

# GUERNSEY LAW JOURNAL

ISSUE - 11

JANUARY — JUNE 1991

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**GUERNSEY LAW JOURNAL**

**ELEVENTH ISSUE**

**Introduction**

This edition covers the six month period from 1st January, 1991 to 30th June, 1991. Included in this edition is an article examining the development of the ancient remedy known as the Clameur de Haro, an article based on a paper presented at the Semaine de Droit Normand in June, 1990, by its author, de Vic Carey.

A new feature of this edition is that, in addition to the list of Guernsey statutory instruments printed at the end of the Guernsey section of the Journal, there is incorporated a list of statutory instruments produced in the United Kingdom but relating directly to Guernsey. The instruments included in that list will only be digested in detail where they are considered to be of sufficient interest but it is hoped that a comprehensive list of such Instruments registered in Guernsey during the period covered by the edition will be of assistance to readers.

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

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

References to this issue and future issues will be cited using the figure and letters 11.GLJ. followed by the paragraph number.

**Editorial Committee**

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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, 1991.

30th September, 1991

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ISSN 0958-6377

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## AGENTS

1. Estate agent - entitlement to commission - whether effective cause of the transaction

See Martel, Maides and Le Pelley v. Wilkinson, paragraph 13.

## BROADCASTING

2. United Kingdom Statutory Instrument: The Broadcasting Act 1990 (Guernsey) Order, 1991. - Extends to Guernsey certain provisions of the Broadcasting Act 1990 concerning broadcasting on Channel 3.

Registered 5.3.91. In force 13.2.91. (U.K. S.I. No. 191 of 1991).

## CHILDREN AND YOUNG PERSONS

3. Projet de Loi: The Children and Young Persons (Miscellaneous Provisions) (Guernsey) Law, 1991. - Amends several aspects of procedure in civil proceedings involving children. The Projet removes the requirement that a child who is the subject of care proceedings be brought physically before the court (unless he is called to give evidence); abolishes the effect of the hearsay rule in relation to evidence given in connection with the upbringing, maintenance or welfare of a child or young person in care proceedings; and enables the court, in civil proceedings, to hear the evidence of a child who in the opinion of the court possesses the necessary level of understanding.

Approved by the States 27.6.91. Awaiting Royal Sanction.

## COMPANIES

### Audit of accounts

4. Ordinance: The Companies (Exemption from Audit) Ordinance, 1991. - Enables "dormant" or "asset-holding" Guernsey companies which have no more than 10 members to dispense, by the unanimous written agreement of their members, with the normal requirement for audit of their accounts. A company which has so elected, and which continues to qualify for unaudited status, will nevertheless lose that status unless-

- (a) its continuance is unanimously agreed by all members voting at each annual general meeting thereafter; and
- (b) each annual return bears a certificate that the various requirements of the Ordinance are still met.

In place of having its accounts audited, each directors' report on an unaudited company must state that the accounts have been properly prepared according to law and agree with accounting records which have themselves

been maintained in accordance with the 1990 Law. An offence is committed by anyone failing to comply with these provisions or making a false statement.

It should be noted that, in making certificated annual returns, directors and secretaries of unaudited companies are required to satisfy themselves, *inter alia*, that they remain either "dormant" or "asset-holding" companies. A company is "dormant" whilst it does not have any transactions required to be entered in accounting records. A company only qualifies as an "asset-holding" company while -

- (a) its principal purpose is (as a matter of fact) to own one or more assets specified in its memorandum or to own assets of a description so specified;
- (b) its activities (if any) are all directly connected with its ownership of those assets and are not trading activities;
- (c) its only significant income derives directly from, and its only significant expenditure is incidental to, its ownership of those assets.

The Ordinance does not apply to companies carrying on banking, insurance or controlled investment business.

In force 1.5.91. (No. XIII of 1991).

#### Law reform

- 5. Order in Council: The Companies (Guernsey) Law, 1990. - See 9.GLJ.9 and 10.GLJ.7.

Registered 19.2.91. (No. XXVII of 1991). In force as to the most part on 1.3.91 but as to the company records and accounts provisions (apart from a provision dealing with corporate auditors, which is not yet in force) on 1.4.91: The Companies Law (Commencement) Ordinance, 1991. (No. II of 1990).

#### CONSTITUTIONAL LAW

##### Board of Employment, Industry and Commerce

- 6. Resolution of the States of 14.3.91. - Directing the dissolution of the Board of Trade and changing the name of the Labour and Welfare Committee to the Board of Employment, Industry and Commerce; and directing the preparation of legislation transferring the statutory functions of the former Boards to the new Board.

##### Committee for Home Affairs

- 7. Resolution of the States of 24.4.91. - Directing the dissolution of the States Prison Board and directing the preparation of legislation

transferring the functions of that Board and those of the Police Committee to the Committee for Home Affairs established by the Resolution.

**Committee to Review the Constitutions of all States Committees**

8. Resolution of the States of 14.3.91. - Directing the dissolution of the Committee with effect from 31.3.91.

**Constitution of the States of Deliberation**

9. Resolution of the States of 31.1.91. - Directing the preparation of legislation providing, pursuant to a report of the Constitution of the States Review Committee -
  1. That the office of Conseiller in its present form (under which Conseillers are elected for a six year term by the States of Election) should be abolished.
  2. That twelve additional seats for People's Deputies be created to be distributed amongst the present parochial electoral districts on a population basis.
  3. That the term of office for People's Deputies be increased from three to four years.
  4. That after each General Election the States of Deliberation should choose from amongst the newly elected People's Deputies twelve of their number to serve as Conseillers until the next General election. These members would occupy the seats presently reserved for Conseillers but would remain representatives of their parish and would not enjoy any extended term of office.

These changes would come into effect on 1st April 1994. A further report is awaited from the Committee on the details of implementation before the legislation is prepared. A proposal to split the parish of St. Peter Port into two electoral districts was rejected. No change was recommended in respect of the office of Douzaine Representative.

**Island Police Committee**

10. Resolution of the States of 24.4.91. - See paragraph 7.

**Prison Board**

11. Resolution of the States of 24.4.91. - See paragraph 7.

**COURTS**

**Costs**

12. Statutory Instrument: The Court of Appeal (Civil Division) (Costs and Fees) (Amendment) Rules, 1991. - See paragraph 60.

Court of Appeal - powers of court - appeal from decision of Jurats - whether decision perverse

13. "X" obtained details of a property owned by "R" from several estate agents including "A". "A", upon "X"s request, made two appointments for "X" to view the property. "X", via "A", offered the sum of £85,000 which was not acceptable to "R", who indicated that he would however accept £90,000. "X" made an increased offer of £87,500 but when it was put to "R" by "A" it transpired that a third party had paid a deposit on the property which was thus no longer available. Subsequently, "X" noticed the same property advertised by another estate agent, the sale to the third party having fallen through. He immediately made an offer for the full £90,000 through the second estate agent, which offer was accepted and led to a completed purchase. "A"s action in the Royal Court to recover their commission was dismissed. "A" appealed to the Court of Appeal. HELD, the question was whether "A"s services when they made the appointment for "X" were the effective cause of the transaction, a question of fact for the Jurats. "A" had argued that, as the primary facts were not in dispute, the question of where the effective cause lay could be said to be a question of inference from the primary facts, an inference which the Court of Appeal had the power to draw for themselves under Rule 12(3) of the Court of Appeal (Civil Division) Rules, 1964. However, as the appeal was one from a decision of the Jurats, it was not open to the Court of Appeal to ask itself simply what inference it would have drawn if it had been the Court of first instance. The proper question for the Court was whether it could be said that there was no evidence on which reasonable Jurats could find otherwise than that "A" was the effective cause. The Jurats were entitled to take into account that "X" had first seen the property in material circulated by other agents as well as "A" and may have decided that when "X" was advised by "A" that the property was no longer available the chain of causation was broken. Although it was possible that other triers of fact might have reached a different conclusion it was not possible to say that there was no evidence upon which the Jurats could reasonably have arrived at their findings or that the findings of the Jurats were perverse, and the appeal would be dismissed.

[Martel, Maides and Le Pelley v. Wilkinson - Court of Appeal 4.4.91 (RJC/RAP)].

Royal Court - functions of Jurats - brief retirement from court before reaching majority decision - whether verdict vitiated

14. On appeal to the Court of Appeal against a criminal conviction "A" complained, *inter alia* (see paragraph 17), that, the Jurats having retired to consider their verdict for less than fifteen minutes in total in a complex case, their majority verdict of six to four was vitiated. Examining the provisions of the Royal Court of Guernsey (Miscellaneous Reform Provisions) Law, 1950, as amended, and with reference to the Commissioners' Report of 1846, the Court of Appeal HELD that, unlike an English juror, each Jurat was an elected judicial officer exercising an individual vote to arrive at a verdict either unanimously or by a simple majority. Although section 6(4) of the Law provided that the Jurats may, and at the request of any one of them shall, retire for consultation

(which in the opinion of the court connoted some measure of discussion rather than a mere vote), the nature and extent of the discussion was a matter for the Jurats themselves. That ground of appeal would be dismissed.

[Law Officers of the Crown v. MacCafferty - Court of Appeal 4.4.91 (HMP/SRM)].

## CRIMINAL LAW AND PROCEDURE

### Attendance Centre

15. Statutory Instrument: The Criminal Justice (Attendance Centre) (Occupation and Instruction) Order, 1991. - Revokes and re-enacts the Order of 1983 which regulates the occupation and instruction of persons attending the Attendance Centre.

In force 1.5.91. (S.I. No. 11 of 1991).

### Computer misuse

16. Projet de Loi: The Computer Misuse (Bailiwick of Guernsey) Law, 1991. - Controls computer "hacking" by creating an offence of securing unauthorised access to, or modifying without authorisation, any program held in a computer.

Approved by the States 30.1.91. Awaiting Royal Sanction.

### Conspiracy - ingredients of offence - necessity for accomplice direction - identification of corroborative evidence

17. "A" was convicted, by a majority of the Jurats of the Royal Court of six to four, of conspiracy (with "B" and persons unknown) to import class B drugs. "B", who had been convicted of importation of the drugs, gave evidence that he had obtained the drugs in Wales from "X" together with a piece of paper containing "X"s telephone number and the number of a person identified as "Nick". That number had turned out to be unobtainable but when he was arrested in Guernsey and certain digits were transposed by customs officials the number was found to correspond to that of "A". It was accepted that "A" was generally known as "Nick". Documents found in "A"s possession connected him with "X". There was evidence that a third party had lent money to "A" at the material time. "A" appealed against his conviction on the ground, *inter alia*, that the summing up had been inadequate. HELD, as "B" was clearly, if his evidence was to be believed, a party to a conspiracy with "X" to import drugs, he was an accomplice. In these circumstances not only was it necessary to give the appropriate direction but also for the Deputy Bailiff to identify what evidence was capable of corroborating "B's" evidence. The Jurats had been directed that the easy transposition of the numbers on the piece of paper was capable of amounting to corroboration: in the Court's view this was incorrect. Secondly, the Deputy Bailiff had identified the question to be answered by the Jurats as being whether "A" was the Guernsey conspirator named as Nick on the slip of paper. In fact, the first question was

whether or not there was a criminal conspiracy; the second was whether "Nick" was a conspirator; and the third question whether that person was "A". The question whether it was properly to be inferred that "Nick" was a conspirator should have been left to the Jurats. In view of those matters and two other minor matters on which the Jurats had been misdirected on the evidence, the Court felt unable to say that no substantial miscarriage of justice had occurred, particularly having regard to the slender majority. The appeal would be allowed.

[Law Officers of the Crown v. MacCafferty - Court of Appeal 4.4.91 (HMP/ SRM)]. (See also paragraph 14).

#### Drug trafficking

18. Ordinance: The Drug Trafficking Offences (Bailiwick of Guernsey) Law, 1988 (Specified Countries and Territories) Ordinance, 1991. - Provides for confiscation orders by the countries and territories specified in the First Schedule to the Ordinance ("external confiscation orders") to be enforceable in the Bailiwick. Provision is also made for restraint and charging orders in respect of proceedings in specified countries to be made in the Bailiwick and the Law of 1989 is modified accordingly.

In force 1.5.91. (No. IX of 1991).

#### Evidence - statutory instrument - judicial notice - whether proof necessary

19. See Law Officers of the Crown v. Russell, paragraph 40.

#### Law reform

20. Order in Council: The Administration of Justice (Bailiwick of Guernsey) Law, 1991. - See 10.GLJ.20, 84 and 97.

Royal Sanction 20.3.91. Registered 30.4.91. In force as to section 15(1) (relating to third party insurance) on 2.10.91; as to certain other provisions (relating to car-sharing, production of driving documents and other driving-related matters) on 30.4.91; and as to the remainder on 28.5.91. (No. I of 1991).

#### Misuse of drugs

21. Ordinance: The Misuse of Drugs (Bailiwick of Guernsey) Law, 1974 (Modification) Ordinance, 1991. - Inserts into the list in Part I of the First Schedule to the Law of 1974 two additional substances.

In force 1.7.91. (No. XXII of 1991).

22. Ordinance: The Misuse of Drugs (Amendment) (Bailiwick of Guernsey) Ordinance, 1991.- Inserts into the list in the Fourth Schedule to the Misuse of Drugs (Bailiwick of Guernsey) Ordinance, 1976 two additional substances.

In force 26.6.91. (No. XXIII of 1991).

### Rules of procedure

23. Order of the Royal Court: The Royal Court (Criminal Procedure) Rules, 1991. - Provide that the Royal Court may be constituted by the Bailiff sitting alone for the purpose of the taking and recording of the plea of a defendant on indictment, the taking of depositions of witnesses in certain circumstances and an application relating to bail after committal for trial.

In force 4.3.91. (ORC No. I of 1991).

### Sentence - affray

24. Five defendants pleaded guilty to various offences of public disorder including affray, having made an unprovoked attack on six people causing several of them serious injuries. The evidence showed that the defendants had been "looking for another gang to make trouble" and the trouble had been vented on the innocent victims. The defendants were young men who had not previously been given custodial sentences. In respect of the count of affray, "A" and "D" were sentenced to 2½ years' youth detention and imprisonment respectively, "B" and "C" to 2 years' imprisonment each, and "E" to 18 months' imprisonment. On appeal to the Court of Appeal, HELD, that there was no proper basis for imposing a longer sentence on "A" and "D" than on "B" and "C". Further, the sentences passed were too long and a sentence of 18 months in custody would be substituted in each case. "E", who had played a lesser part and had only one previous conviction, for a motoring offence, would have his sentence reduced to 12 months' imprisonment.

[Law Officers of the Crown v. Gilman, Corbin, Aitken, Grogan and Whales - Court of Appeal 4.4.91 (HMC/EAGP/JMW/PAA/ADNH/JDMU)].

### Sentence - affray - premeditated affray

25. "A" and "B", who had been convicted in the Royal Court of an affray involving two others, applied for leave to appeal against their respective sentences of 18 months' imprisonment. Dismissing the applications, the Court of Appeal approved the Deputy Bailiff's reasoning when he stated that the Court had noted that there had been provocation and that no member of the public other than the victim and his wife were involved but that "premeditated affray, where the offenders go armed with dangerous weapons and masks, even though on a small scale, will normally attract several years' custody".

[Law Officers of the Crown v. Bullock and Truffitt - Court of Appeal 3.4.91 (HMC/EAGP/FJH)].

### Sentence - causing grievous bodily harm

26. "A" pleaded guilty in the Royal Court to causing grievous bodily harm and was sentenced to 30 months' imprisonment. The attack was an unprovoked, motiveless hard kick aimed at the victim's face while he was on his hands and knees and resulted in very serious injuries. "A" appealed to the

Court of Appeal. HELD, having regard to the need to maintain a differential between offences ranging from grievous bodily harm with intent to grievous bodily harm and unlawful wounding, and previous sentences imposed in respect of such offences, the sentence was excessive and would be substituted by one of 18 months' imprisonment. The Court recognised that there may be some cases where there will some overlap between the sentences for the three offences.

[Law Officers of the Crown v. King - Court of Appeal 2.4.91 (HMP/ADNH)].

**Sentence - misuse of drugs - importation and possession of cannabis resin**

27. "A" pleaded guilty in the Royal Court to the importation into Alderney, and possession with intent to supply, of 301.6 grammes of cannabis resin. He had a previous conviction in the Hague of possession of 635 grammes of heroin although it was suggested that that earlier offence had been motivated by his desire to assist his father financially. Character witnesses had spoken well of him. He was himself in financial difficulties. His appeal against his sentence of 2 years' imprisonment on each count was dismissed.

[Law Officers of the Crown v. Treais - Court of Appeal 7.1.91 (HMP/NJB)].

**Sentence - young offender - criminal damage - driving with excess alcohol - proportionality - consecutive sentences - principles to be applied**

28. "A" was convicted by the Royal Court, on his guilty plea, to an aggregate of two years' youth detention for a series of offences including burglary of, and criminal damage to, a garage, taking of a conveyance (while disqualified and uninsured), criminal damage to a number of vehicles by driving deliberately into them, resisting arrest and damage to a police car. On appeal against sentence, HELD, the sentence for the criminal damage to the vehicles, namely 12 months' youth detention, was more than was justified and would be reduced to 9 months. Secondly, although the Court would not disturb the custodial sentence of 3 months' youth detention for the offence of driving with excess alcohol (as to which, see further paragraph 33), it would be ordered to be served concurrently with that imposed for driving without third party insurance. The Court had adopted two well established principles of sentencing: firstly, proportionality (in that the sentence passed must not be disproportionate to the offence for which it is being imposed); and secondly, the principle that consecutive sentences should not be passed unless the offence is distinct and committed separately from another offence. Although normally such a sentence would not be permitted for a single instance or a single criminal event, in this case the motoring offences and the resisting arrest were distinct from the burglary and criminal damage done earlier in the criminal event and the consecutive sentence imposed therefor would not be disturbed. (R. v. Mussell 1991 1 WLR 187 considered).

[Law Officers of the Crown v. Peden - Court of Appeal 3.4.91 (HMC/NLP)].

### Serious fraud

29. Order in Council: The Criminal Justice (Fraud Investigation) (Bailiwick of Guernsey) Law, 1991. - Provides powers of investigation exercisable by H.M. Procureur in any case where it appears to him that, on reasonable grounds, there is a suspected offence involving serious or complex fraud, wherever committed, and there is good reason for him to exercise such powers. H.M. Procureur is empowered, by notice in writing, to require a person under investigation or any other person to produce at a specified time and place specified documents or a specified class thereof for copies to be taken and an explanation of them to be provided. Power exists for the Bailiff to grant a warrant in certain circumstances, where a notice is not complied with or would be ineffective. There is a saving for information or documents covered by legal or professional privilege and a person will not be obliged to furnish information in respect of which he owes an obligation of confidence by virtue of any banking or fiduciary business unless the client consents or H.M. Procureur requires it. There are various penalties provided for failing to comply with requirements, concealing etc. documents or disposing of them when an investigation is or is likely to be carried out. Provision is made for disclosure authorised by H.M. Procureur for the purposes of a prosecution in the Bailiwick or elsewhere and for agreements to be made by H.M. Procureur for the supply of information. Transitional provisions deal with orders made under the Criminal Justice Act, 1987 (Guernsey) Order, 1989 (see 7.GLJ.18), now lapsed.

Approved by the States 28.2.91. Royal Sanction 16.4.91. Registered 21.5.91. In force 30.5.91. (No. III of 1991).

### Summary offences

30. Order in Council: The Summary Offences (Amendment) (Guernsey) Law, 1990. - See 9.GLJ.24.

Royal Sanction 19.12.90. Registered and in force 19.2.91. (No. XXIX of 1990).

31. Projet de Loi: The Summary Offences (Amendment) (Bailiwick of Guernsey) Law, 1991. - Further amends the Law of 1982 so as to add an offence of threatening etc. behaviour to that of threatening etc. words, thus remedying a lacuna resulting from an earlier amendment.

Approved by the States 29.5.91. Awaiting Royal Sanction.

### Uniform scale of fines

32. Resolution of the States of 27.2.91: Directing the preparation of legislation increasing the level of maximum fines which may be imposed for criminal offences and increasing the Magistrate's powers to impose prison sentences.

**Youth detention - statutory restrictions - multiple offences - whether each offence must qualify**

33. "A" was convicted of a series of offences (see paragraph 28) of varying degrees of severity. He was sentenced to youth detention, the Deputy Bailiff stating, as required by section 2(2) of the Criminal Justice (Youth Detention) (Bailiwick of Guernsey) Law, 1990, that he was acting under section 2(1)(b) thereof, namely that the court considered that a custodial sentence was necessary for the protection of the public or the prevention of crime. On appeal to the Court of Appeal, "A" argued, *inter alia*, that it was necessary for the court to apply the statutory restrictions in section 2(1) separately in relation to each offence for which he was being sentenced and that the court was thus precluded from passing a custodial sentence for offences which would not themselves satisfy section 2(1)(c), i.e. which were not so serious that a non-custodial sentence could not be justified. Following the Court of Appeal in R v. Mussell [1991] 1 W.L.R.187, it was HELD that once the offender fell within one of the statutory criteria in section 2(1), no further restriction applied and even if an offence would not by itself have qualified for any of the criteria (for example, in this case, an offence of driving with excess alcohol) a custodial sentence could properly be imposed in respect of it. The appeal would be dismissed in that regard.

[Law Officers of the Crown v. Peden - Court of Appeal 3.4.91 (HMC/NLP)].

**CUSTOMS**

34. Projet de Loi: The Customs and Excise (General Provisions) (Bailiwick of Guernsey) (Amendment) Law, 1990. - See 10.GLJ.31.

Approved by the States of Alderney 23.1.91 and by the Chief Pleas of Sark 16.1.91. Awaiting Royal Sanction.

**EDUCATION**

**Elizabeth College**

35. Order in Council: Petition amending Statutes. - See 10.GLJ.35.

Royal Sanction 16.4.91. Registered and in force 21.5.91.

**EMPLOYMENT**

**Conditions of employment**

36. Resolution of the States of 13.3.91. - Directing the preparation of legislation to extend and strengthen the Conditions of Employment (Guernsey) Law, 1985 (see 2.GLJ.26). All employees working 15 hours or more weekly must be provided with a written statement of their conditions of employment; all employees must be provided with written wage slips

containing prescribed information; and criminal sanctions will be imposed for non-compliance.

**Proof of housing status**

37. Ordinance: The Right to Work (Limitation and Proof) (Tent Dwellers' Industries) (Amendment) Ordinance, 1991. - Adds retailing, food manufacture, fish farming and building to the list of industries in which people living in tents may lawfully work, on production of a tent dweller's declaration (see 7.GLJ.41), from April to October.

In force 25.4.91. (No. XVI of 1991).

**EVIDENCE**

**Accomplice direction - evidence capable of amounting to corroboration**

38. See Law Officers of the Crown v. MacCafferty, paragraph 17.

**Judgments and pleadings in foreign court - whether admissible in Guernsey proceedings**

39. Dismissing an appeal against a ruling of the Deputy Bailiff, the Court of Appeal HELD that pleadings and judgments in the Irish courts were admissible in the substantive proceedings to prove the issues raised in the Irish actions but were not admissible to prove the facts found by the Irish courts.

[Achates Trust Limited, Steere and Steere v. House of Spring Gardens Limited (formerly Armourshield Limited) - Court of Appeal 10.1.91 (PJGA/PJGA/IHB/PTRF)].

**Statutory instrument - judicial notice - whether proof necessary**

40. "D" was charged under section 2(2)(a) of the Road Traffic (Drink Driving) (Guernsey) Law, 1989 with driving while unfit due to the proportion of alcohol in her breath. The prosecution adduced evidence of two specimens of breath provided on a Lion Intoximeter 3000. "D" argued that there was no case to answer because the prosecution had produced no proof that that device was one approved by the Island Police Committee as required by the Law. HELD by the Magistrate that the fact that the device was so approved was recorded in the Road Traffic (Drink Driving) (Approved Device) (Guernsey) Order, 1990 and he was entitled to take judicial notice of that statutory instrument. Accordingly, the prosecution was not obliged to produce the statutory instrument nor any other proof of the approval of the device by the Committee.

[Law Officers of the Crown v. Russell - Magistrate's Court 8.3.91 (Police/NJB)].

## **FIRE SERVICES**

41. Statutory Instruments: The Fire Services (Guernsey) Law, 1989 Codes of Guidance Nos. 1, 2, and 3. - Prescribe Codes of Guidance, pursuant to the 1989 Law (see 7.GLJ.42 and 8.GLJ.43), in relation to Places of Work, Hotels and Guest Houses, and Sleeping Accommodation other than Hotels and Guest Houses.

In force 4.11.91. (Nos. 18 to 20 of 1991).

## **FISHING**

42. Projet de Loi: The Fishing (Amendment) (Bailiwick of Guernsey) Law, 1990. - See 10.GLJ.42.

Approved by the States of Alderney 3.4.91 and by the Chief Pleas of Sark 16.1.91. Awaiting Royal Sanction.

## **GAMBLING**

### **Gaming and lotteries**

43. Resolution of the States of 14.3.91: Directing the preparation of legislation consolidating and re-enacting, with modifications, the Gambling (Gaming and Lotteries) Ordinances, 1971 to 1987.

## **HEALTH AND MEDICINE**

44. Ordinance: The Health Service (Benefit) (Amendment) Ordinance, 1991. - Amends the 1990 Ordinance (see 10.GLJ.45) by exempting from prescription charges all persons aged 65 and over and resident in Alderney.

In force 1.6.91. (No. XVII of 1991).

## **HORTICULTURE**

### **Plant health**

45. Ordinance: The Elms and Dutch Elm Disease (Extension) Ordinance, 1991. - Extends controls over the felling and lopping of elms for a further 5 years until 30.4.96.

In force 25.4.91. (No. XII of 1991).

46. Ordinance: The Control of Diseased Plant Material (Amendment) Ordinance, 1991. - Extends the disease controls of the 1976 Ordinance, which previously applied only in respect of certain named plants, to the waste material of all plants.

In force 1.5.91. (No. XIV of 1991).

47. Ordinance: The Road Traffic (Conveyance of Plant Material) (Amendment) Ordinance, 1991. - Extends the controls on the conveyance by road of plant material imposed by the 1976 Ordinance, which previously applied only in respect of certain named plants, to the waste material of all plants.

In force 1.5.91. (No. XV of 1991).

#### HOUSING

##### Control of occupation - appeal against refusal of housing licence - jurisdiction of court - meaning of "decision of the Authority"

48. "A" wrote to the Housing Authority requesting a licence to enable him to accommodate qualified staff. The Authority replied that it would be unable to justify the grant of such a licence. "A" appealed. HELD by Sir Godfray Le Quesne, Lieutenant Bailiff presiding in the Royal Court, an appeal to the court lay, pursuant to section 40 of the Housing (Control of Occupation) (Guernsey) Law, 1982, against "any decision of the Authority". It was clear from section 2(2) of that Law that an application must relate to a particular dwelling and it must be made by the owner, lessee or prospective occupier of that dwelling. "A"s application did not relate to any particular dwelling therefore the Authority's reply was nothing more than an indication of their attitude should an application be made, not a decision within the meaning of section 40 which would give rise to a right of appeal. There was no jurisdiction to entertain the appeal which would, accordingly, be dismissed.

[Kirk v. States Housing Authority - Requetes and Appeals to the Royal Court 11.3.91 (unrep/HMP)].

##### Control of occupation - tent-dwellers' declarations

49. Resolution of the States of 14.3.91. - See paragraph 37.

#### INCOME TAX

##### Assessment to income tax - profits of United Kingdom partnership - Double Taxation Arrangement - whether share of Guernsey-resident partner exempt from Guernsey tax

50. "A" was a Guernsey-resident partner of an English firm of solicitors who was entitled to a share in the profits of the London partnership. He was assessed to Guernsey income tax on that share subject to double taxation relief and the assessment was upheld on his appeal to the Income Tax Authority. He appealed further to the Royal Court by way of case stated, contending that the English partnership was, for the purposes of the Double Taxation Arrangement made between the United Kingdom and Guernsey, a person resident in the United Kingdom and therefore its profits were those of a United Kingdom enterprise and not subject to Guernsey income tax except so much of those profits as was attributable to the Guernsey branch. Consequently, "A"s share of those profits was also exempt. HELD,

by the Bailiff, dismissing the appeal, that, unlike Jersey and United Kingdom tax law, under sections 5(1) and 209(1) of the Income Tax (Guernsey) Law, 1975 it was clear that no partnership can have a residence for Guernsey taxation purposes. Accordingly, the English partnership could not be said to be a United Kingdom enterprise within the meaning of the Arrangement. Under section 42(1) each partner must be taxed in respect of his share of the profits of a partnership, the Arrangement did not exempt "A"s share of the partnership profits from Guernsey tax, and "A" had been properly assessed.

[McKean v. Administrator of Income Tax - Requête and Appeals to the Royal Court 11.4.91 (unrep/HER)].

### Pensions

51. Order in Council: The Income Tax (Pension Amendments) (Guernsey) Law, 1991. - See 10.GLJ.57.

Royal Sanction 16.4.91. Registered 21.5.91. In force as respects payments to employers out of occupational pension schemes on 23.11.90; as respects application to annuity payments of the ETI scheme on 1.1.92; and as to the remainder on 22.5.91.

### Oaths of secrecy

52. Resolution of the States of 8.5.91. - Directing the preparation of legislation clarifying and simplifying the law relating to oaths of secrecy required to be taken by members of the Income Tax Authority and others.

## ISLAND DEVELOPMENT

### Detailed Development Plans

53. Detailed Development Plan No. 3, Review No. 1. - Approved by the States 6.3.91.

### Use classes

54. Ordinance: The Island Development (Amendment) (Guernsey) Law, 1988 (Commencement) Ordinance, 1991. - Appoints 1.3.91 for the commencement of the Law of 1988 empowering the States to prescribe use classes by Ordinance (see 6.GLJ.138).

In force 28.2.91. (No. IV of 1991).

55. Ordinance: The Island Development (Use Classes) Ordinance, 1991. - Sets out numerous uses of land in a total of 60 different "use classes" such that, by virtue of the Island Development (Amendment) (Guernsey) Law, 1988 -

- (a) a change in the use of land from a use falling within one use class to a use falling within a different use class is automatically deemed

to be a material change of use and accordingly constitutes development (which usually requires the permission of the Island Development Committee); and

- (b) a change from one use falling within a use class to another use falling within the same use class is excluded from the definition of development (and accordingly does not require that Committee's permission).

The Ordinance does not attempt to compartmentalise every conceivable area of human activity. It is reaffirmed that any change where one or both of the uses is not within any use class remains, as previously, to be judged purely on its materiality as a matter of fact. Also, certain uses which might otherwise be considered as falling within a particular use class are specifically excluded from the scope of the Ordinance and thereby left to be dealt with on the basis of materiality alone.

Use classes are grouped together as residential, tourist, retail, commercial, public administration, public amenity, assembly and leisure, storage/distribution, industrial and agricultural, but those groupings are only for ease of reference. For example, a change from use of a dwelling as a permanent residence for one household to its use as a lodging house is deemed to be development in just the same way as would be changing its use to self-catering tourist accommodation or to use as a shop.

Where the principal use of any given land falls within a particular use class its use for a purpose which is ancillary or ordinarily incidental to that principal use is to be regarded as also falling within that use class. The Committee's permission for that ancillary use is not therefore required; but if it becomes a dominant, or even independent, use, permission will be necessary if it is in a different use class or if it is in fact materially different. A similar rule applies to occasional, temporary and insignificant uses of premises normally used for a purpose within a use class but, in these cases only, if that use does not materially affect natural beauty, character, amenity, roads, traffic, services, public health, open spaces or adjoining properties.

In force 1.1.91. (No. V of 1991).

#### LAND LAW

#### Charge registered over land - vacation - circumstances in which vacation can be ordered

56. In giving judgment in an action for the vacation of a charge which had been registered pursuant to an interlocutory application, the Deputy Bailiff commented on the circumstances in which a registered charge may be lifted by order of the court. The holder of a bond or registered charge in the Livre des Hypothèques may not be ordered to vacate that bond unless funds amounting to the full amount are paid or tendered to him. He will lose the benefit of the charge if, in saisie proceedings, he declines to take the saisie over. Finally, where a charge is registered following an interlocutory application, its lifting or amendment is subject to the

discretion of the court as it will depend upon the outcome of the proceedings.

[Moed v. Cockram - Plaids de Meubles 4.2.91 (PTRF/RPB)].

#### **MOTOR TAXATION**

57. Ordinance: The Motor Taxation and Licensing (Commencement) Ordinance, 1991. - Appoints 27.6.91 for the commencement of certain sections of the Motor Taxation and Licensing (Guernsey) Law, 1987 (see 6.GLJ.150) relating to the Ordinance-making powers of the States.

Made 26.6.91. (No. XXI of 1991).

#### **POLICE**

##### **Island Police Committee - transfer of functions**

58. Resolution of the States of 24.4.91. - See paragraph 7.

#### **POPULATION AND MIGRATION**

59. Resolution of the States of 27.6.91. - Resolving to sursis an Article of the Population and Migration Committee, asking the States whether that Committee should proceed with the Island Register (see 6.GLJ.152), until the results of the 1991 Census (see 10.GLJ.64) are known.

#### **PRACTICE AND PROCEDURE (CIVIL)**

##### **Costs and fees - Court of Appeal**

60. Statutory Instrument: The Court of Appeal (Civil Division) (Costs and Fees) (Amendment) Rules, 1991. - Amend the 1964 Rules so as to increase the various costs and fees payable to the Court, the Registrar and the Sergeant and to Advocates in respect of hearings of the Civil Division of the Court of Appeal.

In force 1.2.91. (S.I. No. 1 of 1991).

##### **Costs - full indemnity - circumstances in which may be ordered**

61. See Kirk v. Lincoln and Riley, paragraph 65.

##### **Discovery - powers of court - document in possession of person not party to proceedings**

62. "R", a litigant in several actions, applied for the disclosure of medical records and certain letter sheets held by the States Prison Board. The Bailiff granted the application. On appeal to the Court of Appeal, HELD, as a general rule the court has no power to order the discovery or

production of documents as against a person who is not a party to the action. The proper procedure would be to issue a subpoena to the relevant person. The appeal would be allowed and the order set aside.

[States Prison Board v. Kirk - Court of Appeal 8.1.91 (HMC/unrep)].

**Evidence - statutory instrument - judicial notice - whether proof necessary**

63. See Law Officers of the Crown v. Russell, paragraph 40.

**Fees - Magistrate's Court**

64. Order of the Royal Court: The Magistrate's Court (Fees) (Amendment) Rules, 1991. - Further amend the Rules of 1981 so as to increase fees payable in respect of civil proceedings and amend the Magistrate's Court (Defence Witnesses) Rules, 1983 so as to increase the fees payable to H.M. Sergeant for service of a summons under those Rules.

In force 1.4.91. (No. II of 1991).

**Summary judgment - application - costs on full indemnity basis**

65. "A" issued proceedings against "RR" who filed draft defences containing an exception requesting further and better particulars. "A" appealed against the dismissal of his application for summary judgment and the Deputy Bailiff's order that he pay costs of the proceedings on a full indemnity basis. HELD, in view of the request for further particulars, which "A" had not answered, the decision to refuse the application for summary judgment could not be criticised. Further, having regard to the "hopeless nature" of the application for summary judgment, there was no reason to criticise the order regarding costs. Where it was considered that there had been the pursuit of an action unreasonably such an order could not be criticised.

[Kirk v. Lincoln and Riley - Court of Appeal 8.1.91 (unrep/PJGA)].

**Terres à l'amende**

66. Ordinance: The Ordinance relating to les Terres mises à l'amende, 1991. - See paragraph 81.

**PRISON**

**Parole**

67. Ordinance: The Parole Review Committee Ordinance, 1991. - Sets out the powers of the Parole Review Committee constituted by the Law of 1989 (see 8.GLJ.74). Persons serving less than 15 months' imprisonment will not be eligible for parole and either 10 months or one-third of the sentence, whichever is the greater, must be served before parole can be granted. There is power to attach conditions to parole licences, recall prisoners, revoke licences, defer applications for parole and review cases. The

Prison Board, Probation Committee and Police Committee must disclose to the Committee any written reports made in respect of the prisoner and H.M. Procureur may submit any information tending to indicate that it would not be in the island's interest to release the prisoner on licence. Also set out is the procedure for the notification of decisions, revocation and recall and the procedure and powers upon commission of an offence by the prisoner while on licence. No appeal lies from a decision of the Committee, nor is legal representation allowed. The Committee, its members and officers are excluded from civil liability in the performance of their functions under the Law of 1989.

In force 31.1.91. (No. I of 1991).

#### **States Prison Board - dissolution**

68. Resolution of the States of 12.4.91. - See paragraph 7.

#### **REGISTRATION OF BIRTHS, DEATHS AND MARRIAGES**

69. Projet de Loi: The Births, Deaths, Marriages and Legitimacy (Bailiwick of Guernsey) (Amendment) Law, 1991. - Amends in minor respects certain legislation relating to births, deaths and marriages and that relating to declarations of legitimacy. The Loi relative à l'Enregistrement des Naissances et Décès dans le Bailliage de l'Ile de Guernesey of 1935 is amended by extending from six days to fifteen days the period for which a body may be kept after death without the permission of the Law Officers and various penalties under that Law are increased. The Loi ayant Rapport aux Mariages Célébrés dans les Iles de Guernesey et de Serk of 1919 is amended to enable a person who is unable on medical grounds to attend at the Greffe to be granted a special licence permitting him to be married in a private house or hospital in which he is confined. The powers of the States to make Ordinances varying the fees payable under the 1919 are extended to enable increased fees to be charged where a special search at the Greffe is required. The Projet also amends the Legitimacy (Guernsey) Law, 1966, so as to increase the fees payable upon the making of a declaration of legitimacy and empowers the States to make future amendments to such fees by Ordinance.

Approved by the States of Guernsey on 28.2.91, by the States of Alderney on 1.5.91 and by the Chief Pleas of Sark on 3.4.91. Awaiting Royal Sanction.

70. Ordinance: The Births, Deaths and Marriages (Fees) (Amendment) Ordinance, 1991. - Increases certain fees payable in relation to the registration of births and deaths and on marriage.

In force 1.3.91. (No. III of 1991).

#### **ROAD TRAFFIC AND PUBLIC TRANSPORT**

##### **Car-sharing**

71. Order in Council: The Administration of Justice (Bailiwick of Guernsey) Law, 1991. - See paragraph 20.

**Disabled persons**

72. Ordinance: The Road Traffic (Disabled Persons) Ordinance, 1991. - Exempts invalid carriages, as defined, from any prohibition against use on a footway and from being treated, for the purposes of licensing and registration, as motor vehicles. Conditions for the issue and use of disabled persons' badges are laid down as are construction and safety requirements for invalid carriages from which the Island Traffic Committee has power to exempt any invalid carriage.

In force 1.7.91. (No. XX of 1991).

**Driving under the influence of drink or drugs**

73. Order in Council: The Road Traffic (Drink Driving) (Amendment) (Guernsey) Law, 1990. - See 10.GLJ.86.

Registered and in force 19.2.91. (No. XXXI of 1990).

**Driving under the influence of drink or drugs - driving with excess alcohol - Lion intoximeter - whether device approved by Island Police Committee - judicial notice of statutory instrument**

74. See Law Officers of the Crown v. Russell, paragraph 40.

**Driving under the influence of drink or drugs - driving with excess alcohol - sentence**

75. See Law Officers of the Crown v. Peden, paragraph 28.

**International driving permits - fees**

76. Order in Council: The Motor Vehicles (International Circulation) (Guernsey and Alderney) (Amendment) Law, 1990. - See 10.GLJ.87.

Registered and in force 19.2.91. (No. XXVIII of 1990).

**Prohibited and one-way streets**

77. Ordinance: The Prohibited and One-Way Streets (Amendment) Ordinance, 1991. - Amends the 1989 Ordinance by making La Rue de la Varde, Torteval prohibited to vehicles until 31.12.93 or such other date as the Island Traffic Committee shall by Resolution prescribe.

In force 13.3.91. (No. VI of 1991).

78. Ordinance: The Prohibited and One-Way Streets (Amendment) (No. 3) Ordinance, 1991. - Further amends the 1989 Ordinance by making part of Sausmarez Street one-way.

In force 24.6.91. (No. XIX of 1991).

## Vehicle registration and licensing

79. **Projet de Loi:** The Vehicle Registration and Licensing (Transfer of Functions) (Guernsey) Law, 1991. - Transfers the functions relating to the registration and licensing of motor vehicles and to driving licences from the Board of Administration and States Supervisor to the Island Traffic Committee or such body as the States may by Resolution prescribe.

Approved by the States 31.1.91. Awaiting Royal Sanction.

## SOCIAL SECURITY

### Attendance and Invalid Care Allowance

80. **Projet de Loi:** The Attendance and Invalid Care Allowance (Amendment) (Guernsey) Law, 1991. - Repeals section 1(4)(a) of the 1984 Law so that attendance allowances will be payable in respect of persons under the age of 2 years.

Approved by the States 27.2.91. Awaiting Royal Sanction.

### Reciprocal agreements

81. **Ordinance:** The Social Insurance and Family Allowance (Reciprocal Agreement with Portugal) (Amendment) Ordinance, 1991. - Amends the Convention with Portugal set out in the 1979 Ordinance.

In force 13.3.91. (No. VIII of 1991).

## TERRES A L'AMENDE

82. **Order in Council:** The Administration of Justice (Bailiwick of Guernsey) Law, 1991. - See paragraph 20.

83. **Ordinance:** The Ordinance relating to Terres mises à l'amende, 1991. - Increases the maximum penalty under the Ordinance of 1786 to £50 in respect of trespasses committed after the commencement date.

In force 1.6.91. (No. XVIII of 1991).

## TRUSTS

84. **Order in Council:** The Trusts (Amendment) (Guernsey) Law, 1990. - See 9.GLJ.79.

Royal Sanction 19.12.90. Registered and in force 19.2.91. (No. XXX of 1990).

WASTE DISPOSAL

85. Ordinance: The Refuse Disposal (Amendment) Ordinance, 1991. - Increases the penalties imposed by the 1959 Ordinance.

In force 13.3.91. (No. VII of 1991).

WATER

86. Order in Council: The States Water Supply (Amendment) (Guernsey) Law, 1991. - See 10.GLJ.100.

Royal Sanction 21.5.91. Awaiting registration.

87. Ordinance: The Water Charges Ordinance, 1991. - Increases charges for water and water meters and for other ancillary services of the Water Board; and re-enacts the 1979 Ordinance which had been substantially amended.

In force 1.5.91. (No. XI of 1991).

GUERNSEY STATUTORY INSTRUMENTS

88. The following Statutory Instruments were made during the period covered by this issue. Except where otherwise indicated they have not been digested in detail. A reference copy of each is held at the Greffe and copies may be obtained from the relevant Committee.

	S.I. Number
The Court of Appeal (Civil Division) (Costs and Fees) (Amendment) Rules, 1991 (see paragraph 60).	1.
The Fishing (Designation of Fisheries) Order, 1991	2.
The Company Documents (Inspection and Copying Fees) Regulations, 1991	3.
The Post Office (Inland Post) (Amendment) Order, 1991	4.
The Income Tax (Guernsey) (Limit of Retirement and Other Benefits) (Amendment) Regulations, 1991	5.
The Income Tax (Guernsey) (Retirement Annuity Schemes and Retirement Annuity Trust Schemes) (Amendment) Regulations, 1991	6.
The Import and Export of Goods (Control) (Guernsey) (Amendment) Order, 1991	7.
The Post Office (Postal Order) (Amendment) Order, 1991	8.
The Post Office (Overseas Parcel Post) (Amendment) Order, 1991	9.
The Animal Products Importation (Amendment) Order, 1991	10.
The Criminal Justice (Attendance Centre) (Occupation and Instruction) Order, 1991 (see paragraph 15)	11.
The Rent Control (Variation) Order, 1991	12.
The Health Service (Pharmaceutical Benefit) (Amendment) Regulations, 1991	13.
The Health Service (Medical Appliances) (Amendment) Regulations, 1991	14.

## S.I. Number

The Import and Export of Goods (Control) (Guernsey) (Amendment No. 2) Order, 1991	15.
The Teachers' Superannuation (Amendment) (Guernsey) Regulations, 1991	16.
The Misuse of Drugs (Designation) (Amendment) Order, 1991	17.
The Fire Services (Guernsey) Law, 1989 Code of Guidance No. 1 - Places of Work (see paragraph 41)	18.
The Fire Services (Guernsey) Law, 1989 Code of Guidance No. 2 - Hotels and Guesthouses (see paragraph 41)	19.
The Fire Services (Guernsey) Law, 1989 Code of Guidance No. 3 - Sleeping Accommodation (other than Hotels and Guest Houses) (see paragraph 41)	20.
The Animals Importation (Revocation) Order, 1991	21.
The Milk (Retail Prices) (Guernsey) Order, 1991	22.

UNITED KINGDOM STATUTORY INSTRUMENTS

89. The following is a list of Statutory Instruments made in the United Kingdom which are specifically applicable to Guernsey and which were registered here during the period covered by this issue. Unless otherwise indicated they are not digested in detail elsewhere in the Journal.

	S.I. Number
The Fishing Vessels (Life-Saving Appliances) (Guernsey) Order, 1990	2147
The Fishing Vessels (Safety Provisions) (Guernsey) Order, 1990	2148
The Merchant Shipping (Safety Convention) (Guernsey) Order, 1990	2150
The Broadcasting Act 1990 (Guernsey) Order, 1991 (see paragraph 2)	191
The Merchant Shipping (Distress Signals and Prevention of Collisions) (Guernsey) (Amendment) Order, 1991	763
The Collision Regulations (Seaplanes) (Guernsey) (Amendment) Order, 1991	769
The Merchant Shipping (Categorisation of Registries of Overseas Territories) Order, 1991	770

ALDERNEY

CENSUS

90. Ordinance: The Census (Alderney) Ordinance, 1991. - Provides for the taking of a census of the population of Alderney on 21.4.91.

Ordinance of the States of Alderney of 6.3.91.

DIVORCE AND MATRIMONIAL CAUSES

91. Ordinance: The Separation, Maintenance and Affiliation Proceedings (Amount of Weekly Sum) (Alderney) Ordinance, 1991. - Increases the maximum weekly sums which may be awarded by the court in separation or affiliation proceedings to £300 for a wife and £100 for each child.

Ordinance of the States of 5.6.91.

92. Resolution of the States of 5.6.91. - Directing the preparation of legislation amending the Separation, Maintenance and Affiliation Proceedings (Alderney) Law, 1964, so as to give to the court the power to make awards of maintenance without being subject to a maximum award provided that in exercising its powers the court must have regard to certain specified matters.

ELECTRICITY

93. Ordinance: The Electricity Concession (Rates of Charge) (Alderney) Ordinance, 1991. - Increases the maximum permitted charge per unit of electricity consumed in Alderney.

Ordinance of the States of Alderney of 1.5.91.

FEES

94. Projet de Loi: The Sewerage (Amendment) (Alderney) Law, 1991. - Empowers the States to set by Ordinance the amount of the charges payable to the States under the principal Law of 1970 when a building is connected to a public sewer.

Approved by the States of Alderney 6.3.91. Royal Sanction 21.5.91.  
Awaiting registration.

HEALTH AND MEDICINE

Medical benefit

95. Ordinance: The Health Service (Benefit) (Amendment) Ordinance, 1991. - See paragraph 44.

**MILK**

96. Ordinance: The Milk (Retail Price) Ordinance, 1991. - Increases the price of milk by 2 pence per pint as from 7.4.91.

Ordinance of the States of Alderney of 3.4.91.

**PUBLIC HEALTH**

**Foot and mouth disease**

97. Ordinance: The Foot and Mouth Disease (Amendment) (Alderney) Ordinance, 1991. - Amends the principal Ordinance of 1952 so as to increase the maximum valuations applied to cattle slaughtered compulsorily under the Ordinance for the purposes of compensation payments and amends the Schedule entry relating to oxen.

Ordinance of the States of Alderney of 3.4.91.

**Slaughterhouses**

98. Ordinance: The Slaughterhouses (Alderney) Ordinance, 1991. - Prohibits the slaughter of animals for human consumption other than in the States slaughterhouse or a licensed slaughterhouse and empowers the Agricultural and Fisheries Committee to make regulations controlling the operation of such establishments.

Ordinance of the States of Alderney of 3.4.91.

## SARK

### COURTS

99. Projet de Loi: The Court of the Seneschal (Increase of Jurisdiction) (Amendment) (Sark) Law, 1991. - Raises the maximum fine which the Seneschal may impose in respect of a criminal offence from £200 to £500 (or level 4 on the Sark uniform scale of fines).

Approved by the Chief Pleas of Sark 16.1.91. Awaiting Royal Sanction.

### HOUSING

100. Order in Council: The Housing (Extension) (Sark) Law, 1991. - See 10.GLJ.117.

Royal Sanction 20.3.91. Registered and in force 21.5.91. (No. II of 1991).

### TAXATION

101. Projet de Loi: The Financial Provisions (Amendment) (Sark) Law, 1991. - Increases the maximum rates of landing tax, harbour dues, horse tax, dog tax and cycle tax that may be imposed by the Chief Pleas by Ordinance.

Approved by the Chief Pleas of Sark 16.1.91. Awaiting Royal Sanction.

THE CLAMEUR DE HARO

(Based on a paper presented by de V. G. Carey, Q.C., H.M.  
Procureur, at the Semaine de Droit Normand held in Guernsey  
in May, 1990)

Laurent Carey, who was a Jurat of the Royal Court towards the end of the 18th century, in his well-known treatise on Guernsey Law(a) describes Haro in these terms:-

"Haro ayant, comme il a été dit, un interdit possessoire a pris son origine de Rollo, Duc de Normandie, grand prince et très juste, et est comme une imploration de son aide et de son assistance contre ceux qui, par voie de fait, se veulent mettre en possession du bien d'autrui; c'est une voie possessoire pour garder sa possession et la défendre contre la violence des plus forts."

The history of the Clameur de Haro will be well known to students of Norman Customary Law and full particulars of its origins can be found in the works of the various commentators thereon(b).

I propose to confine myself to developments with regard to the Clameur in the Bailiwick of Guernsey during the 20th century.

The procedure for raising the Clameur de Haro is well established. The plaintiff in the presence of two witnesses and the defendant falls to his knees and recites the words, "Haro, Haro, à l'aide de mon prince". He then recites the Lord's Prayer in French. The alleged wrong-doer must then immediately stop doing whatever it is that is the subject of complaint. If he does not stop he is guilty of contempt of court. The traditional penalty for this offence was a night of imprisonment in Castle Cornet. The same penalty was likewise imposed on a plaintiff who raised the Clameur without good cause.

The plaintiff is then obliged to take his Clameur to the Bailiff within 24 hours and complete an affidavit before him together with his two witnesses confirming that the Clameur has been duly raised. The Bailiff then orders that the Clameur be registered at the Greffe. After that the plaintiff has a year and a day to commence an action before the Royal Court seeking confirmation of the terms of the Clameur.

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(a) Essai sur les Institutions Lois et Coutumes de l'Ile de Guernesey, 1765, published 1889 by the Royal Court.

(b) Carey (op cit).  
Godfrey Commentaires, Rouen, 1626.  
Terrien Commentaires, Rouen, 1654.  
Etude sur le Haro 1877 (published by La Gazette des Iles de la Manche);  
Pissard: Le Clameur de Haro dans le Droit Normand, Caen 1911.  
Sherwill: Notes as to origin and history of La Clameur de Haro and on its use in Guernsey in the 20th century (Transactions de la Société Guernesise, 1947, p.129).

From this it will be seen that it is extremely easy to raise the Clameur de Haro. As a result there is a real danger of abuse of process. This is evidently a problem in Normandy(c). Before and during the 18th century Guernsey people were notoriously litigious. During the nineteenth century and the first half of the twentieth century there were few instances where the Clameur was raised. However, during the last twenty-five years resort to raising the Clameur increased considerably. The Bailiff and his Deputy adopted the practice of registering a Clameur without inquiry into its merits. Experience showed that after registration it was extremely rare for any further action to be taken before the Court for confirmation.

Unfortunately several Clameurs were registered where it was clear on the face of them that the grounds of complaint were ill-founded. For example, a civil servant who had a complaint against his employers raised the Clameur in the public gallery during the meeting of the States of Deliberation(d). Another individual who had a dispute with the Water Board over his meter raised a Clameur against the States of Guernsey(e). In another case Clameurs were raised by each of two neighbours who had a dispute over a right of way. The two continued to ignore the other's Clameur and exercised their rights as they had done in the past until the judgment of the Court in the substantive action(f). One case which went to a full hearing and was determined in favour of the Claimant concerned the jib of a crane used by a building contractor which crossed over into the airspace above the property of the plaintiff(g). In another case where I was a witness the plaintiff suffered from oily deposits landing on his house from the chimney of a horticultural boiler. The grower who did not live on the vinery where the boiler was situate had a thermostat to activate the boiler automatically whenever the temperature fell. Applying the principle that one cannot raise the Clameur other than at the moment that the trespass is happening the plaintiff in that case waited until the thermostat activated the boiler and smoke started coming over his property and smuts therefrom fell on his house(h).

About seven years ago a local resident began regularly to raise the Clameur de Haro and it was evident from the declarations which he produced to the Bailiff that the Clameurs were manifestly ill-founded. Eventually the Deputy Bailiff decided that the function of the Bailiff in ordering the registration of the Clameur was not just administrative but judicial. On one occasion the plaintiff produced for registration two Clameurs. One had been raised in England and the other for some reason best known to the Plaintiff in

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(c) Pissard (op cit), 113.

(d) Torode: Livre des Clameurs, 26th January, 1966.

(e) Roger: Livre des Clameurs, 6th June, 1967.

(f) McKane: Livre des Clameurs, 5th May, 1977.  
Northern Construction Limited, 25th July, 1977.

(g) Griffin: Livre des Clameurs, 27th August, 1975.

(h) McAllister: Livre des Clameurs, 26th August, 1976.

the Chamber of the Magistrate's Court. The Deputy Bailiff delivered a written judgment declining to register either Clameur. He said that the Clameur could only be raised to protect the plaintiff against an immediate threat to possession of real property where the threat concerned trespass or nuisance. In his opinion the Clameur could not be raised to protect possession of movable property. He concluded that he deemed his function to be judicial because the imposition of an injunction before the Court had given its judgment was a drastic step which must be reserved only for the most urgent cases. He ruled that the Clameur raised in England must be a nullity because the plaintiff could not be in a position to be protecting his Guernsey real property.

The Clameur raised in the Magistrate's Court did not concern immovable property close to the Court and was therefore also a nullity(i).

The individual concerned was not discouraged by this judgment. In 1984 he raised another Clameur outside the surgery which he had one time occupied with his former partner. There was in fact already an action before the Court on the subject of this partnership. Again the Deputy Bailiff refused to permit a registration of the Clameur and the plaintiff decided to appeal to the Guernsey Court of Appeal. In its judgment(j) the Court of Appeal after examining the Nouvelle Coutume and Norman and Guernsey authorities on the subject(k) ruled:-

1. The Clameur can only be used by a person in possession of immovable property to restrain interference with his possession or enjoyment of it. It cannot be used to recover possession once lost. (The Court decided that it was not necessary to decide if the Clameur was available for protection of possession of movable property.) In the present case the plaintiff had been excluded from possession of his surgery, whether rightly or wrongly, for at least two years and for this reason the Deputy Bailiff had been correct to refuse to permit the registration of the Clameur.
2. Apart from this substantive defect in the Clameur there was also a procedural defect. The Court held that the object of presenting the Clameur to the Bailiff was to satisfy himself that on the face of it the Clameur was usable in the circumstances set out by the plaintiff in his declaration. If the Bailiff was not so satisfied that it was appropriate to use the Clameur in the circumstances he should refuse his endorsement.

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(i) Judgment of the Royal Court in re Kirk, May 1984.

(j) Judgment of the Court of Appeal, 16th April, 1985, 1.GLJ.60.

(k) Pissard (op cit);  
Carey (op cit);  
Terrien (op cit);  
Basnage: Note sur Article XV de la Nouvelle Coutume;  
Howard: Dictionnaire de la Coutume Normandie;  
Sherwill (op cit);  
Warburton History of Guernsey.

3. If the Bailiff is to discharge this function it is essential for the declaration to state:-

- (i) the time and place at which the Clameur was raised;
- (ii) the purpose of raising it; and
- (iii) the persons whom it is sought to restrain.

The plaintiff appealed against this judgment to the Judicial Committee of the Privy Council. At the hearing he produced no further valid arguments against the conclusions of the Court of Appeal and the Appeal was dismissed(1).

There are still some questions which the judges have not answered:-

1. Can one use the Clameur to protect movable property? In Guernsey law the distinction between immovable and movable property is of necessity clearly defined because immovable and movable property are treated differently for the purposes of the Law of Succession and the Law relating to Charge and Hypothecation(m).

Although there have not been any valid Clameurs raised in recent times concerning movable property I consider that one would be entitled to raise the Clameur in order to protect possession of movable property. Two examples come to mind. Firstly, I see no reason why a tenant whose possession of an interest in premises that have been leased to him and in which he has a purely movable interest cannot raise the Clameur to protect his possession. Likewise, the Ordinance of 1852 deems certain fruits of the earth to have become movable on a particular date within the year, notwithstanding that they have not been harvested. A person whose possession to such movables is threatened must surely be entitled to protect his possession of them by means of a Clameur, whatever the time of year.

2. Can one raise the Clameur when the party whom it is sought to restrain is not physically present? I have already referred to the case of the thermostatically controlled horticultural boiler. I would suggest that in these circumstances it is possible to raise the Clameur. The party, however, could not be guilty of contempt of court for failing to comply until he had notice thereof, presumably by means of a signification or notice served through Her Majesty's Sergeant, the officer of the Court responsible for the service of judicial process in Guernsey.

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(1) Order in Council, 17th February, 1988.

(m) Ordinance of the Royal Court relating to the distinction between movable and immovable property, 1852, as amended: Recueil d'Ordonnances, Tome III, page 231; Tome IV, page 299.

3. What is the sanction today against those who ignore a Clameur or raise it without just cause? The dungeon of Castle Cornet is now a museum and is not available for its original purpose. In the case of the jib of the crane to which I have referred, on two occasions the offending contractor was prosecuted at the instance of the Law Officers and punished with a fine in the Magistrate's Court. However, I doubt whether the Magistrate in fact has any jurisdiction in cases concerning the Clameur de Haro(n). The Deputy Bailiff in one of his judgments has indicated that he does not regard it as obligatory for the Law Officers of the Crown to commence criminal proceedings against a person who offends(o). If the Law Officers do not decide to take action themselves it is possible for the victim to summon the offending party before the Ordinary Court asking for the Court to deal with the person concerned for contempt of court. That Court could then impose a fine or imprisonment for contempt.

It will be seen from the above that the Clameur de Haro remains a useful and effective remedy in cases where it is appropriate to invoke it. It is to be hoped that the recent authoritative judgments will restore it to its rightful place in the Guernsey legal system and discourage the abuse which I have described.

The Royal Court of Guernsey never developed an equitable jurisdiction in the same way as that established in England by the Courts of Equity. Until the enactment of Part I of the Law Reform (Miscellaneous Provisions) Guernsey) Law 1987(p) there was some doubt as to the power of the Court to grant interim relief by way of injunction. The enactment of that Law has in no way made the Clameur redundant, although in certain situations it may provide an alternative and more appropriate remedy.

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(n) vide proviso to section 1, Magistrate's Court (Guernsey) Law, 1954 (Ordres en Conseil Vol. XVI, page 107).

(o) Judgment of the Royal Court, May 1984 in re Kirk.

(p) Ordre en Conseil No. X of 1987.