 1985 due to burst water pipes and an insurance claim was made by 'P' and settled by the insurers. Before the cheque in the agreed sum, drawn in favour of 'D', was issued 'X' sold his beneficial ownership in 'D'. The cheque was cashed by 'D' and 'P' issued proceedings to recover the amount of the insurance monies, contending that the monies had been received by 'D' for and on behalf of 'P' and that 'D' held the monies on constructive trust for 'P'. The Bailiff directed the Jurats that, in law, that principle could be applied in Guernsey, the courts of which had recognised equitable principles over the centuries, citing the trust funds held by the Royal Court as an example. The Jurats found in favour of 'P' in the sum claimed.

[Beachcomber Hotels Limited v. Beaucette Yacht Marina (Guernsey) Limited - Plaids de Meubles 21.4.89].

### Deed of Appointment - rectification

83. A Deed of Appointment contained certain incorrect definitions and typographical errors the combined effect of which was to exclude a certain person intended to benefit under the settlement and to give inaccurate descriptions of others. Pursuant to an application by the Trustees and the guardian of the excluded beneficiary, the Bailiff ordered the rectification of the Deed of Appointment and ordered that no costs arising directly or indirectly from the application should be paid out of the Trust Fund.

[Re Darby's Settlement Trusts - Plaids de Meubles 2.3.89].

## WATER

### Increase in charges

84. Ordinance: The Water Charges (Amendment) Ordinance, 1989. - Amends the 1979 Ordinance by increasing charges for water and water meters; and by clarifying the basis upon which rateable value (upon which the majority of water charges are based) is to be calculated and the circumstances in which the Water Board can require a property to be charged by meter.  
In force 1.7.89. (No. XI of 1989).

Prevention of pollution

85. **Projet de Loi: The Prevention of Pollution (Guernsey) Law, 1989.** - Creates an offence of pollution of the island's water resources. Empowers the States to make Ordinances regulating the disposal, transportation, storage etc. of sewage and other pollutants. Enables the Water Board to serve anti-pollution notices to prevent pollution or risks thereof in the catchment area. Provides for appeal against such notices to the Royal Court. The board itself can execute anti-pollution works in cases of default or emergency, and recover expenses from the defaulter. Officers of the board are empowered to enter premises, make inquiries and take samples. The board is to prepare, and deposit at the Greffe, a map showing the boundaries of the catchment area.

Approved by the States 29.3.89. Awaiting Royal Sanction.

## ALDERNEY

### AGRICULTURE AND ANIMALS

#### Dogs

86. Ordinance: The Dogs (Controlled Places) Ordinance, 1989. - Prohibits dogs completely from a number of beaches from June to September inclusive; makes it an offence for a dog owner to permit his dog to be in a number of other "controlled" places except on a lead; and makes it an offence for a person in charge of a dog to let it foul any controlled place.

In force 11.5.89. (Ordinance of the States of Alderney of 10.5.89).

### BANKING, INSURANCE AND FINANCE INDUSTRIES

#### Bank holidays

87. Ordinance: The Bank Holiday (Royal Visit) Ordinance, 1989. - Made 24.5.89 a bank holiday in Alderney. (Ordinance of the States of Alderney of 10.5.89).

#### Legal tender

88. Ordinance: The Legal Tender (Alderney) Ordinance, 1989. - Makes provision for notes and coins issued by the States of Alderney to be legal tender in Alderney; specifies the maximum amounts for which a tender of payment may legally be made in coins of various values; and generally updates Alderney's legal tender legislation.

In force 1.3.89. (Ordinance of the States of Alderney of 1.3.89).

### BUILDING AND DEVELOPMENT CONTROL

#### Historic buildings and ancient monuments

89. Projet de Loi: The Historic Buildings and Ancient Monuments (Alderney) Law, 1989. - Provides for the establishment of a register of buildings and other works having special historic, architectural, traditional, artistic or archaeological interest and of areas of special historic or architectural interest ("conservation areas"). Once a building, work or area is registered (against which an appeal lies to the Court of Alderney) new planning controls become applicable:

- (a) permission is required to carry out any work affecting the external appearance of a registered building or, if its interior is registered, its internal appearance;
- (b) in considering applications for such permission special regard must be paid by the Committee to preserving registered buildings and preserving and enhancing the character and appearance of conservation areas;
- (c) special conditions may be attached to such development permissions.

The Project also empowers the States of Alderney to control excavations and creates new offences concerning damage to registered buildings.

Approved by the States of Alderney 1.3.89. Awaiting Royal Sanction.

#### CONSTITUTIONAL LAW

90. Order in Council: The Fees (Alderney) Law, 1989. - Enables the States of Alderney to charge fees, fixed by Ordinance, in respect of four enactments under which licences are issued by the States, relating to "colportage", hawkers, building control and employment permits respectively.

Approved by the States of Alderney 16.12.88. Royal Sanction 18.4.89.  
Registered 6.6.89. In force on a day to be appointed. (No. XIII of 1989).

#### CRIMINAL LAW AND PROCEDURE

91. Order in Council: The Uniform Scale of Fines (Alderney) Law, 1989. - See 6.GLJ.251).

Royal Sanction 20.2.89. Registered 2.5.89. In force on a day to be appointed. (No. VI of 1989).

#### EDUCATION

92. Ordinance: The Alderney (Application of Legislation) (Education) Ordinance, 1989. - Extends to the Island of Alderney the provisions of the Education (Amendment) (Guernsey) Law, 1988 (see paragraph 40).

In force 14.3.89. (No. IV of 1989).

#### MILK

93. Ordinance: The Milk (Retail Price) Ordinance, 1989. - Increases the ceiling price for retail sales of milk.

In force 18.6.89. (Ordinance of the States of Alderney of 14.6.89).

#### ROAD TRAFFIC AND PUBLIC TRANSPORT

##### Prohibited streets

94. Ordinance: The Removal of Vehicles (Temporary Provisions) Ordinance, 1989. - Made special temporary arrangements for the day when the freedom of Alderney was conferred on certain military and naval personnel.

(Ordinance of the States of Alderney of 10.5.89).

TAXATION

Dwellings Profits Tax

95. Order in Council: The Dwellings Profits Tax (Alderney) Law, 1989. - See 6.GLJ.281.

Royal Sanction 15.3.89. Registered 16.5.89. (No. IX of 1989). Deemed to be in force from 27.5.88.

## SARK

### CRIMINAL LAW

96. Order in Council: The Uniform Scale of Fines (Sark) Law, 1989. - See 6.GLJ.287.

Royal Sanction 20.2.89. Registered 2.5.89. In force on a day to be appointed. (No. VII of 1989).

### FISHING

97. Ordinance: The Fishing (Amendment) (Sark) Ordinance, 1989. - Amends the principal Ordinance of 1958 so as to restrict fishing by foreign fishing boats in local territorial waters and replace the provisions relating to offences under the principal Ordinance.

In force 18.1.89.

### HOUSING

98. Ordinance: The Housing (Temporary Provisions) (Prescribed Persons) Ordinance, 1989. - Amends the Housing (Temporary Provisions) (Sark) Law, 1976 so as to include in the classes of person who may be allowed to build and occupy a new house any person who has been ordinarily resident in Sark for an aggregate period of 15 years (or his spouse or surviving spouse) and to include in the class of persons entitled to occupy a house built after the commencement of the Law persons employed in a professional capacity by the Chief Pleas.

In force 29.3.89.

### LIQUOR

99. Ordinance: The Liquor Licensing (General Provisions) (Amendment) (Sark) Ordinance, 1989. - Amends the principal Ordinance of 1979 so as to enable the Court of the Seneschal to restrict the permitted hours in respect of a liquor licence upon application in that behalf by the Constable, and to amend the Schedule of permitted hours in relation to Public House Licences.

In force 29.3.89.

### TAXATION

100. Ordinance: The Financial Provisions (Variation of Rates) (Sark) Ordinance, 1989. - Increases the landing tax chargeable under the Financial Provisions (Sark) Law, 1978.

In force 18.1.89.

Editorial Note: In this Article Mr. Lenfestey makes reference to Billet d'Etat No. II of 1983 which was originally included as an appendix. In view of its length and the general availability of Billets d'Etat at the Greffe we have not included it here.

## LEGISLATIVE DRAFTING IN A MINI STATE

E.J.T. Lenfestey, (formerly an Advocate of the Royal Court of Guernsey)

### INTRODUCTION

1.1 This Paper is based on my experience as a legislative draftsman extending over a period of 25 years, all but two and a half years of which was gained in one of the smallest and oldest countries of the Commonwealth, the Bailiwick of Guernsey. Those two and a half years were recently spent as Second Parliamentary Counsel in the Crown Law Office of the Government of Fiji, a larger, but still small, and newer country of the Commonwealth. The differences between the procedure followed in each country with respect to the preparation of legislation led me to appreciate all the more the simplicity and the efficacy of the procedure in Guernsey.

1.2 The purpose of this Paper is twofold -

- (1) to suggest that the procedure in Guernsey may point to improvements which could usefully be made in other small countries of the Commonwealth; and
- (2) to record the peculiar difficulties of a legislative draftsman in a mini-state as seen from the desk or workbench of an established draftsman.

## A. THE PRELIMINARY CONSIDERATION OF LEGISLATION IS GUERNSEY

### I - THE BILLET D'ETAT

#### Description of nature and contents

2.1 The one-chamber legislature of the Island of Guernsey is known as the States of Deliberation. (a) A Meeting (or Assembly) of the States is convened by the Bailiff of Guernsey, as President of the States, in pursuance of the Rules of Procedure of the States -

"by means of a Billet d'Etat containing particulars of the matters to be debated thereat together with propositions designed to enable the States to take resolutions thereon" (b)

2.2 The Billet d'Etat is a collection of official papers in the form of a brochure, prepared in the office of the Bailiff and issued from there for distribution to members of the States and members of the Douzaines (parochial councils) of the ten parishes of the Island. It is printed privately. Copies are available for purchase by members of the public. The contents of a Billet d'Etat generally receive immediate and extensive publicity in the local newspaper (there is now only one). They may fill a few score pages.

2.3 The Billet d'Etat serves both as an order paper giving the agenda and order of business for an entire Meeting of the States, and as the vehicle for reports by Committees of the States containing their proposals for administrative or legislative action. It is in this latter respect that the Billet d'Etat is so distinctive and of such particular value. Meetings of the States habitually take place on the last Wednesday of each month, except August, and generally last no longer than two days.

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(a) There is another constitutional body known as the States of Election, which is an electoral college for the election of Jurats of the Royal Court and Conseillers of the States of Deliberation. The references to the States in this Paper are to the States of Deliberation.

(b) Rule 1.(1) of the Rules of Procedure in and in relation to Assemblies of the States of Deliberation of the Island of Guernsey made on 28th July 1982. The Rules of 1982 reproduced those of 1953 with only slight variations.

2.4 The main business of a Meeting is the consideration of the reports of the standing or administering Committees of the States (corresponding to Ministries elsewhere) recommending the taking of administrative action or of legislative action by way of a Projet de Loi (or Bill) for sanction by Order in Council or by way of an Ordinance of the States. (c) Occasionally, a report, with such recommendations, may be made by an ad hoc Committee of the States appointed to enquire into a particular matter and to report to the States on its findings with recommendations. All the reports are in the form of a letter addressed to the President of the States by the President of the Committee concerned on behalf of the Committee. They are set out in full in the Billet d'Etat.

2.5 Reports of other Committees are considered by the States Advisory and Finance Committee before they are published in a Billet d'Etat. The report of a Committee will be immediately followed in the Billet d'Etat either by a brief note, in heavy print, stating that the Advisory and Finance Committee recommends the States to adopt the proposals made in the report or by a statement, also in the form of a letter addressed to the President of the States, setting out the Advisory and Finance Committee's views on those proposals - essentially on their financial implications - and recommending the States to accept them, with or without modifications, or to reject them.

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(c) The States cannot move the enactment of legislation in relation to such matters as nationality, citizenship and defence. "The States exercise legislative power by way of Ordinance. That power is in the main the common law power which the Royal Court exercised until 1948 when the powers and functions of a legislative nature of the Royal Court . . . were transferred to the States by the Reform (Guernsey) Law, 1948. The common law power to make Ordinances is limited in scope and, in particular, an Ordinance cannot impose taxation nor can it alter a Law or the common law. Apart from the common law power of the States to legislate by Ordinance, the States are expressly empowered under Laws (Orders in Council) so to legislate in matters to which those Laws relate and to which the common law power does not extend. This common law power has never been questioned or challenged." (Memorandum by the States of Guernsey to the Commission on the Constitution, Minutes of Evidence VI The Channel Islands and the Isle of Man. H.M.S.O 1973)

2.6 The Advisory and Finance Committee occupies a central position in the administrative structure of the States, which is divided into departments each of which is the responsibility of a Committee of the States.(d)

2.7 If any seven members of the States address a request in writing to the President of the States that some matter be laid before the States, the President is required by the Rules of Procedure of the States (e) to send a copy of the request (in the form of a Petition or Requete) to the Advisory and Finance Committee for its opinion on the request, and to include the request and that opinion in a Billet d'Etat. This affords a means for proposals to be put to the States on a matter which is not within the portfolio of a Committee or on which a Committee may refuse to move the States.

2.8 After the report of the administering Committee and the statement of the opinion of the Advisory and Finance Committee on the proposals made in the report, there appears a statement setting out the terms of the proposition or motion to be put to the States by the President of the States. This normally reproduces the terms of the administering Committee's proposals.

2.9 A Billet d'Etat may contain one or more appendices setting out reports for information only from Committees of the States or from other sources.

2.10 If legislation, in the form of a Projet de Loi or draft Ordinance is to be presented to a Meeting of the States, it will be published in a separate brochure which will be distributed together with the Billet d'Etat for that Meeting. The Billet d'Etat will include propositions for the approval of the legislation in the accompanying brochure. In the case of a Projet de Loi, the States are also asked to authorise the Bailiff to present a petition to the Queen in Council praying for the Royal Sanction to be given to the Projet de Loi. In the case of a draft Ordinance, the States are also asked to direct that it shall have effect as an Ordinance of the States; it will have such effect immediately or as from the date which is specified in it as the date for its commencement.

2.11 Statutory instruments (regulations and orders made by Committees of the States) which are required to be laid before the States are included in the brochure containing Projets de Loi and draft Ordinances. They may be annulled by Resolution of the States.

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(d) The mandate of each Committee is conferred and defined by the States either by way of a Resolution of the States or by way of an Order in Council.

(e) Rule 22.

2.12 The contents of a Billet d'Etat may be summarized as follows, in the order in which they are likely to appear -

- (1) The convening notice.
- (2) Election of members of Committees of the States, auditors, etc.
- (3) Propositions to approve Projets de Loi or draft Ordinance (contained in the accompanying brochure).
- (4) Reports of Committees of the States, and requests under Rule 22 of the rules of Procedure (see paragraph 2.7) containing proposals for administrative or legislative action, each followed by -
  - (a) the opinion of the Advisory and Finance Committee on those proposals; and
  - (b) the proposition to approve those proposals.
- (5) Statutory instruments to be laid before the States and contained in the accompanying brochure.
- (6) Appendices: reports etc. for information only.

2.13 A typical example of a Billet d'Etat is the Billet d'Etat for the Meeting of the States on the January 1983 (No. II of 1983). A copy of it and a copy of the brochure accompanying it, containing the legislation submitted for approval at that Meeting, are in the Appendix to this Paper.

2.14 The decisions of the States taken at any Meeting are in the form of Resolutions of the States and are printed and distributed. The Billets d'Etat and resolutions of the states for each year are bound, and volumes of these are kept at the Greffe (f), the library of the Royal Court and the two public libraries of the Island. The bound volumes, going back to 1836, are an immensely rich source of information for local historians and others.

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(f) Serves as the public records office as well as the Registry of the Royal Court and Court of Appeal, the office of the Clerk to the Magistrate's Court, the Registry of Births, Deaths and Marriages and the Registry of Conveyances.

## The convening of Meetings of the States

3.1 The Rules of Procedure of the States as to the convening of Meetings of the States by means of a Billet d'Etat (g) provide that, where the Bailiff is of the opinion that an early decision is required, not less than 3 days must elapse between the date of issue of the Billet d'Etat and the date of the Meeting convened by the Billet d'Etat. In the case of a Meeting for the consideration of the Annual Budget or the Annual Accounts of the States, not less than 15 days must elapse between the date of issue of the Billet d'Etat and the date of the Meeting being convened. In any other case, at least 14 days must elapse between those dates.

3.2 A proviso to the Rules allows the Bailiff to convene a Meeting of the States, other than one to consider the Annual Budget or the Annual Accounts, otherwise than by means of a Billet d'Etat and in such manner and at such notice as he shall decide. This power may be resorted to where the Bailiff considers that the circumstances of the case require it to be used, e.g. where an emergency has occurred and it is desirable for the States to be convened immediately. This power has not been exercised since the end of the last war in 1945.

3.3 The present practice is for a Billet d'Etat for a Meeting, other than one convened to consider the Annual Budget or the Annual Accounts, to be issued 2 days before the Meeting is due to take place. Where a major report is being presented to the States which requires to be given exhaustive consideration, such as a comprehensive legislative scheme on social security or an economic development plan, the Billet d'Etat may be issued several weeks before the Meeting at which the report is to be considered. This allows sufficient time for public opinion to be sounded, for public meetings to be held to discuss the proposals, for press and other media comment and (not unimportant in a small community) comment in the correspondence columns of the local newspaper. The forces of democracy inside and outside the legislature are thus given ample opportunity to join in the discussion of the proposals.

3.4 The contribution of the local newspaper to the publicity given to the contents of a Billet d'Etat is enormous. It repeats, largely verbatim, the contents of each Billet d'Etat the day after it is issued, in the case where the Billet is very bulky, over the next few days.

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(g) Rule 1.(2), (3), (4) and (5)

3.5 This advance notice of the reports and proposals of Committees of the States, through the Billet d'Etat and the press and other media, provides the opportunity for thorough consideration to be given by members of the legislature and members of the public alike to those reports and proposals, and for the members of the States to arrive at their decision thoroughly informed about the subject matter of their decision. They may, of course, have less time to consider amendments to propositions to be moved at a Meeting, but even these are usually known in advance and reported in the press.

The preparation of reports of Committees of the States containing proposals for legislative action

4.1 It is almost invariably the case today that legislation of any kind will be presented to the States for their approval only if it is preceded by a Resolution of the States, passed at an earlier date, directing the preparation of the legislation. Very exceptionally, the report recommending the preparation of the legislation and the legislation itself will both be presented to the States at the same Meeting. This will be permitted by the Bailiff where there is an urgent need for the legislation, but even in such an exceptional case the report will have been considered and the principles of the legislation agreed to before the legislation is presented.

4.2 At one time, it was not uncommon for draft Ordinances to be presented to the States without any preliminary proceeding and merely on the recommendation of a Committee of the States. This practice has been largely discontinued. On occasions, an Ordinance made under the enabling provisions of an Order in Council will be presented to the States without any preliminary proceeding. In such a case, the authority for the preparation of the Ordinance will stem from the original decision of the States directing the preparation of a scheme of legislation by way of the enabling Order in Council and Ordinances to be made under it. The report proposing the introduction of that scheme will have given sufficient indication of what the Ordinances are to contain.

4.3 The Billet d'Etat has thus the signal merit of being the official means for enabling the legislature to discuss and decide on the need for proposed legislation and the principles of proposed legislation before the legislation is prepared. The procedure for such preliminary consideration of proposed legislation is broadly analogous to the general rules of financial procedure of the House of Commons under which a charge on the public funds must first be considered in the form of a resolution which, when agreed by the House, forms a necessary preliminary to the bill or clause by which the

charge is authorised(h). This procedure of the Commons had a wider use at one time in relation to bills other than those founded on financial resolutions -

"It was at one time an accepted practice, where circumstances appeared to require it, to initiate legislation by the preliminary discussion of resolutions in Committee of the whole House (e.g. Government of India (No. 3) Bill, 1858, and the Parliament Bill, 1911). This procedure has now been superseded in the case of government bills, by the practice of prior presentation to Parliament of papers setting out the principles of the legislation that is proposed. Such papers may be the subject of debate, when the House has the opportunity to express its opinion before legislation is finally decided on" (i).

4.8. The reason given for this procedure being discontinued in the Commons by the Standing Order of 1938 in relation to Government Money Bills is that -

". . . the debate on the resolutions was inevitably a debate upon the main principles of the Bill, and therefore covered the same ground as the debate upon second reading. The same Members might make exactly the same speeches in Committee on the resolutions, and on second reading." (j)

This does not occur in Guernsey. Once the States have discussed the principles of proposed legislation and directed that the legislation be prepared, the legislation is usually approved without debate. It is rare for the legislation to be amended when it is presented for approval, although there is no rule stopping the principles of the legislation being debated again on such an amendment. At the stage when the legislation is presented to it, the States should have

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(h) The issue of public money for the public service in Guernsey is merely authorized by a Resolution of the States, usually passed at the Meeting to consider the Annual Budget. There is no constitutional requirement for expenditure authorized by a Resolution to be sanctioned by legislation. Taxation must be effected by or under an Order in Council, but the Income Tax Law confers power on the States to fix the standard rate of income tax by Resolution.

(i) Erskine May, Parliamentary Practice (19th edition), p. 484

(j) "The House of Commons at Work" by Eric Taylor (9th edition), p. 103

the assurance that it has been scrutinized by the Legislation Committee to establish that it will effectually carry into effect the Resolution of the States which it is designed to implement (k).

4.4. A report containing proposals for the enactment of legislation of any kind will have been submitted to the Attorney-General in draft form before it is sent to the Bailiff so as to ensure that the report contains sufficient indication (not necessarily in any great detail) as to what will be required to be provided for in the legislation. The report may set out a legislative scheme in some detail or it may merely propose that legislation on a certain subject should be prepared on the lines of an Act of Parliament dealing with that subject.

4.5. Whatever happens, in every case the legislative draftsman will be asked to consider the draft report, and very often he will have had a hand in its preparation. On occasions, he may virtually be the sole author of the draft report and have played a leading role in the formulation of the policy which is being put forward for adoption. He may have had fruitful discussions with the departmental civil servant concerned and worked in successful collaboration with him in producing the draft report; this is a rewarding experience, but it does not happen always.

4.6. Before it is published in a Billet d'Etat, therefore, a report of a Committee of the States containing proposals for the enactment of legislation will have been considered -

(1) in its draft and final form, by the Attorney-General and the legislative draftsman

(2) in its final form, by the Bailiff and the Advisory and Finance Committee.

During these preliminary stages, the administering Committee may be persuaded to alter its proposals or to withdraw them altogether. The Bailiff is not in a position to direct any such alteration or withdrawal, but he is in a position to exercise appreciable influence. In the course of this century, he has come to exercise this power of influence less and less as the administrative structure of the States has progressively

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(k) See paragraph 6.5, which deals with the functions of the Legislation Committee.

broadened and the central role of the Advisory and Finance Committee increased in importance, which has relieved him of most of his administrative responsibilities. He remains responsible for arranging the business to come before the States, but he is not in a position to refuse to place before the States any question or business if requested to do so by members or Committees of the States.

4.6. The Advisory and Finance Committee, if it has not already among its members the President of the Committee proposing any legislation, may invite him to discuss his Committee's proposals with them. He will, in that event, usually be accompanied by the principal officer of his department. In the course of these discussions, modifications to the proposals may be agreed and a fresh report submitted for publication in a Billet d'Etat. It is not uncommon for the sponsoring Committee to withdraw its proposals altogether or to defer their presentation to the States after discussions with the Advisory and Finance Committee, particularly if public expenditure is involved.

4.7. The copy of the Billet d'Etat No. II of 1983 in the Appendix to this Paper contains two major reports, which include proposals for the enactment of legislation. The first is on the proposed extension of the social security scheme to allow for the grant of attendance allowances and invalid care allowances, and the second is on a new scheme for the licensing of public transport services and public service vehicles. The report on attendance and invalid care allowances sets out in the first eleven paragraphs an ample explanation of the existing legislation with respect to the provision of financial aid to disabled persons, and argues the case for that legislation to be supplemented so as to bring those allowances within the social security scheme of the States. The next part of this report sets out clearly and in straightforward prose the principles of the proposed legislation; the qualifying conditions for entitlement to each allowance, the rates of each allowance and how they are to be determined, the making of claims and payments and the administrative machinery for determining claims. The report then goes on to recommend that the States approve in principle the introduction of the proposed scheme, and ends with a request to the President of the States to submit appropriate propositions to the States, including a proposition directing the preparation of such legislation as is required to give effect to their Resolution. The Advisory and Finance Committee's report follows with a characteristic reference to the need for curbing public expenditure, but also with a recommendation that the proposals of the sponsoring Committee be adopted. The terms of the propositions to be put to the States in relation to those proposals follow next, including one for authorising the preparation of the proposed legislation.

Advantages of the procedure in Guernsey, with particular reference to the legislative draftsman

5.1. The procedure for preliminary consideration of proposals for the enactment of legislation has many advantages, not least for the legislative draftsman. There is much less risk under this procedure of his time being taken up on preparing legislation which will be rejected by the legislature, and hardly any risk at all of legislation he has prepared being abandoned by the sponsoring Committee before being presented to the States.

5.2. If the sponsoring Committee has second thoughts and decides that it does not wish to proceed with the proposed legislation, it is bound to go back to the States for the original Resolution directing the preparation of the legislation to be rescinded.

5.3. Elsewhere, among other smaller countries of the Commonwealth, instances may be found where a major Bill is prepared, even printed and published, without the legislature having given the principles of the Bill any preliminary consideration. It may be abandoned before or after it is printed and published. If it is presented to the legislature it may be at very short notice, being published shortly before it is due to be presented. Explanatory data may be attached to the Bill, but this will usually follow the sequence of the provisions of the Bill and be too succinct to provide a clear exposition of the principles of the Bill. This data will not in any event include any reasoning or evidential material to support the case for the Bill.

5.4. Months of concentrated effort by the draftsman may be wasted altogether. If the Bill is proceeded with, it may be the subject of a desultory debate resulting largely from a lack of a clear understanding of its principles, which have not been explained sufficiently and in good time beforehand. This waste of time and effort may be afforded in larger countries, but it is expensive and should be avoided in the smaller ones, particularly if the services of an ex-patriate draftsman have had to be used.

5.5. The absence of political parties in Guernsey (or at least the absence of their representation in the States) and the resulting absence of party government and of an official opposition, facilitates the smooth operation of government by committees of the legislature which would be impossible elsewhere. It might be quite impracticable for anything similar to the Billet d'Etat to be used in other countries, but it is suggested that consideration might be given to the revision of the standing orders of their legislatures so as to ensure that, as a general rule, Bills are brought in upon resolutions, whether or not they are designed to authorize a charge on public funds. In this way the interests of democracy might be better served, and the services of the draftsman made more effectual.

## II - THE LEGISLATION COMMITTEE OF THE STATES OF GUERNSEY

6.1. Once the States have passed a Resolution directing the preparation of legislation, it is the responsibility of the Law Officers of the Crown, the Attorney-General and Solicitor-General, to draft the legislation and to present it to the Legislation Committee of the States. The work of drafting the legislation will normally be carried out alone by one of the legislative draftsmen employed in the office of the Law Officers. He will have to cope with some, if not all, of the difficulties mentioned in Part B of this Paper.

6.2. The States Legislation Committee is the creature of the Reform (Guernsey) Law, 1948. (1) Its constitution and functions are set out in section 65 of that Law. It consists of the Bailiff, who is President of the Committee, and seven members of the States elected by the States.

6.3. The Committee was intended to take over the functions of the Royal Court (sitting as a Court of Chief Pleas) before the reforms of 1948, and to provide an effective means of controlling the whole legislative process, which was thought necessary on account of the situation then prevailing and partly caused "by the reluctance of the States to undertake the detailed examination of legislative proposals by a method corresponding to the Committee Stage in the Imperial Parliament". (m) It was felt, at the time the proposals were made for setting-up the Committee, that members of the States generally had insufficient time to devote to intensive work in the States and did not generally concern themselves with the detailed contents of measures before them, but were content to lay down the broad lines on which legislation should be framed and leave to the Royal Court the task of ensuring that their wishes were carried out. This applies today as much as it did in the early post-war years, although of course the Legislation Committee now stands in the place of the Royal Court for the purpose of giving detailed consideration to draft Projets de Loi and draft Ordinances.

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(1) Ordres en Conseil Vol. XIII, p. 288. These bound volumes of Orders in Council, written in the English Language since the last war, are published under the authority of the Royal Court. There are now 26 volumes and several more due to be compiled.

(m) The Report of the Committee of the Privy Council on proposed reforms in the Channel Islands, presented by the Secretary of State for the Home Department to Parliament, March 1947 (Cmd. 7074) p. 31. The reforms of 1948, including the establishment of the Legislation Committee, followed the recommendations of this Report.

6.4. The Committee of the Privy Council appointed in 1946 to enquire into reforms in the constitution and procedure of the States of Guernsey (as well as of the States of Jersey) recommended that responsibility for the preparation of all legislation should be transferred from the Royal Court to the States, (n) and suggested -

". . . that the States should examine the possibility of adopting a scheme on the following lines. If it be found impracticable for the States to undertake the detailed examination of Projets de Loi and other forms of legislation at present examined by the Royal Court, those functions might be delegated by the States to a Committee of the States. All legislation should be drafted under the supervision of the Law Officers of the Crown, for presentation to the Committee. We suggest that this Committee should be given powers by the States to decide when circumstances justify the issue of immediate legislation, such as is at present provided for by Ordinance, and to make the necessary order or regulation to be operative immediately. In general, all Projets de Loi, and when there is no urgency, subordinate legislation, should, after examination and adoption by the Committee, be presented to the States, and should not be operative unless approved by the States or, in the case of Projets, by the States and His Majesty in Council. Legislation passed by the Committee and designed to have immediate effect should be subject to a negative resolution of the States at its next meeting without prejudice to anything done thereunder before the passing of the negative resolution. . . ." (o)

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(n) Before 1948, drafts of Projets de Loi and Ordinances were prepared by or under the supervision of the Law Officers, and then presented to the Royal Court for detailed consideration. This took place in public and any member of the public had the right to be heard either in person or by Counsel as regards any Ordinance which might affect his interests, but not as regards a Projet de Loi, in which the Royal Court was bound by the Resolution of the States. The text of the draft of the more important Ordinances was published in the local newspapers and public notice given of the date when the Court was to consider it. The Committee of the Privy Council noted the peculiarity of the part played by the Court, which took a decisive part in the framing of legislation which they might be required to construct in their judicial capacity later on. The Court might itself initiate Ordinances, and it was not unusual for it to do so.

(o) Report of the Committee, p. 31.

6.5. In the event, the Legislation Committee was established with the functions of -

- (a) reviewing and revising every Projet de Loi presented to the Committee by a Law Officer of the Crown for the purpose of ensuring that the same is in accordance with and will effectually carry into effect any Resolution of the States designed to be implemented thereby and of transmitting the Projet de Loi to the States for the consideration and decision of the States, subject to the Royal Sanction;
  - (b) of reviewing and revising every draft Ordinance presented to the Committee by a Law Officer of the Crown at the instance of the States or of a Committee of the States (p) and, except where the Committee exercises its power mentioned in the next sub-paragraph, of transmitting the draft Ordinance to the States for the consideration and decision of the States; and
  - (c) if the Committee is of the opinion that any draft Ordinance should in the public interest be made immediately, making the Ordinance itself so as to have effect immediately or on such date as the Committee shall prescribe.
- (q)

The Power of the Committee to make Ordinances (commonly called Emergency Ordinances) is rarely used. It may be used where an Ordinance is required to be brought into effect between the dates of two Meetings of the States and where it is not of sufficient importance as to require a Meeting of the States to be convened specially to make the Ordinance. An Ordinance made by the Committee is required to be laid before a Meeting of the States as soon as may be after it is made. The States may then annul the Ordinance.

6.6. The Legislation Committee very rarely refuses to approve a Projet de Loi or draft Ordinance. Copies of draft legislation for consideration by the Committee are usually distributed to members of the Committee at least seven days before the Committee is due to meet. The meetings of the Committee are attended by a Law Officer

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(p) As mentioned in paragraph 4.2 the practice of draft Ordinances being presented merely at the instance of a Committee of the States has been largely discontinued.

(q) Section 66 of the Reform (Guernsey) Law, 1948.

of the Crown, the draftsmen responsible for drafting the legislation being considered, the President of the Committee of the States sponsoring the legislation and his principal departmental officer. There is thus an opportunity for members of the Legislation Committee to obtain whatever explanation they require about the draft legislation. It will be their duty to collate the draft legislation with the report of the sponsoring Committee in the Billet d'Etat containing the proposals for the legislation and with the Resolution of the States. Any material departure from the terms of that Resolution will only be allowed by the Committee subject to the approval of the States when the legislation is presented to the States for approval. The Greffier, who is Clerk of the States, attends meetings of the Legislation Committee to record its proceedings.

6.7. The preliminary consideration of legislation in Guernsey is thus carried out in three stages -

- (a) firstly, the report to the States containing proposals for legislation will have been considered by the Law Officers of the Crown, the Legislative Draftsman, the Bailiff and the Advisory and Finance Committee;
- (b) secondly the report will then be considered by the States who may direct the preparation of the legislation; and
- (c) thirdly, the Legislation Committee will examine the draft legislation before it is presented to the States.

This is in sharp contrast with the procedure used elsewhere, where a Bill may be introduced into Parliament by the Minister concerned, at short notice and preliminary consideration having been given to it possibly only by the Cabinet, the Minister and his principal departmental officers, the Legislative Draftsman and the Attorney-General. It will virtually be sprung on members of the legislature, who will usually be able to debate and take a decision on the principles of the Bill only after it has been introduced, with little or no opportunity of informing themselves about the merits or demerits of the Bill.

B. THE PECULIAR DIFFICULTIES OF A LEGISLATIVE DRAFTSMAN IN A  
MINI-STATE

The small voice of long experience in a mini-state

7.1. Much has been written and spoken about the chronic and universal shortage of legislative draftsmen, most acutely felt in the smaller countries, and about ways and means of meeting this shortage. There is a fundamental divergence of views about the value of courses in formal training (r). I suspect this is largely between established draftsmen on one side and other lawyers on the other side (s), although even established draftsmen may have different views. Too often writers and speakers on these subjects fail to distinguish, or at least to point out the differences between the problems of the draftsman in a large country and those of his counterpart in a small country. One might say, that the smaller the country the more diverse and intense are likely to be the problems of the draftsman.

What may be required of a recruit for the post of draftsman in a large country may not be sufficient or appropriate in the case of a recruit for the post of draftsman in a small country, where no apprenticeship is available under the tuition of established draftsmen and where many tasks extraneous to the work of drafting may need to be carried out. Unless this is clearly understood, advice on how to deal with the problems of finding draftsmen for the smaller countries may not be soundly-based and practical.

7.2. This is an attempt to explain some of the peculiar difficulties often encountered by draftsmen in the smaller countries. It is not made from a position of any eminence: far from it. It is made from the workbench, so to speak, and derives from a lengthy experience as a draftsman in a very small country of the Commonwealth.

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(r) In the report of the Working Session on "Legislation: Principles and Methods" (25th July 1977) of the Commonwealth Conference on Law Reform, one speaker (from Scotland) thought that one of the difficulties was that there was no system for training draftsmen in the U.K. as was found in Canada. A Canadian representative, however, said that her experience was that draftsmen had to learn their technique by working with an established draftsman.

(s) See paragraph 7.18.

### Size of country irrelevant to size and number of problems

7.3. The size of a country and of its population does not, however, determine the size and number of the problems of the draftsman. The population of Guernsey is around 50,000 and the island measures only 24 square miles, yet it has criminal legislation, social security legislation, income tax legislation, education legislation, road traffic legislation, public health and other legislation which would be adequate to meet the needs of a country several times the size of its population.

7.4. Owing to the peculiarities of its history and the evolution of its laws and institutions of government, the draftsman in a small country may have to cope with a more intricate governmental structure than the draftsman in a large country. Guernsey has two dependencies, Alderney and Sark. This is something it has in common with several other small countries of the Commonwealth which comprise an archipelago. These dependencies have their own governmental structure, make their own laws and have their own corpus juris besides being subject to Bailiwick legislation. The variations in the extent of the powers of their legislatures and of their courts in civil and criminal matters, and the different relationships they have with Guernsey, add complications for the local draftsman in Guernsey, who is the draftsman for all three jurisdictions separately and for the Bailiwick as a whole. To take one field of law, Sark, although it has under a thousand inhabitants, has a law of successions of its own, quite different to that of Guernsey and of Alderney, which each has a different law of successions. The local draftsman must be conversant with all three, and with the history of the law of successions in each island, when he comes to answer United Nations questionnaires on the subject of rights of inheritance in the Bailiwick, or to draft legislation dealing directly with such rights in any of the islands or legislation on the status of persons which may affect those rights. He will not have standard text books or legal specialists in or outside other departments to guide him.

### Lack of assistance

7.5. The lack, often total, of anyone to assist the draftsman in the preparation of legislation for a mini-state is a peculiar difficulty which his counterpart in a larger country will not meet at all or very seldom. The latter will usually begin his task when he receives detailed drafting instructions from the Ministry concerned, which may have its own legal department.

This extract from the Renton Report of 1975(t) makes  
envious reading for the former -

"The draftsman and his clients

Government Bills

3.8. Parliamentary Counsel are in most instances instructed by the Government department most closely concerned with the subject matter of a Government Bill, through a member or members of its legal staff. The instructions may be in varying degrees formal or informal, but in principle they are expected to contain a sufficiently detailed statement of what the Bill is to achieve and as much background information as may be necessary. . . . A draft Bill is then prepared by the draftsman as an expert team. . ."

It is not unusual for the draftsman in a mini-state to be presented with a 'policy vacuum' and be expected to fill it. He will, on such occasions, be expected to devise a legislative scheme alone or in collaboration with a departmental civil servant who, through no fault of his own, may be of little assistance. He will become, in effect, the author or co-author of the policy to be implemented by legislation which he himself will be drafting. His influence, for good or bad, can therefore be of crucial importance. His competence and sense of public responsibility, or his lack of one or the other or both, may well determine whether anything is done or not done, and, if it is done, if it is done thoroughly or in a half-baked fashion.

In those circumstances, the political head of the department concerned and his supervising officer (and the Law Officer, if legislation is prepared in his office) are entitled to expect a lead to be given by the draftsman. The draftsman's experience should be wider and longer than theirs, taking into account that the size of the population of a small country is generally too small to produce consistently over any given period a succession of well-seasoned politicians in charge of the same department (or, perhaps, of any department) and of experienced civil servants with the relevant skills. If the draftsman is disinclined or unable to show the required initiative, he may well be the primary cause for the failure of the government to deal effectively and in good time with a problem affecting the national interest. This is not overstating the responsibility of the draftsman in a mini-state.

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(t) "The Preparation of Legislation". Report of a Committee appointed by the Lord President of the Council. Chairman: The Rt. Hon. Sir David Renton. Cmnd. 6053.

## The visiting expert on new legislation

7.6. Guernsey is relatively well-stocked with experienced civil servants, but there are no lawyers in any department outside the office of the Law Officers. Several departments also lack the expertise among their staff which is necessary to enable to devise the policy for a piece of legislation without appreciable assistance from the local draftsman. Discussions between the supervising officer of a department and the local draftsman may often be the seed-bed of such policy. They may develop into a fruitful and rewarding collaboration over many years. Unlike several other small countries, it has hardly if ever been found necessary to engage the services of an expert from outside. The visiting expert appointed to advise on new legislation is almost unknown there.

7.7. In those other countries, the draftsman has to undertake the difficult task of collaborating with such a visiting expert (I.M.F.; I.L.O.; U.N. etc.), who is usually making a short visit and is invariably in a great hurry to deal with vast subjects (finance management, town and country planning, accident compensation, etc.). The draftsman may not even have the time to collaborate with the visiting expert, who may depart, never to be seen again, leaving behind a copious report replete with ominous "grey areas" on which there is no prospect of enlightenment. I imagine that there are not a few cupboards in government law offices which have at least one such report gathering dust in oblivion, possibly sitting on a fat first draft of the legislation intended to implement its proposals - the work of the harrassed and bemused draftsman.

7.8. The visiting expert, who may have a formidable reputation, particularly with the Minister and principal officers of the department concerned, may arrive with the expectation of having the draftsman to assist him from the very start and obtaining the early completion of legislation to give effect to his proposals. The visiting expert, even if he is a lawyer himself, will almost certainly suppose that the preparation of the legislation will take only a short period of time to complete. He will not distinguish between the preparation of legislation, with the need for minute attention to detail, and the preparation of his report, filled as it may be with a splendid historical introduction, broad statements of aims and any number of appendices containing statistical information about population, crops, motor vehicles, etc., and recommendations in general terms. His report will not have to run the gauntlet of judicial review and the

strictures of judges. (u) Appendix B of the Renton Report contains an awesome collection of these, aimed at the draftsman and not at the expert advisers who may have driven the draftsman to commit his betises.

#### Extraneous legal work

7.9. A frequent problem for the draftsman in the mini-state is that he may be called upon at any time to interrupt his drafting, even of legislation which is urgently needed, to do other legal work quite unrelated to drafting. Such an interruption may last for days, maybe weeks, seriously disrupting his schedule of work and perhaps aborting a promising train of thought. A draftsman often has many kites flying at the same time, if he has to let them go quickly, he may spend a long time trying to retrace them.

7.10. He will not only have to turn his mind to questions of statutory interpretation which are immediately related to the preparation of the legislation he has in hand, but also to questions relating to the interpretation of statutes which he has no reason to deal with for his own purposes. He may be asked to draw up an opinion on a matter of considerable public importance for the benefit of a Minister, which elsewhere would be the function of the legal advisers within the department of the Minister. It may even be a common law subject on which he is asked for an opinion. If he seeks to rely on the English canons of statutory interpretation, he may be discouraged to find -

"It is notorious that the canons of statutory interpretation, far from forming a symmetrical and harmonious body of rules, overlap and often contradict one another. It is not too much to say that they -

"consist of a number of guides which largely cancel each other out, of learned formulas giving a deceptive appearance of logic which only serves to conceal the choice between opposing conclusions of equal logical validity, and of inarticulate ideological premises which depend on personal predilection and on changing trends of public and social policy (Friedmann, Law and Social Change in Contemporary Britain, 243-244.)"

[Extract from S.A. de Smith's Judicial Review of Administrative Action (3rd Ed.), pp. 85 and 86]

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(u) Strictures sometimes fired, or cross-fired, from canons of perhaps dubious accuracy. See the quotation in paragraph 7.11.

If the draftsman is called upon to interpret a statute which he himself has drafted, he will find an excuse, if not consolation, in Lord Halsbury's most wise dictum that -

"In construing a statute I believe the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed. At the time he drafted the Statute at all events, he may have been under the impression that he had given full effect to what was intended; but he may be mistaken in construing it afterwards just because what was in his mind was what was intended, though, perhaps it was not done."(v)

7.11. It is not unknown for the draftsman in a mini-state to prepare a conveyance, lease or other contract document, and to frame criminal charges as well, if the Law Officer is also responsible for criminal prosecutions.

7.12. The Attorney-General, Minister of Justice or the other head of the ministry or office in which the draftsman operates may hold several portfolios. He may or may not also be the Director of Public Prosecutions. He may be responsible for matters as diverse as liquor licensing, stamp duties, land registration, economic development, the public records office, the registry of companies, patents and trademarks, criminal legislation and many others. The draftsman, working in such an office, cheek-by-jowl with other legal officers, will often be called upon to assist them in advising on any matters within the portfolio of the Law Officer or Minister.

#### Subsidiary legislation

7.13. The draftsman in the mini-state will be expected to draft subsidiary as well as principal legislation; regulations, orders and rules of court, matters which elsewhere would be dealt with by the legal department of a Ministry, a Rules Committee or Registry of the Supreme Court. He may have to draft an entire scheme of legislation, the enabling Law and the subordinate legislation, which may be very tedious and involve

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(v) Hilder v. Dexter (1902) A.C. 474.

minutiae which draftsman of principal legislation only are not troubled with. He may even have to draft pro forma administrative orders, notices and other documents, and thus have been concerned at every stage from the formulation of the policy for the legislative scheme to the detailed implementation of the legislation.

#### Uninformed and un rebutted criticism

7.14. A risk which is greater for the draftsman in the mini-state is that of uninformed criticism, which may be left unanswered for want of the information being made available to the Minister at the time the criticism is made in or outside the legislature. The Minister may not be properly informed for one reason or another, including the inability of his principal departmental officers to fully grasp the implications of the legislation. The draftsman may be the target of scathing and groundless criticism which will go un rebutted. He may have merely reproduced the provisions of an Act of the Imperial Parliament, but this will not spare him from being accused of bad drafting, even when the provisions he has reproduced are well-respected and time-honoured. (w)

#### The debt due to draftsmen elsewhere

7.15. The opportunity should be taken to express gratitude and respect for the work of Parliamentary Counsel in the United Kingdom and of legislative draftsmen elsewhere in the Commonwealth, the products of whose skills have been of considerable assistance to the draftsman in the mini-state, isolated as he is and often in need of being able to refer quickly for guidance and information to sound and reliable source material.

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(w) Two memorable instances of this happened to the writer. On the first occasion, the famous Cowper/Temple clause on non-denominational religious instruction, originally inserted in the Education Act of 1870 and now in the Education Act of 1944, was reproduced word for word in the Education (Guernsey) Law, 1970. This masterly compromise provision of Earl Cowper and Archbishop Temple was described in the States of Guernsey as a "sloppy piece of drafting"; no reply was made to this charge. On the second occasion the provisions of a Projet de Loi presented to the States of Alderney, covering several foolscap pages and reproducing the provisions of the Civic Amenities Act of 1968 (now in the Town and Country Planning Act 1974) were lambasted by a critic as "so many pages of the biggest rubbish I have read in my whole life"; again, there was no reply to this criticism.

Halsbury's Statutes of England and other published collections of the statutes of England and other countries of the Commonwealth are essential in the draftsman's library.

7.16. An Act of the Imperial Parliament, suitably adapted, in the form of a discussion paper, may be the mainspring of policy-making on an important subject. In this way the policy-makers are assured of some expertise which they can rely on for support, the draftsman can adapt the Act confident that what is being reproduced has been tried elsewhere and the judges can refer to the English case law if the provision of the Act corresponding to the one under consideration has also been the subject of judicial review. This indirect use made of the skills of other draftsmen elsewhere in the Commonwealth is an extremely valuable source of mutual aid which may not be sufficiently recognised. It is a respectable form of plagiarism which should give great satisfaction to the original author.

#### The problem of recruiting draftsmen

7.17. I have mentioned in paragraph 7.1 the divergence of views held on the usefulness of courses of formal training in legislative drafting. In 26 years of drafting, I have never come across an established draftsman who began his career with such a course or at any time attended one. I have, however, experience of 5 trainees, three of whom served or half-served a term of pupillage in an office with established draftsmen and who decided not to go on, and two who attended an institute where they received formal instruction in drafting but who both found themselves wanting in the aptitude for the job.

7.18. So far as I can see, few discover the attractions and the inward satisfaction to be derived from drafting which are described in R.M. King's excellent Manual on Legislative Drafting (x) and which are within my experience. I think what is essential in an aspiring draftsman, whether he is a pupil or student, is the aptitude for the work of drafting. No amount of ability or training will make up for want of aptitude. Fine brains may try it, but may soon tire of it. I agree with the lady from Canada, mentioned in the footnote in paragraph 7.1, that a draftsman best learns his trade by working with an established draftsman. If he finds that he has the necessary aptitude for the job he should then go on to make a good draftsman.

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(x) Published in London by the Commonwealth Secretariat, 1976.

A natural propensity for untiring application, an inventive mind and the ability to persevere in preparatory research and in the actual work of drafting (sometimes on very dull subjects) are essential prerequisites for anyone aspiring to become a draftsman. The best evidence of that is not a long list of achievements and skills but perhaps in a simple record of several years of drafting.