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NINTH ISSUE

Introduction

This edition covers the six month period from 1st January, 1990 to 30th June, 1990. Two diverse articles are included: an English translation of a paper on Retrait Lignager presented at the recent locally-held "Semaine de Droit Normand" by Advocate N. Le Poidevin; and an article examining the peculiar position of simnel in sixteenth century legislation by local historian Darryl Ogier.

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 9.GLJ followed by the paragraph number.

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Compiled 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 1990.

24th September, 1990.

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ADVOCATES

1. Signature of summonses - duties - Practice Direction

1. When counsel signs a summons on behalf of a client, it will be presumed that counsel has taken sufficient instructions to establish that there is an arguable cause and the cause is drawn in a conventional way so as best to present the case of the client. Counsel's signature may not be qualified to exonerate counsel from these responsibilities to the client and the Court.
2. Counsel shall be responsible for ensuring that the certificated cause is drawn in due form and lodged with the Court.
3. The Court will not accept ex parte causes unless they are endorsed by an Advocate. The same responsibilities lie upon Advocates in this respect as in the signing of summonses.
4. Witness summonses shall not be signed by counsel unless counsel is satisfied that the proposed witness has material evidence to present to the Court. Any witness summons must have attached to it a copy of the cause to which it relates.
5. This Direction in no way derogates from the oath sworn by Advocates on their admission.

(Practice Direction of 23.2.90).

AGRICULTURE AND ANIMALS

Animals - offences relating to

2. Projet de Loi: The Summary Offences (Amendment) (Bailiwick of Guernsey) Law, 1990. - See paragraph 24.

Dogs

3. Ordinance: The Stray Dogs (Amendment) Ordinance, 1990. - Amends the 1941 Ordinance by increasing fees payable to the police in respect of the seizure and destruction of stray dogs.

In force 27.6.90. (No. XVII of 1990).

BANKING, INSURANCE AND FINANCE INDUSTRIES

Exchange Control

4. Order in Council: The Exchange Control (Special Provisions) (Repeal) (Bailiwick of Guernsey) Law, 1990. - See 6.GLJ.16.

Royal Sanction 1.5.90. Registered and in force 19.6.90. (No. IX of 1990).

Financial Services Commission

5. Ordinance: The Financial Services Commission (Limitation of Liability) Ordinance, 1990. - Excludes the liability of the Commission and of the States under the Financial Services Commission (Bailiwick of Guernsey) Law, 1987 (see 6.GLJ.17) except in cases of bad faith.

In force 27.6.90. (No. XIV of 1990).

Insurance business

6. Ordinance: The Insurance Business (Limitation of Liability) Ordinance, 1990. - Excludes the liability of the Guernsey Financial Services Commission, the States, the Advisory and Finance Committee and H.M. Greffier under the Insurance Business (Guernsey) Law, 1986 (see 3.GLJ.7), as amended, except in cases of bad faith.

In force 27.6.90. (No. XV of 1990).

Investment business

7. Ordinance: The Protection of Investors (Limitation of Liability) Ordinance, 1990. - Excludes the liability of the Advisory and Finance Committee and the Guernsey Financial Services Commission under the Protection of Investors (Bailiwick of Guernsey) Law, 1987 (see 5.GLJ.5) as amended except in cases of bad faith.

In force 27.6.90. (No. XIII of 1990).

BANKRUPTCY AND INSOLVENCY

International co-operation

8. United Kingdom Statutory Instrument: The Insolvency Act 1986 (Guernsey) Order, 1989. - Extends section 426(4), (5), (10) and (11) of the Insolvency Act 1986 (replacing section 122 of the Bankruptcy Act, 1914), with modifications, to the Bailiwick. The effect is to require Bailiwick courts to assist other courts in the British Islands exercising corresponding jurisdiction in relation to insolvency law (which is defined for the Bailiwick's purposes by the extending Order) and in so doing to apply, having regard to the rules of private international law, either local law or that of the requesting court.

Registered 22.1.90. In force 1.2.90. (U.K. S.I. No. 2409 of 1989).

COMPANIES

Law reform

9. Projet de Loi: The Companies (Guernsey) Law, 1990. - Modernises, improves and clarifies the law relating to Guernsey-incorporated companies, making significant changes in the fields of
- corporate capacity and a company's dealings with third parties;
 - the relationship between a company and its members;
 - liquidation, striking-off and restoration to the register;
 - internal company administration, accounting, audit and meetings.

Part I deals with the membership of companies, members' rights, constitutive documents and changes to them, and dealings with third parties.

The Projet will permit any two people (including spouses) to constitute a company; rules about quorum etc. are modified in consequence, and the definition of who is a company member is clarified. Companies will be permitted more general objects and, although power to alter a memorandum is specifically restricted to the cases for which the Companies Laws make express provision, to the existing cases there is added a general power to change the objects by special resolution (the rules as to which are relaxed as noted below). In such a case, application to cancel the alteration may be made by at least 15% of the members to the Ordinary Court, which is given wide powers to refuse confirmation or impose conditions including a condition that the company purchase dissentient members' shares. A company's articles may be altered without the Court's confirmation. On the other hand, the requirement of Court approval for a change of company name is retained and the Court will be required to have regard to any views expressed by the Advisory and Finance Committee in considering whether a proposed new name would be misleading or inappropriate in relation to the company concerned.

Clauses 8 to 10 of the Projet in effect abolish the ultra vires rule in its application to Guernsey companies. A person dealing with a company will not be bound to enquire as to the limitations of its memorandum or any restriction on directors' powers, which are deemed in favour of that person to be free of any limitation provided he is in good faith (which is prima facie presumed, even if he knew of an excess of powers). However, the duties of directors themselves to adhere to the memorandum and respect limitations on their powers are unaffected, and members are given a specific right under clause 11 to restrain excesses by court order. The Court is also given wide powers to regulate a company's affairs (and even order the purchase of members' shares and regulate any consequent reduction in capital) on the application of members who are or would be unfairly prejudiced by any actual or threatened action or inaction by the company; this important new remedy is available whether or not any fraud is involved and irrespective of whether the company's action could be ratified in general meeting.

Part II restates and modifies the law relating to the keeping and inspection of books and records, and the maintenance and audit of company accounts.

The evidential effect of company minutes and the matters in respect of which they must be made are clarified, and the requirement for minutes to be approved "seance tenante" is abolished. Companies will have to keep registers of their directors and secretaries and, in the case of companies having more than 50 members, up-to-date indices of their members. Each of these, and the register of members, must be kept at the company's registered office and available for inspection (free to members and directors; on payment of a prescribed fee in the case of other people). The keeping of such records on computer will be permitted so long as they are capable of being reproduced in legible form and adequate precautions are taken against falsification.

Accounting records - which will have to be kept for 6 years but may also be on computer provided the above requirements are met - will be required to disclose the company's financial position at any time with reasonable accuracy and enable the directors to make sure that the balance sheet and profit and loss account are properly prepared in accordance with the law.

Details of their required content are specified and, if they are not kept in Guernsey, accounts and returns in respect of them must be sent here regularly.

Subject to a saving for existing operators, auditors will in future have to hold British, Irish or recognised overseas professional qualifications; the categories of people who are disqualified on grounds of connection from auditing a company's accounts are widened and the law on disqualification generally is clarified; auditors' powers and duties are restated and slightly revised, and the law on the making and content of their reports is updated. Two further potentially important future reforms for which the Projet caters by empowering the States to make provision by Ordinance are the possible relaxation of audit requirements in relation to companies of specified descriptions, and their modification in cases where companies elect to appoint a body corporate, or a partnership as such, as their auditors.

Part III deals with winding up, striking-off and restoration to the register.

Where a company has deliberately done anything with a view to putting a particular creditor, surety or guarantor in a better position at a time when it was insolvent (or if it became so as a result) and it goes into liquidation within the next six months (or two years in a case where the person "preferred" is "connected" with the company, as defined) the Court will have power, on the liquidator's application, to restore the position to what it otherwise would have been; the Court may even (subject to protection for those acting in good faith and without notice) impose obligations in this respect on third-parties. Amongst the other reforms relating to liquidation are an increase from £50 to £750 in the minimum debt for deemed insolvency after a formal demand; legislative recognition of the requirement to inform a company of a winding-up application, of a liquidator's rights to apply to the Court for directions and act in accordance with them, and to carry on business so far as expedient for a beneficial winding-up; and clarification of the rules governing the appointment and powers of provisional liquidators.

The law on striking off is modified by reducing the notice procedure to one notice of two months' duration after which the company is to be struck off and specifically recognising failure to deliver an annual return as a ground for striking off. Where this latter is the ground a company will not be able to avoid being struck off except by delivering its annual return and paying a penalty in accordance with a sliding scale.

Restoration to the register of a struck-off company will become conditional (subject and without prejudice to any other order of the Court) on payment of all sums which the company should have paid in the interim together with an extra £100 (which can be increased by Ordinance). A company which is restored within 6 years will generally be entitled to the return of any property which vested in the Crown as bona vacantia (or, if it has been disposed of, its value).

The miscellaneous reforms in Part IV relate to general meetings, special resolutions, shares and returns in respect of them, seals, criminal liability of officers, court procedure and statutory fees.

It will be possible to hold general meetings anywhere in the world; to count proxies for purposes of quorum and demanding a poll; and, by unanimous agreement only, to hold a meeting on short notice. The period within which

the first general meeting must be called is extended to 18 months after commencement of business and annual general meetings must be held at least once every 15 months thereafter. The requirements as to contents of directors' reports are simplified and other clarificatory changes are made. A special resolution will no longer have to be confirmed at a second meeting and will become effective from the moment it is passed but will become inoperative if not filed with the Greffe within 21 days.

The validity of fractional shares, and of shares with a par value lower than the smallest unit of legal tender of their issue currency, is recognised. Details of redeemable preference shareholders will no longer have to be included in annual returns or returns of allotments.

Provision is made for facsimile seals for use abroad; small fees are abolished and the Projet identifies six events only within the context of the Companies Laws which will give rise to a fee, sets those fees and provides for them to be changed by Ordinance; all "petitions" to the Court will be replaced by "applications"; the Projet will impose a general criminal liability on companies' officers, and those for whom they act, for consent, connivance and neglect.

The general and supplementary provisions in Part V include amendments which are mainly clarificatory but will also enable an attorney to be appointed to act in Guernsey as well as elsewhere and increase to £5 the maximum fee chargeable to a member demanding a copy of a special resolution.

Approved by the States 30.5.90. Awaiting Royal Sanction.

CONSTITUTIONAL LAW

Security Service Act 1989

10. United Kingdom Statutory Instrument: The Security Service Act 1989 (Channel Islands) Order, 1990. - Extends to the Channel Islands, with modifications, section 3(1) of the 1989 Act, thereby empowering the Secretary of State, after consultation with H.M. Attorney General for Guernsey, to issue warrants for entry on, or interference with, property if such appears necessary in order to obtain information.

In force 14.3.90. (U.K. S.I. No. 249 of 1990).

States Committees

11. Order in Council: The Island Development (Amendment) (Guernsey) Law, 1990. - See 8.GLJ.14.

Royal Sanction 14.2.90. Registered 20.3.90. In force 1.4.90. (No. I of 1990).

12. Orders in Council: The Reform (Amendment) (Guernsey) Law, 1990 and the Post Office (Amendment) (Bailiwick of Guernsey) Law, 1990. - See 8.GLJ.14.

Royal Sanction 14.2.90. Registered and in force 20.3.90. (Nos. II and III of 1990).

13. Order in Council: The Public Assistance (Amendment) (Guernsey) Law, 1990. - See 8.GLJ.14.

Royal Sanction 14.2.90. Registered 20.3.90. In force on a day or days to be appointed. (No. IV of 1990).

14. Orders in Council: The Public Thoroughfares (Amendment) (Guernsey) Law, 1990 and the Electricity (Amendment) (Guernsey) Law, 1990. - See 8.GLJ.14.

Royal Sanction 1.5.90. Registered and in force 19.6.90. (Nos. X and XI of 1990).

15. Projet de Loi: The Appointments Board (Amendment) Law, 1990. - Amends the 1932 "Loi sur la Constitution d'un Conseil de Nomination" by providing for a new constitution for the Appointments Board.

Approved by the States 28.2.90. Awaiting Royal Sanction.

16. Projet de Loi: The Cadastre (Amendment) (Guernsey) Law, 1990. - Amends the 1947 Law by providing for a new constitution for the Cadastre Committee.

Approved by the States 28.2.90. Awaiting Royal Sanction.

COURTS

17. Privy Council - leave to appeal to - conditional leave - conditions imposed

See Taylor v. States Board of Health and Parsons, paragraph 54.

CRIMINAL LAW AND PROCEDURE

Compensation

18. Order in Council: The Criminal Justice (Compensation) (Bailiwick of Guernsey) Law, 1990. - See 8.GLJ.19.

Royal Sanction 14.2.90. Registered 10.4.90. In force on a day to be appointed. (No. VI of 1990).

19. Evidence - pre-trial statement - exclusion of incriminatory references to co-defendant - exercise of judicial discretion - procedure on voir dire

See Law Officers of the Crown v. Hein and Yeo, paragraph 33.

Insider dealing

20. Order in Council: The Company Securities (Insider Dealing) (Bailiwick of Guernsey) Law, 1989. - See 6.GLJ.68.

Royal Sanction 19.12.89. Registered 6.2.90. (No. XXX of 1989). In force 1.3.90: The Company Securities (Insider Dealing) (Bailiwick of Guernsey) Law, 1989 (Commencement) Ordinance, 1990. (No. VI of 1990).

Prevention of terrorism

21. **Projet de Loi: The Prevention of Terrorism (Bailiwick of Guernsey) Law, 1990.** - Prohibits activities which lend support to or which facilitate the activities of terrorists and terrorist organisations; and provides for extensive enforcement measures including seizure of terrorist funds.

Part I and Schedule 1 define proscribed organisations. Membership and soliciting or displaying of support is an offence.

Part II and Schedule 2 empower the Lieutenant-Governor to make exclusion orders in respect of suspected terrorists, thereby prohibiting entry to the Bailiwick. Representations may be made. Persons in breach of exclusion orders may be detained pending removal. Detention is subject to supervision under Schedule 3. Harboursing a person subject to such an order is an offence.

Part III prohibits the soliciting and making of contributions towards acts of terrorism or for the benefit of proscribed organisations. It is an offence to be concerned in an arrangement whereby the retention of terrorist funds is facilitated. It is a defence to prove that the defendant neither knew nor had reasonable cause to suspect that the arrangement related to terrorist funds. Persons are released from contractual duties of confidence if they suspect that monies constitute terrorist funds. The Royal Court can, upon a conviction under Part III, order the forfeiture of terrorist funds. In addition, Schedule 4 empowers the Royal Court to make restraint orders prohibiting dealings with specified property. Forfeiture and restraint orders made in other jurisdictions can be enforced in the Bailiwick.

Part IV provides powers of arrest, search and detention (the latter being subject to supervision under Schedule 3). Powers are also conferred upon officers of police and of customs and immigration to examine, search and detain persons arriving in the Bailiwick. Ships and aircraft are also liable to be searched.

Part V and Schedule 7 enable the carrying out of "terrorist investigations". Obstructing such investigations, and failing to disclose information material thereto, constitute offences. The Bailiff (or, in urgent cases, the Chief Officer of Police) may issue search warrants for the purposes of such investigations. Documents (unless subject to legal professional privilege) may be seized. The Bailiff may also order the production of material and the making of explanations thereof.

Approved by the States 27.6.90. Awaiting Royal Sanction.

22. **Sentence - attempted murder - accused suffering from psychopathic disorder**

'A' pleaded guilty to attempted murder and indecent assault, having struck a girl on the head with a hammer numerous times, fracturing her skull. The attack, which was unprovoked, took place in a country lane late at night. 'A' gave himself up shortly afterwards. A psychiatrist's report showed that 'A' was suffering from a psychopathic disorder. 'A' had been sentenced by the Royal Court to 15 years' imprisonment and had, pending his appeal to the Court of Appeal, been transferred from a U.K. prison to a special hospital pursuant to section 47 of the Mental Health Act 1983. His appeal against sentence was dismissed.

[Law Officers of the Crown v. Blampied - Court of Appeal 5.3.90 (HMP/EAGP)].

23. Sentence - misuse of drugs - importation of cannabis resin

In two appeals to the Court of Appeal against sentences imposed by the Royal Court on four defendants for offences relating to possession or importation (without intent to supply) of small quantities of a Class B drug, namely cannabis resin, the Court of Appeal observed that from previous decisions of the Guernsey courts it could not be inferred that the courts adopt an invariable practice of imposing an immediate term of imprisonment.

In the first case, 'C' and 'N' both pleaded guilty, inter alia, to the improper importation of approximately four hundred grammes of cannabis resin, contrary to section 23(1) of the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law, 1972, as amended by the Misuse of Drugs (Bailiwick of Guernsey) Law, 1974. 'C's sentence of eighteen months' imprisonment was reduced on appeal to one of nine months suspended for two years and 'N's sentence of two years' imprisonment was reduced to fifteen months, also suspended for two years. (Both 'C' and 'N' were also fined £500).

In the second case, 'P's appeal against his sentence of eighteen months' imprisonment together with a fine of £1,000 for possession with intent to supply of approximately two hundred grammes of cannabis resin was dismissed. 'O', who pleaded guilty to two counts of improper importation of cannabis resin (approximately four hundred grammes in all) was sentenced on those charges to twenty-one months' imprisonment with a fine of £2,500 and twelve months (concurrent) with a further fine of £2,500. 'O's first-mentioned sentence of imprisonment was reduced to eighteen months but his appeal against the second was dismissed. On each charge the fine was reduced to £500. His appeal against a further (concurrent) sentence of twelve months' imprisonment for supplying two hundred grammes of cannabis resin to another was dismissed.

[Law Officers of the Crown v. Coffell and Nagy (HMC/NLP/SRM); Law Officers of the Crown v. Percy and Oksuz (HMC/NLP/EAGP) - Court of Appeal 5.4.90].

Summary offences

24. Projet de Loi: The Summary Offences (Amendment) (Bailiwick of Guernsey) Law, 1990. - Further amends the principal Law of 1982 by replacing the offence of permitting a mischievous or ferocious animal to wander or attack or chase a person with one of permitting an animal dangerous to other animals or to persons to wander or attack or chase an animal or person.

Approved by the States 30.5.90. Awaiting Royal Sanction.

Young offenders

25. Order in Council: The Criminal Justice (Youth Detention) (Bailiwick of Guernsey) Law, 1990. - See 8.GLJ.28.

Royal Sanction 1.5.90. Registered 19.6.90. (No. XII of 1990). In force 1.7.90: The Criminal Justice (Youth Detention) (Bailiwick of Guernsey) Law, 1990 (Commencement) Ordinance, 1990. (No. XVIII of 1990).

CUSTOMS

Import and export control

26. Projet de Loi: The Import and Export (Control) (Amendment) (Guernsey) Law, 1990. - Increases penalties under the 1946 Law and transfers functions of the States Supervisor thereunder to the Chief Revenue Officer.

Approved by the States of Guernsey 31.1.90. Awaiting Royal Sanction.

27. Statutory Instrument: The Customs and Excise (General Provisions) (Bailiwick of Guernsey) (Amendment) Order, 1990. - Amends the principal Order of 1973 (S.I. No. 17 of 1973) so as to provide that Customs entry will not be required for goods imported from, and in free circulation in, the European Community, Jersey or another island of the Bailiwick except for goods liable to excise duty or where the Chief Revenue Officer otherwise directs.

In force 1.4.90. (S.I. No. 4 of 1990).

DIVORCE AND MATRIMONIAL CAUSES

Law reform

28. Order in Council: The Matrimonial Causes (Amendment) (Guernsey) Law, 1990. - Amends the Matrimonial Causes Law (Guernsey), 1939, as amended, so as to provide (for the avoidance of doubt) that the Matrimonial Causes Division is empowered -

- (1) to make an award of property following a "pronouncement" of judicial separation by the Ordinary Court (as opposed to a "decree" of judicial separation by the Matrimonial Causes Division); and
- (2) to make such an award as regards property in which one only of the parties to the marriage has an interest.

Approved by the States 28.6.89. Royal Sanction 14.3.90 Registered and in force 23.4.90. (No. VII of 1990).

ELECTRICITY

States Electricity Board

29. Order in Council: The Electricity (Amendment) (Guernsey) Law, 1990. - See paragraph 14.

EMPLOYMENT

Proof of housing status

30. Order in Council: The Right to Work (Limitation and Proof) (Guernsey) Law, 1990. - See 7.GLJ.41.

Royal Sanction 14.2.90. Registered 10.4.90. In force on a day or days to be appointed. (No. V of 1990). (See also paragraph 32).

31. Statutory Instrument: The Right to Work (Employment Records) Regulations, 1990. - Make provision, pursuant to the Law of 1990 (see paragraph 30), for information required to be kept by employers in respect of their employees and by self-employed persons under section 5 of the Law.

In force 1.12.90. (S.I. No. 11 of 1990).

32. Resolution of the States of 29.3.90. - Directing the preparation of legislation amending the Right to Work (Limitation and Proof) (Guernsey) Law, 1989 (see paragraph 30) so as to substitute 1.12.89 as the relevant date in place of 9.6.88.

EVIDENCE

33. Pre-trial statement - exclusion of incriminatory references to co-defendant - exercise of judicial discretion - procedure on voir dire

'AA' appealed against their convictions of conspiring (with another, 'X') to import a Class B drug and of supplying such a drug to another contrary to the Misuse of Drugs (Bailiwick of Guernsey) Law, 1974. 'X' had made a confession statement to the police which, pursuant to a voir dire, was ruled admissible as against 'X' but which was also incriminatory of 'AA'. 'AA' argued that the incriminatory references should have been edited out of the statement. HELD, although the trial judge had a discretion to exclude from an extra-judicial statement made by a defendant parts of that statement which would be unfairly prejudicial to a co-defendant, the matter was one of discretion to be applied in the circumstances of the particular case and there was no justification for any general practice of making such exclusions. The Deputy Bailiff had rightly exercised his discretion not to exclude any part of the statement in this case. It was however important in such circumstances that the judge should negative any possible prejudice by directing the Jurats not only that the evidence of the statement was not admissible against the co-defendant but also that they must entirely disregard the statement when considering the guilt or innocence of that co-defendant. As the direction given was not adequate the appeal would be allowed.

The Court of Appeal also observed that on the voir dire the only issue was the admissibility of the statement as against 'X'; only the Crown and 'X' had a proper interest therefore only they, and not the co-defendants, had a right to examine or cross-examine witnesses on that issue.

[Law Officers of the Crown v. Hein and Yeo - Court of Appeal 7.3.90 (HMP/EAGP/SRM)].

FISHING

34. Order in Council: The Fishing (Bailiwick of Guernsey) Law, 1989. - See 8.GLJ.44.

Royal Sanction 19.12.89. Registered 6.2.90. In force 6.3.90. (No. XXVIII of 1989).

35. United Kingdom Statutory Instrument: The Fishery Limits Act 1976 (Guernsey) Order, 1989. - Applies the 1976 Act to Guernsey with modifications, thereby extending British fishery limits adjacent to Guernsey to 12 miles and controlling fishing by foreign fishing boats therein.

Registered 20.2.90. In force 1.2.90. (U.K. S.I. No. 2407 of 1989).

36. United Kingdom Statutory Instrument: The Sea Fisheries (Channel Islands) (Amendment) Order, 1989. - Applies the Sea Fisheries Act 1968 to Guernsey with modifications and allows the regulation of fishing operations and enforcement by British sea fishery officers.

Registered 20.2.90. In force 1.2.90. (U.K. S.I. No. 2412 of 1989).

37. United Kingdom Statutory Instrument: The Sea Fish (Conservation) (Channel Islands) (Amendment) Order, 1989. - Applies the Sea Fish (Conservation) Act 1967 to Guernsey; prohibits the carrying of fish of less than the minimum size within 12 miles of Guernsey; provides for the regulation of mesh size, construction etc. of nets; and allows the prohibition of all fishing in Guernsey waters (unless authorised by Sea Fisheries Committee licence) and of fishing elsewhere by Guernsey-registered boats.

Registered 20.2.90. In force 1.2.90. (U.K. S.I. No. 2411 of 1989).

GAMBLING

Crown and Anchor

38. Ordinance: The Gambling (Crown and Anchor) (Guernsey) (Amendment) Ordinance, 1990. - Amends the principal Ordinance of 1983 so as to increase the fees payable in respect of operator's licences and table permits to £40.

In force 28.2.90. (No. IV of 1990).

Lotteries

39. Ordinance: The Gambling (Channel Island Lottery) (Bailiwick of Guernsey) (Amendment) Ordinance, 1990. - Further amends the principal Ordinance of 1975 so as to require that all monies contributed by the Gambling Control Committee towards the cost of prizes shall be paid from the Channel Islands Lottery (Guernsey) Fund and so as to amend the definition of "paying officer".

In force 31.1.90. (No. II of 1990).

HEALTH AND MEDICINE

40. Projet de Loi: The Health Service (Benefit) (Guernsey) Law, 1990. - Sets out benefits available to persons undergoing medical and dental treatment in Guernsey.

Part I provides for the management and objects of the Guernsey Health Service Fund from which benefit is payable.

Part II defines the persons entitled to benefit under the Law. The basic qualification is current residence in Guernsey plus past residence and presence in Guernsey for an aggregate of 26 weeks.

Part III defines the benefits available and provides for the issue to qualified persons of Health Benefit Cards.

Part IV provides for the payment of "medical benefit", being a grant of £8, to a qualified person who consults a medical practitioner approved by the Board of Health. A grant of £4 is payable if the consultation is with an approved nurse. Regulations will provide for the manner of obtaining payment.

Part V provides that qualified persons undergoing treatment by approved doctors or dentists are also entitled, on prescription, to "pharmaceutical benefit", being the drugs and medicines requisite for their treatment. Prescription charges are payable. Benefit is only obtainable from authorised suppliers.

Part VI provides that qualified persons undergoing treatment by approved doctors or dentists are also entitled, upon presentation of an "appliance prescription", to medical appliances requisite for the treatment, management or control of diseases from which they are suffering. Only those appliances prescribed by regulations will be so supplied. Appliances are only obtainable from an authorised supplier. A prescription charge is to be payable.

Parts VII and VIII contain provisions as to offences, penalties and the determination of claims by the Administrator, Tribunal and Ordinary Court.

Part IX establishes the Health Service Advisory Committee to supervise activities under the Law of approved doctors, dentists and pharmacists and of authorised suppliers.

Approved by the States 30.5.90. Awaiting Royal Sanction.

HIGHWAYS

41. Ordinances: The Road Humps Ordinance, 1990 and (No. 2) Ordinance, 1990. - Together approve the retention of nine road humps.

In force 28.2.90 and 25.4.90 respectively. (Nos. VII and X of 1990).

42. Ordinance: The Public Highways (Amendment) Ordinance, 1990. - Removes the statutory duty previously incumbent upon the Constables and Douzeniers under the 1840 "Ordonnance Générale relative aux Routes, Rues et Chemins" to repair all walls bordering the roads of their parish which may be in a dangerous condition.

In force 27.6.90. (No. XVI of 1990).

HOUSING

Control of occupation

43. Order in Council: The Housing (Control of Occupation) (Amendment) (Guernsey) Law, 1990. - See 7.GLJ.46.

Royal Sanction 14.2.90. Registered 23.4.90. In force 23.5.90. (No. VIII of 1990).

44. Order in Council: The Right to Work (Limitation and Proof) (Guernsey) Law, 1990. - See paragraphs 30 to 32.

45. Ordinance: The Housing (Control of Occupation) (Restoration of Dwelling) Ordinance, 1990. - Restores an hotel, which was removed in 1988 (see 6.GLJ.122), to the list in the Second Schedule to the Housing (Control of Occupation) (Guernsey) Law, 1982, as amended.

In force 28.3.90. (No. VIII of 1990).

INCOME TAX

46. Resolution of the States of 31.1.90. - Directing the preparation of legislation transferring the quasi-judicial functions of the Income Tax Authority to a Tribunal established for the purpose.

ISLAND DEVELOPMENT

47. Order in Council: The Island Development (Amendment) (Guernsey) Law, 1990. - See 8.GLJ.61.

Royal Sanction 14.2.90. Registered 20.3.90. In force 1.4.90. (No. I of 1990).

LAND LAW

48. Servitudes - right of way - acquisition by prescription - aggravation

Access to 'RR's premises was by way of a driveway part of which traversed premises owned by 'A'. In 1770 both premises had been in the same ownership but they had apparently been divided by an unregistered partage between that date and 1795. A subsequent conveyance in 1832 declared that the then owner of 'RR's premises had "droit de passage de pied, de cheval, de charrue et de charrette" over 'A's premises "pour aller et venir toutes fois et quantes" between his premises and the public road. Glasshouses had been erected on 'RR's premises (previously agricultural) prior to 1966 and an electricity cable had been installed by 'RR' in the driveway. 'A' erected a barrier on his premises which 'RR' alleged denied them access to their premises. 'RR' applied to the Royal Court seeking a declaration that 'A' should allow them to exercise the right of way and the right to lay cables and other services. 'A' alleged that by reason of the erection of glasshouses 'RR's right of way had been aggravated. The Royal Court's Order defined the extent of the area over which the right of way was exercisable and confirmed that the right to keep the electricity cable in position was established, the Deputy Bailiff having directed the Jurats (inter alia):

- (1) that the words in the 1832 conveyance had the effect of conferring upon the dominant tenement as comprehensive a right as it was possible to convey, with no restriction on user;
- (2) that the question for the Jurats was what 'RR' had used by way of 'A's land to gain access to their premises for twenty years undisputed: this should be the area over which the right of way should be exercised;
- (3) although the original right did not include the right to lay services, a basic servitude right could be enlarged or reduced prescriptively and in the present case the right to lay services had been acquired prescriptively for the electric cable which would be construed as a right to lay services generally.

On appeal to the Court of Appeal it was HELD:

- (a) that there was no authority for the proposition that a grant of a right of way not expressly limiting the use was implicitly to be limited to use for such purpose as may have existed at the time of the grant;
- (b) that a servitude could not be acquired by prescription. Whilst the coutume did develop over the centuries, such development could not change the fundamental common law. Maxims such as "nul servitude sans titre" were part of the coutume which could not be altered by judicial decision;
- (c) that the Royal Court did have jurisdiction to determine the width of a right of way and the Court would not interfere with the Jurats' decision in that regard; and
- (d) that a servitude "aller et venir" could not extend to the laying and keeping of services and the order that 'RR' had the right to keep the electricity cable in position would be set aside.

[Singleton v. Le Noury - Court of Appeal 5.6.90 (JDL/NLP)].

LANDLORD AND TENANT

49. Rent control - assessment by Rent Officer - relevance of "open market" status

'A' appealed against a decision of the Cadastre Committee upholding the Rent Officer's assessment of rent of an "open market" flat, the ground of the appeal being (inter alia) that the Committee was wrong in law in taking into account that the premises were inscribed on the Housing Control Register. HELD by the Bailiff, sitting alone, that s.3(1) of the Rent Control (Guernsey) Law, 1976 charged the Committee with making a decision as to the "fair and reasonable" rent for the flat which it could only do by taking into account all relevant factors. The fact that there was a scarcity of open market flats was a fact that could not and should not be ignored by the Committee which had an absolute discretion to take into account any factor which it may consider relevant. The appeal would be dismissed.

[M & K Furnishers Ltd. v. States Cadastre Committee - Requête 20.2.90 (PTRF/HER)].

POST OFFICE

States Post Office Board

50. Order in Council: The Post Office (Amendment) (Bailiwick of Guernsey) Law, 1990. - See paragraph 12.

PRACTICE AND PROCEDURE (CIVIL)

Affidavits - Rules

51. Order of the Royal Court: The Royal Court (Affidavits) Civil Rules, 1990. - Make provision as to the form and contents of, and other matters relative to, affidavits sworn in a civil cause or matter.

In force 1.2.90. (Order of the Royal Court No. I of 1990).

52. Appeals - appeal to Court of Appeal - admission of further evidence

Prior to the hearing of his appeal against the dismissal of his action for negligence against a medical practitioner 'A' applied to the Court of Appeal for leave to adduce fresh evidence by way of an affidavit sworn by the medical expert who had been called to give evidence on behalf of 'A' in the Royal Court, alleging that the expert witness for 'R' had given incorrect evidence which had misled the Court. HELD, applying the principles set out in the decision of the Court in Kirk v. Blackwell (see 4.GLJ.65), even if there was any substance to the allegation being made 'A's proper remedy would have been to recall his medical expert to give further evidence at the trial. As this had not been done it could not be said that the further evidence could not have been obtained with reasonable diligence for use at the trial and the application would fail.

[Taylor v. States Board of Health and Parsons - Court of Appeal 7.7.89 (NJB/JPG/RJC)]. (See also paragraphs 54 and 77).

53. Appeals - appeal to Court of Appeal - admission of further evidence - evidence going only to credit - oral evidence

'A' sought the admission of further evidence in two forms: firstly, a tape recording of 'R' making statements which allegedly contradicted what he had said in evidence at first instance; and, secondly, documents making statements about 'R' which would assist 'A's appeal. HELD by the Court of Appeal -

- (1) additional evidence going only to the credit of a witness could not be admitted unless it was evidence which must have led a reasonable tribunal to a different decision; and
- (2) the documents sought to be adduced by 'A' were hearsay and not in themselves admissible. Further, A's request to treat the application as one to call the makers of the statements could not be allowed without a copy of the statement of the proposed witness to enable the Court to judge whether the additional evidence could properly be admitted.

The application would be dismissed.

[Picot v. Jehan - Court of Appeal 8.3.90 (unrep/JPG)].

54. Appeals - appeal to Privy Council - conditional leave - conditions imposed

At the conclusion of his unsuccessful appeal to the Court of Appeal 'A' applied for leave to appeal to the Privy Council. Having considered section 16 of the Court of Appeal (Guernsey) Law, 1961, the Judicial Committee (General Appellate Jurisdiction) Rules Order, 1982 and the Notes on Procedure in Commonwealth Appeals from the Judicial Committee of the Privy Council, 1983, the Court of Appeal granted 'A' conditional leave to appeal upon the conditions that 'A' would cause the record in connection with the appeal to be dispatched to the Privy Council by a specified date approximately three months later and that 'A' pay the sum of £1,000 security for costs in respect of each respondent proceeded against. 'A' would have to apply for final leave to appeal once the conditions had been satisfied.

[Taylor v. States Board of Health and Parsons - Court of Appeal 3.4.90 (NJB/JPG/RJC)]. (See also paragraphs 52 and 77).

PUBLIC ASSISTANCE

55. Order in Council: The Public Assistance (Amendment) (Guernsey) Law, 1990. - See 8.GLJ.76.

Royal Sanction 14.2.90. Registered 20.3.90. In force on a day or days to be appointed. (No. IV of 1990).

ROAD TRAFFIC AND PUBLIC TRANSPORT

Clearways

56. Ordinance: The Road Traffic Temporary Regulations and Clearways (Amendment) Ordinance, 1990. - Clarifies the rule about stopping on clearways and transfers functions to the Island Traffic Committee. (See also paragraph 66).

In force 30.4.90. (No. XII of 1990).

Driving tests - fees - transfer of functions

57. Ordinance: The Driving Tests (Amendment and Transfer of Functions) Ordinance, 1990. - Further amends the principal Ordinance of 1929 so as (a) to increase the fee payable for a driving test to £12; (b) to provide that where a student driver fails to keep an appointment for a test without good reason or without giving 7 clear days' notice of cancellation the fee shall be forfeit; and (c) to transfer the functions of the Island Police Committee and of the Chief Officer of Police under that Ordinance to the Island Traffic Committee.

In force 28.3.90. (No. IX of 1990).

Driving under the influence of drink or drugs

58. Order in Council: The Road Traffic (Drink Driving) (Guernsey) Law, 1989. - See 8.GLJ.81.
- Royal Sanction 19.12.89. Registered 6.2.90. In force 6.3.90. (No. XXVI of 1989). (See also paragraph 60).
59. Statutory Instrument: The Road Traffic (Drink Driving) (Approved Device) (Guernsey) Order, 1990. - Approves the Lion Intoximeter 3000 as a device for the provision of specimens of breath for analysis under the 1989 Law (see paragraph 58).
- In force 6.3.90. (S.I. No. 3 of 1990).
60. Resolution of the States of 30.5.90. - Directing the preparation of legislation amending the Road Traffic (Drink Driving) (Guernsey) Law, 1989 (see paragraph 58) so as to entitle a person providing a specimen of breath containing a proportion of alcohol not exceeding 50 microgrammes of alcohol in 100 millilitres of breath to elect that such specimen be replaced by a specimen of blood or urine.

Foreshore - riding and driving

61. Ordinance: The Foreshore (Riding and Driving) (Amendment) Ordinance, 1990. - Amends the principal Ordinance of 1951 so as to provide that, subject to certain exceptions such as fishermen and vraic collectors, riding or driving a vehicle or riding a horse on the foreshore is prohibited from 1st May to 30th September between 10.00 a.m. and 7.00 p.m.
- In force 31.1.90. (No. I of 1990).

International driving permits - fees

62. Projet de Loi: The Motor Vehicles (International Circulation) (Guernsey and Alderney) (Amendment) Law, 1990. - Changes the method of setting fees payable by Guernsey and Alderney residents for international driving documents from Ordinances of the States of Guernsey and Alderney to Orders of Guernsey's Board of Administration and Alderney's Finance Committee, respectively.
- Approved by the States of Guernsey 28.3.90 and by the States of Alderney 6.6.90. Awaiting Royal Sanction.
63. Ordinance: The Motor Vehicles (International Circulation) (Amendment) Ordinance, 1990. - Increases the fee for an international driving permit from £2.50 to £3.00.
- In force 1.3.90. (No. V of 1990).

Penalties

64. Ordinance: The Traffic Offences (Fixed Penalties) (Amendment) Ordinance, 1990. - Requires a fixed penalty payment to be accompanied by a fixed penalty notice, a notice to owner, or a letter from the Chief Officer of Police giving the number of the fixed penalty notice and the date of the offence; enables the Treasurer to accept a cheque in respect of more than

one fixed penalty even if part of the payment is too late (in which case that part has subsequently to be returned); provides for a receipt to be given only when requested and an address provided; permits service of notices to owners by ordinary post; and adds to the fixed penalty system the offence of unauthorised off-road driving in a scheduled place of recreation.

In force 1.5.90. (No. XI of 1990).

States Public Thoroughfares Committee

65. Order in Council: The Public Thoroughfares (Amendment) (Guernsey) Law, 1990. - See paragraph 14.

Temporary regulations

66. Ordinance: The Road Traffic Temporary Regulations and Clearways (Amendment) Ordinance, 1990. - Extends the maximum validity of temporary regulations from 6 to 12 months and transfers the power to make them to the Island Traffic Committee. (See also paragraph 56).

In force 30.4.90. (No. XII of 1990).

SHIPPING

Collision rules

67. United Kingdom Statutory Instrument: The Merchant Shipping (Distress Signals and Prevention of Collisions) (Guernsey) Order, 1989. - By extending to the Bailiwick, subject to modifications, the Merchant Shipping (Distress Signals and Prevention of Collisions) Regulations, 1989, the Order gives effect to amendments, made by two resolutions of the International Maritime Organisation, to the 1972 International Regulations for Preventing Collisions at Sea; replacing in consequence most of the Merchant Shipping (Distress Signals and Prevention of Collisions) (Guernsey) Order, 1986 (see 4.GLJ.75). Ships registered in Guernsey, and their masters and crew, are required to comply with the updated International Regulations and non-complying ships are in some circumstances liable to be detained.

Registered 22.1.90. In force 1.2.90. (U.K. S.I. No. 2410 of 1989).

Passenger boats and hired boats

68. Ordinance: The Hired Boats and Passenger Boats (Guernsey) Law, 1988 (Commencement) Ordinance, 1990. - Appoints 1.2.90 (as respects part) and 1.4.90 (as respects the remainder) for the commencement of the Law of 1988 (see 6.GLJ.206 and 7.GLJ.74). (No. III of 1990).
69. Statutory Instrument: The Boats (Guernsey) Regulations, 1990. - Replace the Regulations of 1988 (see 6.GLJ.207) and make new provision for the licensing of boats and boatmen, and lay down safety standards, pursuant to the Hired Boats and Passenger Boats (Guernsey) Law, 1988 (see paragraph 69).

In force 1.2.90 (part) and 1.4.90 (remainder). (S.I. No. I of 1990).

Registration

70. Order in Council: The Merchant Shipping (Registration) (Amendment) (Bailiwick of Guernsey) Law, 1989. - See 8.GLJ.89.
- Royal Sanction 19.12.89. Registered and in force 6.2.90. (No. XXIX of 1990).

SOCIAL SECURITY

Social insurance

71. Statutory Instrument: The Social Insurance (Benefits) (Miscellaneous Provisions) (Amendment) (Guernsey) Regulations, 1990. - Amend the principal Regulations of 1978 (S.I. No. 21 of 1978) so as to permit evidence of incapacity, personal injury or prescribed disease to be furnished by a dentist, physiotherapist or osteopath in addition to medical practitioners.
- In force 1.6.90. (S.I. No. 10 of 1990).

TELECOMMUNICATIONS

72. Projet de Loi: The Wireless Telegraphy Apparatus (Bailiwick of Guernsey) Law, 1990. - Empowers the States Telecommunications Board, by order, to prohibit the manufacture, sale, possession and importation of wireless telegraphy apparatus of the class or description specified in the order. Persons holding a licence granted by the Board will be exempt.
- Approved by the States of Guernsey 31.1.90 and the States of Alderney 4.4.90. Awaiting the approval of the Chief Pleas of Sark.

TERRES A L'AMENDE

73. Action to recover penalty - club premises - club member in breach of club rules - whether penalty recoverable

The owner of club premises brought an action to recover a penalty from one of its members who had a parking permit in respect of the relevant car park but who was in breach of a club rule as to the circumstances in which members with permits might park on club premises. Dismissing the action, the Bailiff expressed doubt that the defendant's disobedience of a club rule could enable the club to invoke the "terres à l'amende" Ordinance.

[Loveridge and Burke v. Pickering - Plaids de Meubles 14.6.90 (JDL/unrep)].

74. Action to recover penalty - defendant entitled to park on other part of premises 'à l'amende' - whether action lies

'D' was a member of a club which rented a number of car parking spaces in a car park owned by 'P', the whole of which was "terre à l'amende". A third party, 'C', also rented spaces in the same car park. 'D' parked his car in one of the spaces let to 'C'. 'P' brought an action against 'D'.

Dismissing the action, the Bailiff stated that 'D', as a member of the club, had a general licence to park in the whole premises: that although he was a trespasser as against 'C', he was not a trespasser as against 'P'.

[Piette Ltd. v. Livie - Plaids de Meubles 14.6.90 (SRM/unrep)].

75. Application for permission to publish - no actual complaints

In an application for permission to publish a notice in La Gazette Officielle declaring premises terres à l'amende the applicant stated that no problems had been experienced with persons parking or abandoning vehicles on the premises although problems had been experienced on other premises owned by the applicant. The Deputy Bailiff commented that the Court did not normally grant such applications when there was no actual complaint although it was a matter for the discretion of the Jurats. The application was refused.

[In re Channel Islands Co-operative Society's Application - Plaids de Meubles 18.1.90 (JDL)].

TORT

76. Assault - defendant previously charged with common assault - whether claim for damages barred

'P' actioned 'D' for damages for assault. 'D' had already been convicted of common assault in the Magistrate's Court. 'D' claimed by way of exception de fonds, citing English authorities, that in those circumstances 'P' could not now proceed with a claim in the civil courts. HELD by the Bailiff, referring to the Commissioners' Report on the State of the Criminal Law in the Channel Islands, that under the customary law of Guernsey there was a right to claim damages for assault by way of a Cause en Adjonction. Although such Causes were abolished in 1951 the right to claim such damages still existed and the exception would be dismissed.

[Tanguy v. Le Sauvage - Plaids de Meubles 19.1.90 (JDL/EAGP)].

77. Negligence - standard of care - professional person - test to be applied - misdirection - whether fresh trial should be ordered

In an action for negligence against a medical practitioner the Deputy Bailiff directed the Jurats, quoting Lord Denning in Hucks v. Cole (1968) 118 NLJ 469, that as the consequences of a charge of professional negligence against a medical man were far more serious than a charge of negligence against a non-professional person so the burden of proof was correspondingly greater. He was only liable when he fell below the standard of a reasonably competent practitioner in his field so much so that his conduct might be deserving of censure or be inexcusable. 'A' appealed to the Court of Appeal, requesting a fresh trial. HELD, the test in respect of a professional person was different from that in respect of a non-professional only insofar as in the first case the court was concerned with the exercise of professional skills. The proper test was that laid down by the House of Lords in Whitehouse v. Jordan [1981] 1 All ER 267, namely that the question was whether on a balance of probabilities it had been established that the defendant had failed to exercise the standard of care of a reasonably competent professional man, judged by the standards at the relevant time,

having regard to the experience and expertise that the professional man held himself out as possessing, resulting in damage to the plaintiff. The conduct under consideration did not necessarily have to be deserving of censure or inexcusable. The direction of the Deputy Bailiff raised an unduly high hurdle against 'A'. However, applying rule 13(1) of the Court of Appeal (Civil Division) (Guernsey) Rules, 1964, and having regard to the whole of the evidence, no fresh trial would be ordered because no substantial wrong or miscarriage had thereby been occasioned.

[Taylor v. States Board of Health and Parsons - Court of Appeal 3.4.90 (NJB/JPG/RJC)]. (See also paragraphs 52 and 54).

TRADE AND INDUSTRY

78. Projet de Loi: The Trading Stamps (Amendment) (Guernsey) Law, 1990. - Transfers functions under the 1966 Law from the Advisory and Finance Committee to the Board of Trade and Industry. Also increases penalties and the amount of security required to be deposited by promoters of trading stamp schemes. The Projet makes provision for an annual registration fee of £500 and improves warranties to be implied for the benefit of the customer on redemption of trading stamps for goods. The 1966 Law is also brought into operation.

Approved by the States 31.1.90. Awaiting Royal Sanction.

TRUSTS

79. Projet de Loi: The Trusts (Amendment) (Guernsey) Law, 1990. - Amends the 1989 Law (see 6.GLJ.236) by giving the court jurisdiction over foreign trusts if the terms thereof so provide; by excluding foreign rules of "forced heirship" which would otherwise invalidate a Guernsey trust or disposition of property thereto ("forced heirship" being the concept of law under which the settlor's right to dispose of his property during his lifetime is restricted so as to protect the rights of his heirs); by providing that settlors of Guernsey trusts shall be deemed to have had capacity to create the trust if they had capacity to do so under Guernsey law or under the law of their domicile or nationality; by empowering trustees to delegate by power of attorney; by clarifying the powers of trustees to retain assets to cover liabilities and to reimburse themselves for properly incurred expenses; by providing that the terms of a trust cannot relieve a trustee of liability for gross negligence; by eliminating a trustee's personal liability on a transaction where the other party is aware that the trustee is acting in that capacity; and by prohibiting the tracing of trust property where a bona fide purchaser thereof without notice has passed title to a third person.

Approved by the States 27.6.90. Awaiting Royal Sanction.

WATER

Prevention of pollution

80. Order in Council: The Prevention of Pollution (Guernsey) Law, 1989. - See 7.GLJ.85.

Royal Sanction 19.12.89. Registered 6.2.90. In force on a day or days to be appointed. (No. XXV of 1989).

GUERNSEY STATUTORY INSTRUMENTS

81. The following Statutory Instruments were made during the period covered by this issue. Except where otherwise indicated they have not been digested in detail but copies are available from the Greffe.

	S.I. Number
The Boats (Guernsey) Regulations, 1990 (see paragraph 69)	1.
The Immigration (Work Permit Fee) (Guernsey) Order, 1990	2.
The Road Traffic (Drink Driving) (Approved Device) (Guernsey) Order, 1990 (see paragraph 59)	3.
The Customs and Excise (General Provisions) (Bailiwick of Guernsey) (Amendment) Order, 1990 (see paragraph 27)	4.
The Post Office (Postal Order) (Amendment) Order, 1990	5.
The Post Office (Overseas Parcel Post) (Amendment) Order, 1990	6.
The Customs and Excise (Bailiwick of Guernsey) (Personal Reliefs) (Amendment) Order, 1990	7.
The Rent Control (Variation) Order, 1990	8.
The Parking Places (Amendment) Order, 1990	9.
The Social Insurance (Benefits) (Miscellaneous Provisions) (Amendment) (Guernsey) Regulations, 1990 (see paragraph 71)	10.
The Right to Work (Employment Records) Regulations, 1990 (see paragraph 31)	11.
The Import and Export of Goods (Control) (Guernsey) (Amendment No. 11) Order, 1990	12.
The Parking Places (Amendment) (No. 2) Order, 1990	13.

ALDERNEY

BUILDING AND DEVELOPMENT CONTROL

Historic buildings and ancient monuments

82. Order in Council: The Historic Buildings and Ancient Monuments (Alderney) Law, 1989. - See 7.GLJ.89.

Royal Sanction 19.12.89. Registered and in force 6.2.90. (No. XXIV of 1989).

MILK

83. Ordinance: The Milk (Retail Price) Ordinance, 1990. - Increases the ceiling price for retail sales of milk.

In force 5.4.90. (Ordinance of the States of Alderney of 4.4.90).

ROAD TRAFFIC

Fixed penalties

84. Ordinance: The Traffic Offences (Fixed Penalties) (Amendment) (Alderney) Ordinance, 1990. - Increases the amount of fixed penalties in Alderney from £5.00 to £10.00.

(Ordinance of the States of Alderney of 6.6.90).

Hired vehicles

85. Order in Council: The Hired Motor Vehicles (Alderney) Law, 1989. - See 8.GLJ.113.

Royal Sanction 19.12.90. Registered 6.2.90. In force on a day or days to be appointed. (No. XXVII of 1989).

Traffic regulations

86. Regulations: The Traffic (Amendment) Regulations, 1990. - Make provision for the parking of hire cars at Alderney airport.

Made 30.4.90. In force 1.6.90.

SHIPPING

Passenger boats

87. Ordinance: The Licensing of Passenger Boats (Amendment) (Alderney) Ordinance, 1990. - Makes it an offence to operate a water ferry service without a boat licence.

In force 3.5.90. (Ordinance of the States of Alderney of 2.5.90).

VEHICULAR TRESPASS

88. Ordinance: The Vehicular Trespass Ordinance, 1990. - Creates a new civil remedy available to the owner of any land on which another person drives, rides or parks a motor vehicle without lawful authority or reasonable excuse (the proof of which lies on that person) irrespective of whether any damage is caused. If the Court of Alderney determines an application in the Plaintiff's favour it must, unless in the particular circumstances a lesser sum seems appropriate, order the defendant to pay £50 to the Plaintiff.

(Ordinance of the States of Alderney of 6.6.90).

SARK

NATURAL AMENITIES

89. Resolution of the Chief Pleas of 18.4.90. - Directing the preparation of legislation amending the Preservation of Natural Amenities and Agricultural Land Control (Sark) Law, 1961.

RETRAIT LIGNAGER
in the Bailiwick of Guernsey
by N. Le Poidevin
Advocate of the Royal Court of Guernsey

The Law of 30 Ventôse year XII abolished for French Normandy its customary law. However this customary law continues nearly 200 years later in an active and living form here in the Bailiwick of Guernsey.

A characteristic of the customary law of Normandy is a highly exaggerated concept of keeping family property within the family by ensuring that a portion of family property does not pass outside it. One maxim of the custom is that "un homme n'a point des héritiers que ceux que la Coutume lui donne". No man has any heirs except those permitted him by the custom. Despite the social developments of the second half of this century the Bailiwick of Guernsey has kept the spirit of the Norman custom and in so doing has kept alive a custom which has as its object the preservation of a reserve of property within the family for transmission by inheritance. Therefore there is not a freedom of disposition of property by means of Will. There are rules against gifts; there is a separation of the property of parties to a marriage; and there remains the right of retrait lignager by which a descendant can re-purchase part of family property which has been sold.

It is not my intention to give to you a detailed historical survey of the right of retrait but I would refer you to the proceedings of the Semaine de Droit Normand held in Jersey in 1923. The first part of that seminar was devoted to the consideration of the preservation of family property by the customary law of Normandy and in its transactions you will find an important paper by Monsieur Génestal, a former professor at the Faculty of Law in the University of Caen, concerning the right of retrait.

It is my intention today to give you some information concerning the right of retrait as it exists today in the Bailiwick of Guernsey and afterwards I wish to propose the question as to whether one should keep at the end of this twentieth century a right which is inconsistent with the concept of the inviolability of a contract.

Firstly it is necessary that I explain to you that there are three distinct jurisdictions within the Bailiwick of Guernsey each having its own law. Besides the jurisdiction of the Island of Guernsey itself there are the separate jurisdictions of the Court of the Seneschal of Sark and of the Court of Alderney.

In the Island of Sark one finds a country governed entirely by customary law. The law of Sark has scarcely changed since the times of Basnage or even of Terrien. In that Island one finds the right of retrait existing as it did in French Normandy prior to the Revolution. A relation up to the seventh degree of affinity can bring an action in retrait but he has only forty days within which to do this after the passing of the contract. This is in fact the same delay as one found in the townships of Normandy.

The Island of Guernsey abolished the right of retrait in its customary form by a law registered on the 12th January, 1924[1], the law which remains applicable today. There were three principal reforms at that time. Firstly there was a limitation of the number of persons who could bring an action in retrait and it is now only available to close relatives. For real property which has been acquired by purchase, that known as "aquêts", the right can only be exercised by the direct linear descendants of the person who transfers the property. For inherited real property ("propres") the brothers and sisters of the transferor together with their descendants can bring an action in retrait along with the descendants in direct line. The second change brought about by the law of 1924 has been to limit the time of action to a delay to one calendar month only from the time of transfer. Prior to the coming into force of this law there were ten years available within which one could bring an action unless it had been limited to a year and a day by having the contract read publicly before the court sitting "en Plaids d'Héritage". Thirdly, there were considerable procedural modifications and now the action is heard summarily.

The Island of Alderney kept the customary form of retrait until the 25th January, 1949 and the present law in Alderney resembles that of Guernsey the principal difference being that in Alderney there exist three months within which an action can be brought[2].

I would now wish to discuss the differences which exist between the three jurisdictions of the Bailiwick and in so doing I shall put forward reasons as to why these differences may be found. One can find a reason in the maxim which I have already given to you: "un homme n'a point des héritiers que ceux que la Coutume lui donne". The law of Sark does not permit the disposition of real property by Will. That Island follows the old procedures of customary law and searches and looks up to and including the sixth degree of affinity in order to find an heir. The forty principal properties in Sark, the "tenements", have become highly desirable properties. The owner of each tenement has a seat in Chief Pleas which comprises the government of an Island which is blessed by its freedom from income tax. In Sark some person has got the expectation of becoming heir to a "tenement" by operation of law. Is it therefore just that such expectations be frustrated by the disposal of the tenement? In practice in the Island of Sark all the possible heirs have also got a right of retrait. The other question concerning Sark is why there is a delay of forty days only. I believe the reason is because the community in Sark is a small compact one and there is a publication of each transfer of land on the porch of its only church. In pre-Revolution Normandy it was considered that forty days was sufficient in urban communities and I believe that this gave rise to a parallel consideration in Sark.

Customary law of successions in Guernsey was modified by a law registered on the 13th July 1840[3]. This law gave a person without linear descendants the right to dispose of his real property by way of Will. Although there were modifications to this law by the law of 13th April, 1954[4] there remains today in Guernsey the situation that a person with descendants can only dispose of his real property by Will to one or more of such descendants or to his spouse.

[1] Loi relative au Retrait Lignager, etc., 1924. Ordres en Conseil Vol. VII, p.176.

[2] Loi relative au Retrait Lignager, etc. (Auregny), 1949. Ordres en Conseil Vol. XIV, p.16.

[3] Loi sur les Successions, 1840. Ordres en Conseil Vol. I, p.51.

[4] Law of Inheritance, 1954. Ordres en Conseil Vol. XVI, p.10.

Therefore a descendant has the hope of becoming the owner of the real property of his or her father or mother. Logically if the property has been bought it is only the descendants which have such an expectation. On the other hand if a person's father or mother became owner by inheritance it is possible that the father or mother had been preferred in their turn over other possible heirs. So if a person who has received property by way of inheritance wishes to dispose of it, is it not logical to give the right of retrait not only to their descendants but equally to other persons who might have had the possibility of inheriting it?

The situation in Alderney is very unusual. When the inhabitants of Alderney returned to their Island after the War of 1939-45 they discovered that the Germans had removed nearly all the landmarks and also the registries of the Greffe ("Court Office"). The only possible course of action was to divide the land afresh between the inhabitants and to start a new system of registering land. However at that time there existed the right of retrait in its customary form. In 1949 a law was enacted[5], I believe as a matter of urgency, to abolish the customary law and to bring the law of retrait in line with that of Guernsey with one sole difference. There are three months available within which an action in retrait can be brought. The reason for this is, I suggest, because many of the inhabitants were still out of the Island at that time and the situation when the lands were being apportioned to new owners was extremely fluid.

Until 1949 the law of succession in Alderney had, since 1841, resembled that of Guernsey. The law of 1949[6] which changed the law of succession to real property in Alderney completely overturned the entire spirit of customary law. Today in Alderney despite the existence of the customary law rights of dower ("douaire") and widower's right ("franc veuvage"), abolished in Guernsey in 1954, there is a complete freedom of disposition of real property by way of Will. Curiously this freedom does not exist for personal property.

Therefore in Alderney there is no longer any expectation of becoming an heir by operation of law as in Sark or under the provisions of statutory law as in Guernsey. Perhaps that explains why, as far as the author is aware, there has not been any action in retrait in Alderney since 1949.

Even in Guernsey there are only a very limited number of actions in retrait. I believe that the reason is that the right of retrait in Guernsey, as in Alderney, is well known and a purchaser is made aware of the possibility of such an action taking place. Therefore a purchaser can if he so wishes ask the persons who have this right of action whether they would agree with the sale. In fact in Guernsey there have been only eight actions of retrait since 1960.

By way of contrast there have been several actions of retrait in Sark during the last ten years. I have already indicated the reasons. The tenements are extremely desirable properties, there is no freedom of testamentary disposition and therefore if one searches up to and including the sixth degree of affinity one is almost sure to find someone who has the expectation of becoming the new owner of a tenement.

[5] Loi relative au Retrait Lignager, etc. (Auregny), 1949. Ordres en Conseil Vol. XIV, p.16.

[6] Alderney Land and Property etc. Law, 1949. Ordres en Conseil Vol. XIV, p.67.

I have described the right of retrait as it exists today in the Bailiwick of Guernsey. Now I wish to pose the question as to whether one ought to keep this right at the end of the twentieth century. Is it not an anachronism? I understand that the majority of the Guernsey Bar would wish to see the abolition of this right. In fact the former Bailiff of Guernsey, Sir John Loveridge, when as Deputy Bailiff he delivered judgment in the course of an action of retrait brought on the 3rd November, 1972 (in the matter of Rault), expressed the opinion that it was extremely difficult to justify the continuation of such a right.

For my part I consider that the right of retrait is an essential part of our customary law concerning property. A person does not have any heirs except those given to him by the custom. If the customary law gives to a person the expectation of becoming the heir to some real property why should he not have the possibility of protecting his expectation against the loss of such property by a transfer?

Here in this Bailiwick we have kept alive the customary law of Normandy. I venture to say that the society which one finds today in the Bailiwick of Guernsey is one which has been moulded by the customary law. Above anything else it is the law of property which fashions a social group, a community of people, even a nation. We are what we are in Guernsey thanks to the customary law of Normandy. At the end of this century we keep alive the spirit of the custom and by it we seek to preserve for the family a portion of its property. If there is a restriction against the way in which property may be disposed of by Will, a restriction against gifts, a separation of property of spouses, why should there not be a restriction against the disposal of family property or at least a protection of the expectations which an heir may have under customary law? If a community moulds its life upon customary law why abandon the right of retrait? I put forward the proposition that it is not unreasonable to keep it but it would be unreasonable for the communities of the Bailiwick to abolish it.

THE ROYAL COURT AND SIMNEL - A CURIOSITY

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At Chief Pleas in September, 1532 and on 19th January, 1551 the Royal Court of Guernsey made ordinances concerning the banning of simnel, which was a sort of flour. Besides this, in the ordinance of 1532, fouaches too were prohibited[1]. I will explain what these were below. The text of the earlier ordinance[2] is slightly damaged, but its sense can be recovered by reference to the later one, which reads:

le cymynel est deffendu sy non pour lez femmes en gesynne sur la paine de xviiij sous damende toutes foes et quants

[Simnel is prohibited, save for women in childbed, on punishment of an eighteen sous fine]

By an ordinance of 18th January 1552 the provisions were lifted: "Le Cymynell est eslargy" - which is to say that simnel was "released" from the ban[3].

The purpose of these ordinances is quite clear. Simnel (Latin simila) was particularly pure and refined flour, and bread and cakes made with it were somewhat superior to the everyday fare consumed by Guernsey's early modern peasantry. Fouaches may be translated as "oven cakes" (the word being connected with four - "oven"), and these too, as a glance at chapter 25 of Rabelais' Gargantua (1534) will show, were "more of a delicacy than ordinary bread"[4]. These ordinances were made, then, to conserve flour by controlling the demand for a variety of it which lost some of its potentially edible, if coarse, content during manufacture. These were times when food supplies were particularly subject to the vagaries of weather, disease, and other phenomena which affected both the local production of wheat and international trade in it. The reason for making ordinances such as these in times of shortage is, therefore, comprehensible.

What is less easily explained, and of more interest, is why women in childbed should have been excluded from the provisions of the regulations. I will offer a tentative explanation.

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- [1] Greffe, Guernsey, Jugements vol. 1a, pp.15, 62 cf. Actes des Etats de l'Ile de Jersey 1524 - 1596 (Jersey, 1897) p.85. In this note I have adjusted dates to a year beginning 1st January.
- [2] Jugements vol. 1a, p.15. Such of the text as survives reads: "le symenel et fouaches sont defendus anuly denfer pour lez femmes en gesyne sur peyne de xviiij soulx tou".
- [3] *ibid.* p.65.
- [4] C. Clark, The Vulgar Rabelais (Glasgow, 1983) p.12.

Simmel cakes were a traditional gift on Mothering Sunday (Mid-Lent or Laetare Sunday)[5]. The introit used in churches at that feast (Isaiah lxvi, 10) goes as follows:

Rejoice in Jerusalem and exult in her,
all you who love her;
share her joy with all your heart,
all you who mourn over her.
Then you may suck and be fed from the breasts that give comfort,
delighting in her plentiful milk.

The epistle for that day (Galatians iv, 26) is similar in subject, referring to "Jerusalem which is the mother of us all". The festival when simmel cakes were enjoyed was therefore associated with these verses. By extension the cakes themselves came to be identified in the popular mind with lactation and parental affection.

This suggests why cakes of the same sort as those which were consumed on Mothering Sunday were taken to the bedsides of newly delivered mothers, just as in England "groaning cakes" were taken to confinements for the refreshment of the neighbours and gossips who were present[6].

Through a process of association which has some similarities to the basis of sympathetic magic, it appears that simmel cakes came to be seen as symbols of the good health and happiness which was wished upon the mother and child by those who gave and shared them. But there was no formal liturgical endorsement of the activities which I have described - the "blessing" was given by the laity.

These speculations are more than antiquarian. In the ordinances we seem to have some evidence of the Royal Court's acceptance of traditional practices (of a sort which it would later label "superstitious"), and a degree of willingness to accommodate popular mentalities - which of course the Court's members may have shared - when framing legislation in the first half of the Sixteenth century. This is a discussion which I hope to continue elsewhere.

[5] J. Brand, Observations on Popular Antiquities (ed. H. Ellis) (3 vols., London, 1841-42) vol.i, pp.61-68.

[6] *ibid.* vol. ii pp.44-48; cf. A. van Gennep, Manuel de Folklore Français Contemporain part I vol. i (Paris, 1943) p.120.