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CONTENTS

HERALD

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FIFTEENTH ISSUE

Introduction

This edition covers the six month period from 1st January, 1993 to 30th June, 1993.

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 15.GLJ. followed by the paragraph number.

As subscribers may be aware full reports of important decisions of the Court of Appeal since that Court was constituted in 1964 have been printed and available to interested persons at the Greffe. It has now been decided for the future to include these as an appendix to the Law Journal covering the period in which they are delivered. This edition includes such reports for the first time. Generally such decisions will not be summarised separately in the Digest but will be referred to in the Digest under the appropriate Heading with a cross-reference to the paragraph containing the report in question. There are a number of unpublished decisions from earlier years, which will be printed in later issues.

We are pleased to include an article by the Bailiff on the Law of Wreck which is based on the paper he delivered to the Semaine de Droit Normand in 1990. We respectfully offer our congratulations to the Bailiff on the Knighthood which Her Majesty the Queen conferred on him in the Birthday Honours.

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 1993.

15th November, 1993

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SARK IN THE SEVENTEENTH CENTURY

Extract from a pamphlet published in 1671 by Mr. F. WHEARIS who kept a coffee house next to "Symonds Inn" in Chancery Lane, London and who spent several years on Sark. The original spelling is retained.

"But least you should think we mind too much our Bellies, take next a survey of our political Government, first for our defence we have a Captain with about 40 Souldiers, who continually keep Guard, and are maintained by contribution of the Inhabitants: Then we have a court of Judicature held every TUESDAY where an honest Fisherman we call the Judge, Another (at present his son) that is intituled Monsieur LE PROVOST, a Person that has the gift of writing, and learning enough to read the Obligation of a Bond, serving as Clerk or Recorder, with 5 other sage Burgers that are Justices, or some of them meet, and without any tedious formalities, Intricate Demurrers, special Verdicts, wiredrawn Arguments, chargable Injuctions, multiplyed Motions or endless Writs of Error, briskly determine all causes SECUNDUM AEQUM & BONUM according to their Mother-wit and grave discretions except in Criminals when Life is concerned, in which case the offenders are immediately sent away for tryal and punishment to GUERNSEY."

HEADINGS USED IN THIS ISSUE

GUERNSEY

AGRICULTURE AND ANIMALS

Protection of animals

1. Order in Council: The Animal Experiments (Bailiwick of Guernsey) Law, 1992. - See 12.GLJ.2 and 14.GLJ.2. Registered 2.2.93. (No. X of 1992).

   Commencement to be by Ordinance.

AVIATION AND AIRPORTS

Airport fees

2. Ordinance: The Airport Fees (Amendment) Ordinance, 1993. - Amends the 1987 Ordinance by empowering the States by resolution to specify the fees payable in respect of the departure of aircraft from Guernsey and Alderney airports.

   In force 28.4.93. (No. VIII of 1993).

BANKING, INSURANCE AND FINANCE INDUSTRIES

Banking regulation

3. States Resolution of 31.3.93: Directing preparation of legislation to replace the existing provisions of the Protection of Depositors legislation with a new Banking Regulation Law.

Bills of exchange

4. Projet de Loi: The Bills of Exchange (Amendment) (Bailiwick of Guernsey) Law, 1993. - Amends the 1958 Law by substituting the concept of "public holidays" for that of "bank holidays"; by giving the Advisory and Finance Committee power to specify non-business days by order; and by giving statutory effect to the words "account payee" on a cheque.

   Approved by the States 27.1.93. Awaiting Royal Sanction.

Friendly societies

5. Statutory Instrument: The Income Tax (Registered Friendly Societies : Tax Exempt Business) Regulations 1993. - See paragraph 28.

Investment business

6. Agreement: Exchange of notes concerning extension to the Bailiwick, with effect from 20th July, 1992, of an agreement between the U.K. and Grenada for the promotion and protection of investments.

   Registered 6.4.93.

7. Agreement: Exchange of notes concerning extension to the Bailiwick, with effect from 22nd September, 1992, of an agreement between the U.K. and Guyana for the promotion and protection of investments.

Registered 2.3.93.

8. Agreement: Exchange of notes concerning extension to the Bailiwick, with effect from 9th December, 1992, of an agreement between the U.K. and Bolivia for the promotion and protection of investments.

Registered 16.3.93.

BASTARDY AND LEGITIMATION

Bastardy proceedings in the Magistrate's Court - separate application to Royal Court for respondent to undergo a blood test - powers of the Royal Court

9. A had started against R proceedings which were currently adjourned in the Magistrate's Court under the Loi relative à l'Entretien des Enfants Illegitimes 1927. A then applied to the Ordinary Court for a direction that R submit to a blood test for the purposes of establishing paternity of her child.

A conceded that in Guernsey there was no equivalent of section 20(1) of the Family Law Reform Act 1969 which provides that, in any civil proceedings in which the paternity of any person falls to be determined by the Court, the Court may give a direction for the use of blood tests. [That Act went on to provide that where the Court gives such a direction and any person fails to take any step required of him for the purpose of giving effect to the direction the Court may draw such inferences if any from that fact as appear proper in the circumstances].

A invited the Court to make the Order on the basis that it had a similar jurisdiction to that enjoyed by the Court of Chancery derived from the right and duty of the Crown as parens patriae to take care of those who are not able to take care of themselves.

HELD BY THE DEPUTY BAILIFF, dismissing the application:

(1) In the appropriate case the Court had a residual jurisdiction to protect the interests of both children and persons of unsound mind but that jurisdiction had not evolved in parallel to that of the High Court in England.

(2) That before 1969 the English Court had no power to order an adult (as opposed to a child) to undergo a blood test and accordingly neither did this Court.

(3) There was no general proposition that it was in the interests of any child to establish with certainty the identity of its natural father, even if there were a material benefit in the form of maintenance to be obtained therefrom. He would, even if he had power, require a welfare report before deciding what was in the child's best interests.

B. v. B. and E. [1969] 1 WLR 1801, S. v. McC. and W. v. W. [1972] AC 24, McVeigh v. Beattie [1988] 2 WLR 992, Edmeades v. Thames Board Mills [1969] 2 QB 67, Re L. [1968] 1 AER 24 considered.

[A. v. B. - Plaids de Meubles (Interlocutories) 17.3.93 (PAA/NJB).]

COMPANIES

Restoration to the Register - whether opposition can be heard - discretion of Court to require immediate liquidation

10. A, a company engaged in insurance business but not approved under the Insurance Business legislation had been struck off following failure to file an Annual Return in 1990. It applied to be restored to the Register pursuant to section 25 of the Companies (Guernsey) Law, 1990. The Company had at time of striking off been engaged in litigation in England against some re-insurers and these proceedings were still extant. Counsel for the re-insurers sought to be heard in opposition to A's application for restoration.

HELD BY THE DEPUTY BAILIFF:-

1. The re-insurers had no right to be heard thereon. Section 25 was in similar terms to section 653 of the Companies Act 1985 and the English authorities contrasted the position between applications under that section and those under section 651 where opposition could be heard. The only persons entitled to be heard on applications under section 25 were the Law Officers who represented the Crown Estate.

2. That where the affairs of a company were confused or where it was in the public interest that the outstanding business of the company be concluded in an orderly manner the Court had a discretion to allow the application on the basis that the company was put into compulsory liquidation. This was a case where the Court would so order and a liquidator was accordingly presented and sworn.

Halsbury's Laws of England 4th Edition reissue Volume VII(2) paragraphs 2188 and 2189 and references therein to in Re Portrafam Limited, 1986 and In re Conrad Hall and Co. Limited, 1916 considered.

[In re General Insurance Company (International) Limited - Plaids de Meubles 3.6.1993 (NTC/AMM/RPO)].

CONSTITUTIONAL LAW

Legislative procedures

11. Order in Council: The Taxes and Duties (Provisional Effect) (Guernsey) Law, 1992. See 14.GLJ.30. Registered 16.2.93.

In force 17.2.93. (No. XI of 1993).

Review Board system

12. Order in Council: The Administrative Decisions (Review) (Amendment) (Guernsey) Law, 1992. - See 13.GLJ.6 and 14.GLJ.10. Registered 18.1.93.

In force 18.1.93. (No. VIII of 1992).

13. Order in Council: The Administrative Decisions (Review) (Guernsey) (Amendment) Law, 1993 . - See 14.GLJ.11.

Royal Sanction 10.3.93. Registered and in force 11.5.93 (No. II of 1993).

States of Deliberation - election of Conseillers and minor reforms

14. Order in Council: The Reform (Election of Conseillers and Minor Amendments) (Guernsey) Law, 1993. - Provides for Conseillers to be elected in the future by popular vote of people inscribed on the Electoral Roll, and makes a number of minor amendments.

Eligibility for the office of Conseiller will continue to be confined to persons who have at some time been Members of the States of Deliberation for at least 30 months, and Conseillers will still hold office for a term of six years. Elections are to be conducted as nearly as possible in the same way as elections to the office of People's Deputy but on an island-wide basis.

A general election of Conseillers is to be held in March 1994, and from 1st May 1994 the office of Conseiller will be held by popularly elected candidates. Provision is made for such General Elections to be held triennially thereafter, for a further election should there be insufficient candidates, and for by-elections to fill casual vacancies.

Candidates will be entitled to have their prospectuses distributed at States' expense on terms and conditions to be set by the President of the States. This is not to absolve a candidate from any liability in consequence of what he puts in his prospectus or, conversely, to impose any liability on the States. The States are also to meet the cost of calling and holding a series of pre-election meetings where candidates may put forward their views; the States will decide how many meetings are to be held and in which electoral districts, and the Registrar General will attend to the detailed arrangements for them.

With effect from 1994 the triennial elections of Deputies are postponed until April, to enable unsuccessful candidates for the office of Conseiller to stand. Douzaine Representatives will similarly be elected in April; and all members of the States so elected will in future take office from 1st May.

As Conseillers are to be elected by Island-wide popular vote the sole remaining function of the States of Election will be the election of Jurats.

The Law contains transitional provisions about the March 1994 Conseillers' elections: all existing Conseillers will retire on 30th April, 1994 (unless re-elected) and of those elected in March 1994 the six who gain the fewest votes will serve an initial term of only three years, in order that there may thereafter be general elections of six Conseillers every three years.

The Law also amends the Reform Law in a number of other minor respects:

- it makes the present system of automatic re-inscription on the electoral roll without a fresh application in the two years between triennial election years more flexible; and makes it easier to fill in application forms;

- it changes the last date which may be fixed for delivery of nominations from 15 days before an election to 22 days before;

- it entitles candidates to one copy of the electoral roll free of charge, and up to four further copies on payment of a sum to be prescribed by regulations;

- it requires a copy of the electoral roll to be kept at the office of the Registrar General instead of at the States Office; another copy will still have to be kept at the Greffe as at present;

- it removes the requirements for Returning Officers in the several electoral districts to communicate results to each other and display the results of other districts;

- it makes clear that a person may not vote personally at an election for which his name is inscribed on the register of absent voters, whilst providing an opportunity to such people to have their names deleted from that register.

Approved by the States 27.1.93. Royal Sanction 12.5.93. Registered 29.6.93.

States of Deliberation - Alderney Representation

15. Order in Council: The Election of Conseillers (Participation of Alderney) (Guernsey and Alderney) Law, 1993. - Enables Alderney voters to participate in elections of the 12 Conseiller Members of the States of Guernsey to be held in accordance with the "Reform (Election of Conseillers and Minor Amendments) (Guernsey) Law, 1993" ("the 1993 Law"), (see paragraph 14).

The Law entitles people whose names are inscribed on the Alderney register of electors to vote, and to nominate eligible candidates, in such elections, for the purposes of which Alderney is declared to be an electoral district and the Alderney register of electors to be a section of the electoral roll. The Clerk of the States of Alderney is required to deliver a certified copy of the Alderney register of electors to the Registrar-General in Guernsey at specified times in respect of such elections.

The relevant provisions of the Reform Laws (including sections 1 to 7 of the 1993 Law) are applied to Conseillers' elections in Alderney, with certain modifications: notably, the Clerk of the States of Alderney will have those functions which are in Guernsey performed by the Constables and Douzaines, and at least one pre-election meeting is to be held in Alderney. Because these are elections throughout both Islands for membership of the States of Guernsey, it is Guernsey's Laws concerning secret ballot and absent voters which are to apply. The Law provides for the division of the register of absent voters into 11 sections, including one section for the electoral district of Alderney.

The States of Alderney are required to contribute towards the cost of any Conseillers' election (in addition to the cost of calling and holding one or more meetings under clause 5 of the 1993 Law) in proportion to the number of voters inscribed on the Alderney section of the electoral roll.

The States of Guernsey (Representation of Alderney) Law, 1978 provides for Alderney representatives to sit, firstly, in Guernsey's States of Deliberation, and secondly, in Guernsey's States of Election for the election of Conseillers; the present position with regard to the States of Deliberation is unaffected, but the Law revises the 1978 Law so as to reflect the removal from the States of Election of the function of electing Conseillers.

Approved by the States of Guernsey 27.1.93 and by the States of Alderney 5.3.93. Royal Sanction 12.5.93. Registered 29.6.93.

In force in two stages on 29.7.93 and 1.5.94. (No. VI of 1993).

CRIMINAL LAW AND PROCEDURE

Evidence - Hearsay - Res Gestae - Maker of statement available to give evidence

16. Police were waiting for J and B when they burgled a house of an elderly lady late at night. J was apprehended by one policeman and at that moment shouted to B "Run, Kerry, Run". Another policeman shone his torch on B and saw a tattoo on his neck, his face, like J's, being covered with a balaclava. With the assistance of the word Kerry and the sight of the tattoo the officer recognised the other man as B, who then escaped. J and B were indicted together and J pleaded guilty and B not guilty. J was not offered by the Crown for cross-examination. The Deputy Bailiff admitted the hearsay statement of J. On appeal against this decision, HELD: the Deputy Bailiff was wrong. Applying the principles enunciated by Lord Ackner in R. v. Andrews 1987 84 Cr. App R. 382 , after satisfying himself that the matter falls within the principle of Res Gestae the trial judge has to go on to take a second step in circumstances where the maker of the statement is still alive. He has to ask himself whether the statement should be admitted notwithstanding the fact that the maker is not to be called. The mere fact that the maker has a criminal record or is a co-accused who has pleaded guilty did not take him outside the ambit of Lord Ackner's observations. Proviso applied. See also paragraph 18.

See report of judgment of the Court of Appeal paragraph 82.

[Law Officers of the Crown v. Benford - Court of Appeal 20.4.93 (HMP/NLeP].

Penalties

17. United Kingdom Statutory Instrument: The Criminal Justice Act 1982 (Guernsey) Order 1992 - amends the Criminal Justice Act 1982 (Guernsey) Order 1986 (4.GLJ.20) to increase the maximum levels of fines on the standard scale for offences committed under U.K. Legislation which has been extended to Guernsey.

Registered 18.1.93. In force 1.2.93. (U.K. S.I. No. 3202 of 1992).

Sentence - Burglary

18. For facts see paragraph 16. Despite differing pleas J, aged 30, and B, aged 27, were each sentenced to three years. B had a record for petty crime whereas it was J's third appearance in the Royal Court within 5 years. Both applications for leave to appeal against sentence dismissed, the fact that the Police were waiting being no mitigation.

[Law Officers of the Crown v. Jones and Benford - Court of Appeal 20.4.93 (HMP/GWA/NLeP)].

19. A, aged 21, appealed against a sentence of eighteen months' imprisonment imposed for a burglary which he had committed when aged twenty. The offence involved stealing property valued in excess of £60,000 from an unoccupied dwelling-house. Property was recovered. A co-operated with the police and pleaded guilty. He had criminal convictions but not for offences of this seriousness. He was married with a young family. Application for leave to appeal refused, the Court opining that the sentence if it erred at all was on the side of leniency.

[Law Officers of the Crown v. Corbin - Court of Appeal 6.1.93 (HMC/PTRF)].

Sentence - misuse of drugs - possession with intent to supply

20. The Court of Appeal dismissed three applications for leave to appeal against sentences in drugs cases and in doing so indicated that the Court had power to vary sentences either way. Any further reliance or inferences to be drawn from previous sentences of the Royal Court and indications of principle derived from some cases such as Petit 10.GLJ.24 may be regarded in future as no longer properly applicable to the current circumstances. The facts of the three applications were as follows:-

1. B (aged 21) found with 24 grammes of amphetamines (Class B) concealed in a deodorant bottle at the harbour after arriving on a day return from England. No previous convictions. Lost place at College as a result of arrest. Guilty Plea to possession with intent to supply. Fifteen months' imprisonment upheld.

2. G (aged 17) pleaded guilty to possession of LSD (Class A) and two counts of supplying the same on the same day and a fourth count of supplying on previous occasion as a result of admissions after arrest. Previous convictions including one of possession of cannabis. Eighteen months' youth detention concurrent on each count upheld.

3. R (aged 23) found to have 168 milligrams of amphetamines (Class B) in twenty-four capsules concealed in his body on arrival from Jersey. Guilty Plea to possession with intent to supply. Eighteen months' imprisonment upheld.

[Law Officers of the Crown v. Baines, Goguelin and Reidy - Court of Appeal 6.1.93 (HMC/EAGP/NLeP].

Sentence - grievous bodily harm with intent

21. A, aged 28, violently assaulted his victim late at night after a party fracturing his skull in two places after striking his head on the ground. 2 previous convictions for common assault. Effective sentence of thirty months upheld as "fair, moderate and proper".

[Law Officers of the Crown v. Rive - Court of Appeal 4.1.93 (HMC/EAGP)].

DIVORCE AND MATRIMONIAL CAUSES

Magistrate's Court proceedings

22. Order of the Royal Court: The Domestic Proceedings and Magistrate's Court (Amendment) Rules, 1993. - Amends the 1989 Rules by (inter alia) providing new standard forms for certain applications for financial provision for children and for applications for protection against domestic violence.

In force 19.4.93. (No. I of 1993).

Matrimonial Causes Division - procedure

23. The following is the text of a Practice Direction issued on 6th May 1993:

"Final Order applications

Counsel will not be required to attend when applications are considered. In cases where appearance has been entered by Counsel the application should be signed by the Advocates for both parties.

Evidence of adultery

When confession statements are to be provided, affidavits from the Respondent and Co-Respondent may be presented. It will not then be necessary for the witness to a statement to attend Court to give evidence. Affidavits should be retained by Counsel until the hearing of the petition and the Respondent's Affidavit should be shown to the Petitioner for verification of the signature.

Removal of children

On any application by consent of both parties for the removal of a child from the Bailiwick, the Court has an interest over and above the interest of the parties and Counsel will be required to attend hearing of the application."

Practice Direction Number 1 of 1993.

EMPLOYMENT

Industrial disputes

24. Order in Council: The Industrial Disputes and Conditions of Employment (Guernsey) Law, 1993. - See 13.GLJ.24.

Royal Sanction 10.3.93. Registered 11.5.93. (No. I of 1993). In force on a date to be appointed by Ordinance.

Employers' liability insurance

25. Projet de Loi: The Employers' Liability (Compulsory Insurance) (Guernsey) Law, 1993. - Requires employers carrying on business in Guernsey to insure under an approved policy with an authorised insurer against liability for bodily injury or disease sustained by their employees in the course of their employment.

Approved by the States 30.6.93. Awaiting Royal Sanction.

HEALTH AND SAFETY AT WORK

Employers' liability insurance - see paragraph 25.

HUMAN RIGHTS

Data protection

26. Ordinance: The Data Protection (Functions of Designated Authority) Ordinance, 1993. - Prescribes the functions to be discharged by the Advisory and Finance Committee in its capacity as the designated authority in the Bailiwick for the purposes of Article 13 of the European Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (relating to co-operation between Convention countries).

In force 28.4.93. (No. IX of 1993).

INCOME TAX

Charities, Friendly Societies, oaths, and penalties

27. Order in Council: The Income Tax (Amendment) (Guernsey) Law, 1992. - See 13.GLJ.31, 34, 37, 39 and 14.GLJ.29. Registered 18.1.93.

In force: section 6(a) and (b) 1.1.89; section 6(c) 1.1.84; remainder 19.1.93. (No. VI of 1992).

Friendly Societies

28. Statutory Instrument: The Income Tax (Registered Friendly Societies: Tax Exempt Business) Regulations 1993. - Specify, for the purposes of section 40(h)(ii) of the Income Tax (Guernsey) Law, 1975, the categories of business in respect of which, the circumstances in which and the conditions subject to which, the profits of a registered friendly society are eligible for exemption from income tax. The principal exemption is for the profits arising from such a society's life or endowment business (other than pension business) under contracts of no more than a specified value which varies according to the dates when they were entered into. Exemption is afforded to the other profits of a registered friendly society only in the limited circumstances in which similar exemption is still available in the United Kingdom.

In force 19.1.93. (No. I of 1993).

International bodies

29. Projet de Loi: The Income Tax (International Bodies) (Guernsey) Law, 1993. - Enables the Income Tax Authority to approve the taxation of a body wishing to establish a presence in Guernsey, but which is wholly owned by non-residents and trades exclusively with non-residents, at a rate other than the normal standard rate of income tax.

The qualifications for such "international tax status" are as follows: The body must be liable to pay Guernsey income tax, must derive no income from trading with Guernsey residents (except other bodies with international tax status) and must be wholly owned by non-residents (again, except for other such bodies); it must never have carried on business in Guernsey (or, in the case of a Guernsey body, anywhere else) without international tax status; previously exempt bodies are excluded, as are banks, and insurers writing significant domestic business. Specified information about beneficial ownership must be disclosed to the Financial Services Commission.

Applications must be made prior to commencing operations in Guernsey and, in the case of a local company, prior to incorporation; they must establish the body's qualifications, confirm that the Financial Services Commission has been notified about its beneficial ownership, specify a rate (of up to 30%) at which it is proposed that tax should be charged, and satisfy the Authority that the body's intended activities are appropriate for international tax status and that the specified rate is appropriate and in Guernsey's best economic interests.

The Law deals with the grant or refusal of international status, and specifies the matters to be included in the necessary certificate. As all applications will be from bodies wishing to establish a Guernsey presence for the first time, the Authority's discretion to grant or refuse them is totally unfettered, and not subject to appeal.

The effect of international tax status is that the body concerned is taxed at the specified rate. The Projet effects various necessary technical modifications, and debars any application for exempt status, and any election by an insurer to be taxed on the sliding scale basis available to insurers in certain circumstances.

In normal circumstances international tax status will last for up to five years, as specified in the certificate, and is renewable. It is automatically lost if the body ceases to qualify, fails to comply with requirements to give information, or gives false information, but the Administrator may relieve a loss due to inadvertence or circumstances beyond the body's control. The consequence of a loss of international tax status being that an assessment will be raised at the standard rate, the Projet allows a body exercising its right to appeal against such an assessment to challenge the loss and/or the Administrator's refusal to relieve it. Where the status is not automatically lost, the Authority is empowered to revoke it in specified cases with effect from the beginning of the following year, but a decision to do so may be appealed against.

The Projet contains a transitional provision allowing Bailiwick companies incorporated since 9th December, 1992 to apply for international tax status at any time before 1st October, 1993, but they will have to satisfy all other qualifications, including not having carried on any business anywhere in the world.

Approved by the States 30.6.93. Awaiting Royal Sanction.

Provisionally effective 1.7.93 (States' Resolution on Article 3 of Billet d'État No. X of 1993 under the Taxes and Duties (Provisional Effect) (Guernsey) Law, 1992: see 14.GLJ.30).

Legislative procedures

30. Order in Council: The Taxes and Duties (Provisional Effect) (Guernsey) Law, 1992. See 14.GLJ.30. Registered 16.2.93.

In force 17.2.93. (No. XI of 1992).

Pensions

31. Projet de Loi: The Income Tax (Pension Amendments) (Guernsey) Law, 1993. - Facilitates tax efficient transfers from U.K. pension schemes to Guernsey schemes and vice versa; allows transfers from States schemes into retirement annuity schemes without a tax charge; and ensures that members of States schemes have the same rights of entry into annuity schemes, and the same entitlement to tax relief on contributions, as other individuals.

Approved by the States 31.3.93. Awaiting Royal Sanction.

Provisionally effective 31.3.93 (States' Resolution on Article 1 of Billet d'État No. V of 1993 under the Taxes and Duties (Provisional Effect) (Guernsey) Law, 1992: see 14.GLJ.30).

Reliefs and allowances

32. Order in Council: The Income Tax (Allowances Amendments) (Guernsey) Law, 1993. - Provides for the allocation of personal and other allowances to individuals who are not solely or principally resident in Guernsey on a proportional basis by reference to the time which such individuals spend in Guernsey; and introduces an initial allowance of 30% on capital expenditure incurred by the owners or lessors of premises used in hotel business.

The ambit of States' resolutions prescribing personal and other allowances becomes limited to cover only individuals solely or principally resident in Guernsey; whilst section 51 of the Income Tax Law (proportional and other allowances to non-resident individuals) is amended and applied so as to give an entitlement to allowances calculated on the basis of one fifty-second part of the full allowances for each week spent in Guernsey, to persons who are resident but not solely or principally resident.

The new 30% capital allowance for hotel business investment applies to capital expenditure incurred on or after 1st January, 1991 by hoteliers (as defined) on the construction, reconstruction, extension, renovation or alteration of their premises. The States are empowered to suspend or vary the allowance. The allowance can be claimed back from an owner who sells his premises, from a lessee whose lease determines, or in any case if the premises cease to be used for hotel business, within six years of being granted. Investment eligible for the new allowance is excluded from any claim to annual allowance in addition.

Approved by the States 27.1.93. Royal Sanction 12.5.93. Registered 29.6.93.

In force 29.6.93. (No. IV of 1993).

INSOLVENCY AND DÉSASTRE

Alderney - désastre - rights of creditors who have not got judgments to have claims considered

Désastre - co-existing proceedings in Guernsey and Alderney - procedure

33. The debtor company traded in both Guernsey and Alderney and separate proceedings were taken in the Courts of each Island to obtain judgment, levy execution and obtain permission to sell assets belonging to the company in each jurisdiction.

In the case of the Alderney proceedings the Alderney Court allowed applications by G and MM that monies held by the Clerk of the Court of Sequestrator be paid over firstly to G who had obtained judgment in the Court of Alderney and secondly to MM pro rata notwithstanding the fact that through an advocate a number of other creditors including the appellant C had sought an Order that the claims of all creditors both in Alderney and Guernsey, whether judgment creditors or otherwise, be marshalled by the Clerk and the claims met pro rata having regard to preferential claims of former staff. On appeal by C, HELD BY THE BAILIFF, that the Court of Alderney was wrong in rejecting his and other claims as it was well established in the common law of Alderney that such applications could be made whether or not the creditor had a judgment.

On the question of the conflicting claims on the two funds of assets en désastre in Alderney and Guernsey the Bailiff was satisfied that the Insolvency Act 1986 could be brought into play to settle the conflicting claims of creditors. A Commissioner had been appointed in the désastre proceedings in Guernsey. If the Guernsey Commissioner sought the assistance of the Court of Alderney in the Guernsey désastre the Court of Alderney would assist by transmitting the assets held by the Clerk of that Court to Her Majesty's Sheriff in Guernsey. Those funds would then be received for administration by the Commissioner in Guernsey as between the laws of Guernsey and Alderney and the rules of private international law.

[Coxell v. Georgian House Investments Limited Margesson and Mahieu and Air Sarnia Limited - Appeals 5.4.1993 (unrep./NLeP)].

Preferred Debts (Guernsey) Law, 1983 - amendment

34. Order in Council: The Preferred Debts (Guernsey) (Amendment) Law, 1992. - See 13.GLJ.41.

Royal Sanction 28.10.92. Registered and in force 18.01.93. (No. VII of 1992).

Tacit hypothecation - Preferred Debts (Guernsey) Law, 1983 - third-party claiming ownership of goods arrested but failing to apply to the Court under section 4(2) thereof within 14 days

35. D was the sub-lessee from L of commercial premises. L obtained judgment in respect of unpaid rent and the Sheriff arrested goods apparently belonging to D at the premises. Amongst these were goods which A, a third party, claimed to own having stuck labels thereon before the Sheriff reached the premises. The Sheriff however treated all the items as in the apparent ownership of D. The necessary publications required under section 4 of the Preferred Debts (Guernsey) Law, 1983 were made but A made no application to the Court within 14 days to establish its ownership. A at a later date applied out of time to have the goods it claimed to own released and this was opposed by L.

After reviewing the history of tacit hypothecation and Book 7 Chapter 9 of *Terrien* and the events leading up to the enactment of the Preferred Debts (Guernsey) Law, 1983 the Deputy Bailiff found that A had failed to make application to the Court within 14 days as envisaged by section 4 of the Law of 1983 and the Court had no power to extend this time limit.

A further argued that it was open to it to challenge the action of the Sheriff in treating the goods as appearing to be owned by D. The facts were that A had originally bought the goods from D in the previous year. When learning of D's difficulties it had labelled all the goods that D had purported to sell to it, but some of these were in fact owned by other third-parties so from the Sheriff's point of view it was clear that not all the goods that A had purported to label could be its property.

HELD BY the Deputy Bailiff

that in view of the fact there was a clear statutory procedure for establishing ownership of goods in circumstances such as this and A had failed to take advantage of this it would be wrong for the Court to get around the time limit by embarking upon an investigation of the actions of the Sheriff.

The Deputy Bailiff concluded by observing

(1) That the time limit imposed by section 4(2) was on the face of it harsh and perhaps the legislature should in due course look at some further amendment of the Law of 1983 to provide a more equitable situation so as to avoid the problems that had arisen in this case.

(2) That it was in the nature of things that whenever the Sheriff arrived to effect an arrest, claims that goods apparently in the possession and ownership of the judgment debtor are the property of third-

parties are regularly made. If the Sheriff is effectively to protect the interests of creditors he should be taking a firm line in arresting goods where ownership was in doubt and leaving it to the third-parties to take action to protect their position.

(3) That following what *Terrien* says on page 244 of the 1654 edition landlords must look first to payment of rent out of the proceeds of sale of goods actually in the ownership of the debtor and secondly, if these are insufficient, to the proceeds of sale of goods subject to tacit hypothecation. The sale of the latter should therefore be deferred by the Sheriff until such time as the proceeds of sale of the goods in the undisputed ownership of the debtor has been effected and then only so much of the third-parties' goods as are necessary to cover any shortfall should be sold.

[Bell Data Systems (C.I.) Limited v. William Moffat: in re application of Prospects Limited - Plaids de Meubles 2.6.93 (RPB/JMW).]

ISLAND DEVELOPMENT

Appeal to the Royal Court - meaning of "person aggrieved" for purposes of section 26(1) of the Island Development (Guernsey) Law 1966

36. The Appellants instituted an appeal under section 26(1) of the Island Development (Guernsey) Law, 1966 against the decision of the First Respondent, the Island Development Committee, to permit, notwithstanding the appellants' objections, the appellants' neighbour, who had been joined as Second Respondent, to convert an outbuilding on his property into an aviary.

On a preliminary point taken by the I.D.C. as to whether the Appellants were "persons aggrieved" for the purposes of appealing under section 26(1),

HELD BY the Deputy Bailiff

that the circumstances of this case were indistinguishable from those found in the English case of Buxton v. Minister of Housing and Local Government [1961] 1 Q.B. 278 where it was held that the expression "person aggrieved" in the equivalent Act meant a person who had suffered a legal grievance. Before the enactment of planning legislation any landowner was free to develop his land as he liked, provided he did not infringe the common law. No adjoining owner had any right which he could enforce in the courts in respect of such development unless he could show that it constituted a nuisance or trespass or the like. The scheme of the Island Development Law and its predecessors was to restrict development for the benefit of the public at large and not to confer new rights on any individual members of the public, whether they live close to or far from the proposed development. The Appellants had not shown that any legal right of theirs had been infringed and were not therefore "persons aggrieved" under section 26(1). Appeal dismissed.

[Green and wife v. Island Development Committee and Winslow - Royal Court 19.4.93 (RPO/HMP/MJR)].

Detailed Development Plans

37. States Resolution 27.1.93: Directing the preparation of legislation and amendments to the Rules of Procedure to change the way in which Detailed Development Plans are considered by the States of Deliberation.

LAND LAW

Conveyancing procedure - boundaries - neighbour appearing in conveyance to confirm description of boundary - whether purchaser subsequently estopped from claiming that boundary so defined is incorrect

38. The Court of Appeal dismissed an appeal by P against the decision of the Ordinary Court in the case reported at 13.GLJ.44, after itself holding a vue de justice. The Court held that P was not a party to the action of the deed of conveyance to D, he was merely a witness of fact, so it did not lie in his mouth to assert rights of estoppel against D. Furthermore estoppel did not apply where a deed should be rectified as was the case here. The President of the Court of Appeal concluded by remarking that it was frequently helpful for neighbours to appear to confirm their belief in the position of boundaries. This judgment should not give any anxiety to conveyancers where a title discloses that a boundary has been confirmed in this way; such a statement may have value as a representation. A conveyancer would not normally expect such a representation supported by a guarantee.

[Sparkes v. Lancaster - Court of Appeal 8.1.93 (NJB/RJC)]

LANDLORD AND TENANT

Rent Control

39. Projet de Loi: The Rent Control (Amendment) (Guernsey) Law, 1993. - Amends the 1976 Law in a number of respects. In particular tenants will not be able to apply for the assessment of a basic rent unless they have been in occupation for at least 3 months; rent assessments will lapse after 5 years; rent books cease to be mandatory; and landlords may levy a deposit of one month's rent by way of security.

Approved by the States 31.3.93. Awaiting Royal Sanction.

LIQUOR LICENSING

Legislation

40. States Resolution 28.4.93: Directing preparation of legislation to amend substantially the Liquor Licensing Ordinance, 1984 to provide, inter alia:-

(1) The reduction of the number of categories of Licence,
(2) Introduction of permits for extension of hours for night clubs,
(3) Extension of hours for exercise of meal permits, and
(4) Stricter conditions and penalties concerning young persons.

Liberation Day

41. Ordinance: The Liquor Licensing (Liberation Day) Ordinance, 1993. - Allowed licensed premises (other than off-licences) to open for business on Sunday, 9th May, 1993, between 12 noon and 11.00 p.m.

In force 31.3.93. (No. VI of 1993).

PAROCHIAL MATTERS

Maintenance of rectories

42. Resolution of the States of 31.3.93. - Directing the preparation of legislation implementing the administrative procedures relating to the maintenance and use of rectories in a plurality upon the coming into force of the Rectories (Maintenance and Use in Cases of Plurality) Law, 1993 (see paragraph 43).

43. Projet de Loi: The Rectories (Maintenance and Use in Cases of Plurality) Law, 1993. - Makes provision for the maintenance and use by parishioners of the rectories in their parishes where one rector has been appointed in respect of two or more parishes and where this Law has been applied to the plurality by Ordinance of the States. Ratepayers of each of the parishes shall be responsible for the costs of maintenance of each rectory and any rectory which is not being used for the purpose of housing the rector may be used, and the income therefrom applied, for such purposes as the ratepayers may approve. The Projet also amends the Loi relative à la Taxation M of 1923 so as to enable rates to be collected for the purpose of insuring a parish church and rectory against all usual risks.

Approved by the States 31.3.93. Awaiting Royal Sanction.

Refuse Collection

44. Order in Council: The Parochial Collection of Refuse (Guernsey) (Amendment) Law, 1993. - See 14.GLJ.41.

Royal Sanction 12.5.93. Registered and in force 29.6.93. (No. VIII of 1993).

Remède - "besoins publics"

45. The Constables of Castel applied to the Court for permission under the Loi relative à la Taxation M 1923 to levy a certain sum by way of occupiers rate including an amount to cover the cost of employing an Advocate to represent the Douzaine at La Grande Mare Planning Inquiry. The Douzaine wished to object to the proposal to re-zone land owned by W at La Grande Mare as a golf course. The representation was mainly concerned with the impact on drainage of the area of the proposed development.

A ratepayer (a director of W) opposed the Remède on the basis that the Douzaine did not have power to make the representation at the Planning Inquiry, that the ambit of their representation was too wide and that they had no legitimate fears of flooding.

The Bailiff referred the Jurats to two paragraphs in Article 1 to the Law namely (n) and (t) concerning power given to the constables to raise funds to defray the costs of exercising their functions and for "besoins publics" and further to the Loi relative aux Douits which empowers the Douzaine to appoint a Committee to inspect and report on watercourses within its parish. The Bailiff asked the Jurats to consider whether the costs opposed could fall within articles (n) or (t) above. The Bailiff referred the Jurats to a decision of the Royal Court on 16.7.49 on the construction of the expression "besoins publics".

The Bailiff observed

(1) that the decision of 16.7.49 was made by the Royal Court sitting as an Ordinary Court and not as a Full Court as provided by the Law.

(2) In that case the Constables had asked the parishioners to vote on the proposal before adopting it which had not been done in this case.

HELD BY THE FULL COURT: that the opposition should be dismissed by a majority of 7 to 2.

Remède of the Castel Constables 16.7.49 considered.

[Remède of the Constables of Castel - Vermeulen opposing - RC 25.5.93 (MJR/Unrep).]

[Note: The 1949 decision referred to in the above judgment concerned the erection of a war memorial.]

POLICE

Special Constabulary

46. Ordinance: The Special Constabulary (Amendment) Ordinance, 1993. Amends the Special Constabulary Ordinances 1950 to 1985 by adding a new Division "C" of the Special Constabulary for certain States employees and amending the oaths for Division "B" thereof.

In force 30.6.93. (No. X of 1993).

PRACTICE AND PROCEDURE

Action against estate of deceased person - summons issued against deceased defendant - validity - subsequent summons issued against Administrators of estate - effect - prescription - application for extension of time

47. In 1988, P was injured as a passenger in a car driven by D. D died from his injuries leaving no estate. P's Advocate made a claim against D's insurers who in correspondence admitted liability, but disputed quantum. Negotiations broke down and the insurers refused further waivers of prescription. P then issued a summons against "Christopher Keith Phillip Dewis, deceased" and served it on the insurer's advocate within the extended prescriptive period. When this cause was tabled the matter was adjourned to Chambers. Without conceding the invalidity of a cause tabled

in this way, P's Advocate agreed to investigate the question of Letters of Administration being obtained. After the relatives of D and the insurers had declined to obtain a grant to enable the proceedings to be defended two partners of P's Advocate's practice obtained a grant of Letters of Administration in the Ecclesiastical Court limited to the action brought by P against the estate of the deceased. P then issued fresh proceedings against the Administrators - the prescriptive period then having expired. On behalf of the Administrators who were then represented by the Insurer's Advocate four exceptions de fonds were tabled:-

1. That the proceedings were prescribed.

2. That the proceedings disclosed no cause of action - this was disposed of by P being given leave to amend her cause to show that the proceedings were being brought under the Law Reform Law of 1936.

3. That the original proceedings against D deceased were still extant and that the issue of fresh proceedings against the Administrators was an abuse of process.

4. That the terms of the Letters of Administration appeared to relate only to the defence of the original proceedings against D deceased.

P was not prepared to concede that the proceedings brought in May were a nullity, but made application under section 8 of the Law Reform (Tort) (Guernsey) Law, 1979 that the provisions of section 5 thereof should not apply to the second action and that the prescription period be extended.

HELD BY the Deputy Bailiff:

1. Granting P's application, the only persons interested in this matter were the insurers. They had been aware of the efforts of P to pursue her action against the estate and although there had been further delay, they would not be prejudiced by his granting an extension of time, especially as the case was limited to quantum. The first exception therefore fell.

2. There was accordingly no need to consider the third exception in detail and hear full argument on the status of the original proceedings. He was prepared to treat them as a nullity, which meant that the third exception failed [*obiter* his view was that the only persons on whom a summons could be served as representatives of a deceased person's estate were the executors or administrators].

3. With regard to the fourth exception he accepted that the present wording of the grant is expressed to relate to the defence of the original proceedings. Grants of administration in these circumstances were extremely rare and taking a broad view of the matter he was satisfied that the Administrators were entitled to defend the second proceedings under the authority given to them by the grant. If there was any doubt the matter could be overcome by amending the wording of the Grant. On this basis the fourth exception would be rejected.

[Craigie v. Estate of Dewis, Plaids de Meubles, (Interlocutory) 24.3.93 (JPG/NLEP)].

Arrests and Injunctions - Procedure

48. Practice Direction Number 5 of 1990 has been revised and replaced by the following:

"PROCEDURE TO BE ADOPTED WHEN MAKING APPLICATION FOR AN ARRET OR INJUNCTION

The following procedure should be adopted when Counsel wish to make application to the Bailiff or Deputy Bailiff for an Arret or Injunction :-

1. All applications must be made through Her Majesty's Greffier;

2. A copy of the Affidavit(s), duly sworn, together with a copy of the Order to be applied for, should be submitted to Her Majesty's Greffier - together with copies of all supporting documents;

3. Her Majesty's Greffier will inform Counsel of the time at which the Bailiff or Deputy Bailiff will deal with the matter in Chambers. Counsel should be ready to attend, together with completed documentation, when summoned.

4. Counsel should present the original Affidavit and any supporting exhibits to the Bailiff or Deputy Bailiff at the hearing of the application. Counsel must sign next to the Order applied for.

5. Her Majesty's Greffier will retain the copy of the Order originally submitted - together with all original Affidavits. The Order should therefore not be attached to the original Affidavit(s).

6. Application to the Bailiff or Deputy Bailiff in Chambers will be made by Counsel. It will not be necessary for clients to be present. Affidavits should be sworn before a Notary Public.

7. Fees for the application will be charged to Advocates accounts by the Greffe."

[Practice Direction No. 2 of 1993].

Court of Appeal - application for extension of time to file documents under rule 8(1) of the Court of Appeal (Civil Division) (Guernsey) Rules 1964

49. The Court refused an application by the appellants to have further time to file their case.

See report of judgment of the Court of Appeal paragraph 78.

[Havilland Estates Limited v. Channel Islands Ceramics Limited - Court of Appeal 4.1.93 (JPG/NJB)].

Court of Appeal - application for leave to appeal to Privy Council - powers of the Court

50. The Court of Appeal has no power under section 16 of the Court of Appeal (Guernsey) Law, 1960 to give leave to appeal against the decision by that Court other than one by which the rights of the parties are finally decided. [The decision subject to this application was the one referred to in paragraph 49.]

See report of judgment of the Court of Appeal paragraph 81.

[Havilland Estates Limited v. Channel Islands Ceramics Limited (No. 3) Court of Appeal 18.1.93 (IHB/NJB].

Court of Appeal - costs - power of the Court to order payment by Advocate personally - principles on which Court acts

51. Following an appellant's unsuccessful application [see para 49.] to extend the time for filing its case, it was held:-

1. As the Court of Appeal has, under section 13 (1) of the Court of Appeal (Guernsey) Law 1961 vested in it all those powers which previously resided in the Cour des Jugements et Records, it has power to order an Advocate or his firm to pay personally any costs in a matter before the Court.

2. That the Court would follow the principle elucidated in paragraph 62/11/3 of the White Book where Lord Donaldson was reported as having held in Gupta v Comer [1991] 2 WLR 494 that Myers v Elman [1940] AC 282 was authority "...for the proposition that in the exercise of its inherent or common law jurisdiction over solicitors, as officers of the...Court, the court should not make a cost order against a solicitor in his capacity as such unless satisfied that the conduct which gave rise to those costs...could properly be described as "a serious dereliction of duty"."

3. There was, sadly in this case, a sufficient dereliction of duty on the part of the Appellant's advocate to make it appropriate to disallow the costs of and occasioned by this application as between the advocate and his client, and order that the successful Respondents' costs be paid by the advocate or his firm personally.

[Havilland Estates Limited v. Channel Islands Ceramics Limited (No.2) - Court of Appeal 4.1.93 (JPG/NJB)].

Discovery - order for discovery before close of pleadings - principles upon which Court acts

52. The Court of Appeal refused an application by the Defendants for leave to appeal against a decision of the Bailiff ordering discovery prior to delivery of responses to Exceptions de Forme in a case where a former client was suing his advocates for wrong advice.

See report of judgment of the Court of Appeal paragraph 79.

[Nielsen v. van Leuven et al - Court of Appeal 5.1.93 (SGD/MGF)].

Péremption d'instance - power of Court to restore to Role after action has become périmé

53. On the 2nd January, 1992 an action was placed on the Witness List. On the 9th January, 1992, P's Advocate wrote to D's Advocate seeking further and better particulars of the defences and discovery. Apart from an acknowledgment by D's Advocate to the effect that he would take instructions nothing happened until the 15th January, 1993, when P's Advocate filed with the Greffier applications for further and better particulars of the defences and discovery. D's Advocate responded that he action had become "périmé" by reason of the expiry of a year and a day since the action was placed on the Witness List.

HELD BY THE DEPUTY BAILIFF:

1. The action was "périmé".

2. The common law position relating to peremption was clearly explained in Chapter XIII of *Gallienne* page 313 and the Court formerly had no power to extend peremption. This position had been altered by Rule 50 of the Royal Court Civil Rules 1989. The Court now had a discretion to allow restoration after an action had become "périmé".

3. Rule 50 was intra vires section 12 of the Royal Court (Miscellaneous Reform Provisions) Law of 1950 as peremption is a procedural matter. It is clear from the authorities that it does not in itself extinguish a cause of action.

4. As P's Advocate had filed his application within six days of the date of peremption he would exercise his discretion in its favour and allow restoration. Counsel had invited him to give some guidance as to how the Court will exercise its discretion under Rule 50. He was reluctant to see the rules as to peremption being eroded to the stage that restoration will be allowed in all cases other than those that would have reached the stage of being struck out for want of prosecution. It was in the public interest that litigation should proceed expeditiously. It would be for the Court to decide where the line should be properly drawn in future cases.

Gallienne v. Douglas 12.GLJ.49 followed.

[Saromaje Limited v. Janet Holdings Limited - Plaids de Meubles Interlocutories 17.3.93 RJC/PTRF].

Third-party proceedings - appeal against a direction of the Royal Court that a third-party should cease to be a party to an action - principles to be applied

54. The Court of Appeal allowed an appeal against a decision of the Deputy Bailiff that a third party who had been joined as a defendant to an action for personal injuries should cease to be a party to the action.

See report of judgment of the Court of Appeal paragraph 80.

[Shorto v. Guernsey Stevedores Limited et al, Duquemin Third Party - Court of Appeal 7.1.93 (RJC/JPG/PTRF/MGF)].

PRISON

Parole

55. Ordinance: The Parole Review Committee (Amendment) Ordinance, 1993: Implements resolution of the States of 30.9.92. - See 14.GLJ.47.

In force 31.3.93. (No. V of 1993).

ROAD TRAFFIC AND PUBLIC TRANSPORT

Control of parking on States land

56. Ordinance: The Vehicular Traffic (Control of Parking on certain States Land) (Amendment) Ordinance, 1993. - Amends the principal Ordinance of 1988 so as to add to the controlled areas land at Belgrave, La Tonnelle, Richmond Corner, Vazon car park and L'Erée; to prohibit trading from a parking place on controlled land; and to provide, for the avoidance of doubt, that motor cycles and pedal cycles may not park in a disc parking place.

In force 24.2.93. (No. II of 1993).

Prohibited and One-Way Streets

57. Ordinance: The Prohibited and One-Way Streets (Amendment) Ordinance, 1993. - Adds to the Schedule of prohibited streets a road at the North Plantation, St. Peter Port, between 7 p.m. and 6 a.m.

In force 31.3.93. (No. III of 1993).

Public Transport

58. Ordinance: The Public Transport (Amendment) Ordinance, 1993. - Exempts States vehicles from various provisions of the Public Transport and Road Traffic (Permits to Drive Public Service Vehicles) Ordinance, 1986, in relation to the provision of road services and the approved drivers of vehicles so engaged. Introduces provisions allowing "taxi-buses", "public hail and ride", "public ring and ride" and "taxi-sharing" services or schemes, amending the Public Transport Ordinance of 1986, and prescribes conditions for taxi-sharing schemes.

In force 22.2.93. (Legislation Committee). (No. VII of 1993).

SECURITY INTERESTS

59. Order in Council: The Security Interests (Guernsey) Law, 1993. - See 14.GLJ.56. Royal Sanction 31.3.93. Registered 25.5.93.

In force 26.5.93. (No. III of 1993).

SOCIAL SECURITY

Attendance and invalid care allowances

60. Projet de Loi: The Attendance and Invalid Care Allowances (Amendment) (Guernsey) Law, 1993. - Amends the Law of 1984 so as to enable attendance allowance to be paid in the case of a person who is terminally ill and is likely to die within six months of his claim even though he has not satisfied the conditions for receipt of such benefit for a period of three months prior to his claim; and so as to add widow's benefit and industrial disablement benefit to the list of periodic payments receipt of which will not preclude a person from entitlement to invalid care allowance.

Approved by the States 31.3.93. Awaiting Royal Sanction.

Social insurance

61. Projet de Loi: The Social Insurance (Amendment) (Guernsey) Law, 1993. - Amends the 1978 Law so as, inter alia, to reduce the period over which the yearly average of contributions is to be calculated for the purposes of determining entitlement to old age pension, widows' benefits and death grant (which will henceforth commence at the age of 20 rather than 16 as at present); to provide that where a person dies before attaining the age of 23 the conditions for the payment of death grant may be satisfied by the contribution record of a parent or guardian of the deceased; to deem satisfied the conditions for payment of a death grant where a person dies as a result of an industrial accident; and to amend the provisions relating to the office of Vice-President of the Authority.

Approved by the States 31.3.93. Awaiting Royal Sanction.

TORTS

Nuisance - Defence of Statutory Authority - Application for trial as a Preliminary point - Power of the Court to grant an injunction.

62. Prior to the trial of an action for nuisance by PP against D which used a former quarry adjoining PP's dwelling as a firing range D asked for trial as a preliminary issue the question whether it could rely on the Firearms Ordinance, 1987 as having approved the use by D and any other persons specifically authorised by D of the quarry as a range and that as a consequence D's use of the range for firing firearms was not actionable even if nuisance which was not admitted was proved.

After considering the history of the legislation concerned and the Firearms (Guernsey) Law, 1983 under which the power was given to the States to approve ranges by Ordinance the Deputy Bailiff concluded that in passing the Ordinance the legislature's prime concern had been to control the use of firearms which are inherently dangerous objects and more particularly to limit firing of certain weapons to approved ranges. He could find nothing in the legislation from which he could infer that the States intended that the common law position namely that the activity of operating a firing range must be conducted without causing a nuisance to

persons living in the locality of the range was to be altered. Accordingly he rejected D's application for the issue to be tried as a preliminary point.

Metropolitan Asylum v. Hill 1881 6 A.C. 193, Manchester Corporation v. Farnworth 1930 A.C. 202. Canadian Pacific Railway v. Parke 1899 A.C. 544 and Allen v. Gulf Oil Refining Limited 1981 A.C. 101 considered.

[Note: The action later proceeded to trial on the substantive issue. The Deputy Bailiff directed the Jurats that the law relating to the tort of nuisance was similar to that in England and that the Court had a wide discretion when it came to the issue of whether or not an injunction should be granted. The Jurats found that the activities of D did amount to a nuisance and granted PP an injunction requiring use of the range to cease within 5 years and imposing certain interim restrictions on D's activities at the range. This decision is subject to appeal]

[Dadd v. Guernsey Rifle Club - Plaids de Meubles (Interlocutory) 30.3.93. Judgment on main action 10.5.93 (NJB/JPG)].

TRUSTS

Hague Convention on Law applicable to Trusts

63. Note from the Ministry of Foreign Affairs of the Netherlands acknowledging the notification from the Government of the United Kingdom that the said Convention shall extend to Guernsey with effect from the 1.7.93.

Registered 26.6.93.

WATER

Charges

64. Ordinance: The Water Charges (Amendment) Ordinance, 1993. - Increases water charges with effect from 1.3.93.

In force 1.3.93. (No. I of 1993).

WILLS AND ADMINISTRATION OF ESTATES

Action against estate of deceased - procedure

65. See Craigie v. Dewis paragraph 47.

GUERNSEY STATUTORY INSTRUMENTS

66. 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.

Title	Date Made	Coming into force	No.
The Income Tax (Registered Friendly Societies: Tax Exempt Business) Regulations 1993 - see para. 27	15.1.93	19.1.93	1
The Protection of Game (Amendment) Order 1993	23.2.93	24.2.93	2
The Health Service (Medical Appliances) (Amendment) Regulations 1993	22.3.93	1.4.93	3
The Post Office (Inland Post) Order 1993	30.3.93	5.4.93	4
The Post Office (Overseas Letter Post) Order 1993	30.3.93	5.4.93	5
The Post Office (Overseas Parcel Post) Order 1993	30.3.93	5.4.93	6
The Post Office (Postal Orders) Order 1993	30.3.93	5.4.93	7
The Rent Control (Variation) Order 1993	8.4.93	1.7.93	8
The Health Service (Payment of Authorised Suppliers) (Amendment) Regulations 1993	27.5.93	1.6.93	9
The Health Service (Payment of Authorised Appliance Suppliers) (Amendment) Regulation 1993	27.5.93	1.6.93	10
The Import and Export of Goods (Control) (Guernsey) (Amendment) Order 1993	8.6.93	9.6.93	11

UNITED KINGDOM STATUTORY INSTRUMENTS

67. 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 Criminal Justice Act 1982 (Guernsey) Order 1992 (see paragraph 17)	3202
The Wireless Telegraphy (Television Licence Fees) (Amendment) Regulations 1993	476
The Serbia and Montenegro (United Nations Sanctions) Channel Islands) Order 1993	1253

ALDERNEY

AGRICULTURE AND ANIMALS

B.S.E.

68. Ordinance: The Bovine Spongiform Encephalitis (Alderney) Ordinance, 1993. - Applies the Foot and Mouth Disease (Alderney) Ordinance, 1952 to B.S.E. which accordingly becomes a notifiable disease.

Ordinance of the States of Alderney of 5.3.93.

CONSTITUTIONAL LAW

69. **Election of Conseillers in the States of Guernsey**

Order in Council: The Election of Conseillers (Participation of Alderney) (Guernsey and Alderney) Law, 1993. - See paragraph 15.

EDUCATION

70. Ordinance: The Alderney (Application of Legislation) (Education) (Alderney) Ordinance, 1993. - Specifies the modifications subject to which the Education (Amendment) (Guernsey) Law, 1987 is to apply to Alderney.

In force 31.3.93. (No. IV of 1993).

HARBOURS AND MOORINGS

71. Ordinance: The Braye Harbour (Amendment) (Alderney) Ordinance, 1993. - Amends the 1983 Ordinance by requiring water-taxi services within the harbour to be licensed.

Ordinance of the States of Alderney of 2.6.93.

INSOLVENCY AND DÉSASTRE

72. **Désastre - rights of creditors who have not obtained judgment - co-existing proceedings in Guernsey and Alderney - procedure**

Appeal to Royal Court: See paragraph 33.

MILK

73. Ordinance: The Milk (Retail Price) Ordinance, 1993. - Increases retail price of milk to 47 pence per pint or half-litre.

Ordinance of the States of Alderney of 2.6.93.

ROAD TRAFFIC

Speed trial

74. Ordinance: The Tourgis Hill Speed Trial (Alderney) Ordinance, 1993. - Closes Tourgis Hill to traffic on 18th September 1993 for the purposes of a speed trial. Participants are exempted from speed and noise restrictions.

Ordinance of the States of Alderney of 5.3.93.

SHIPPING

75. Ordinance: The Licensing of Passenger Boats (Amendment) (Alderney) Ordinance, 1993. - Amends the 1954 Ordinance by exempting from licensing requirements any boat sailing from Alderney where the boat is based outside Alderney and its visit to the Island is part of a pre-arranged trip.

Ordinance of the States of Alderney of 2.6.93.

TRUSTS

Variation of trust

76. Order in Council: The Saint Anne's Trust (Alderney) Law, 1992. - See 13.GLJ.67.

Royal Sanction 28.10.92. Registered and in force 18.01.93. (No. IX of 1992).

SARK

SHIPPING

Pilotage

77. The Sark Pilotage (Amendment) Ordinance, 1993.

In force 14.4.93.

78. [CIVIL DIVISION - APPEAL NO. 164/1]

1993 JANUARY 4

HAVILLAND ESTATES LIMITED et al. Appellants

v.

CHANNEL ISLAND CERAMICS LIMITED et al. Respondents

Before: COLLINS, HARMAN and FROSSARD, JJ.A.

Court of Appeal - application for extension of time to file documents under Rule 8(1) of the Court of Appeal (Civil Division) (Guernsey) Rules, 1964

See paragraph 49 of this issue.

J.P. Greenfield , for the Appellants.
N.J. Barnes, for the Respondents.

COLLINS, J.A.:- This is an application made on behalf of the Appellants who are the unsuccessful Plaintiffs in an action brought against the first and second Respondents, which action resulted in a judgment delivered on 29th June, 1990.

The action was one which arose out of a contract for the supply and installation of some seven bathrooms on a property on the Island, and it is sufficient for present purposes to say that the Plaintiffs were alleging defects in the work done and materials supplied by the Defendants, that the Defendants were counterclaiming for the balance of the price and that the Defendants were successful on both claim and counterclaim.

The Plaintiffs gave notice of appeal and an appeal was set down on 18th July, 1990, by which time the Plaintiffs had requested a transcript of the fairly lengthy hearing, together with the direction by the learned Deputy Bailiff to the Jurats. There were delays in the production of the transcript and the successful Defendants eventually made application to this Court for an Order confirming that the appeal had lapsed owing to the failure of the Appellant, that is the Plaintiffs in the action, to comply with Rule 8 of the Court of Appeal (Civil Division) (Guernsey) Rules, 1964.

By Rule 8 an appellant is required, before the expiration of four months after the day on which the appeal was set down, to lodge with the Registrar four copies of a number of different documents. Those include: the notice of appeal; the judgment, order, decree or award under appeal; the pleadings, if any, in the proceedings in the court below; such affidavits or depositions, if any, as are relevant to the matters in controversy on the appeal; and such exhibits or parts of exhibits (including correspondence) as are relevant to the matters in controversy on the appeal. Finally, four copies have to be lodged of a statement setting out the contentions to be urged and the authorities to be cited by the appellant in support of his appeal, and that statement is said hereafter in this Rule to be referred to as "the appellant's case").

By Rule 9, provision is made in respect of failure on the part of the appellant to lodge with the Registrar all such documents and exhibits as are required under paragraph 8(1) within the time limited under that paragraph, or such time as may have been extended under Rule 17, in terms that in the event of such failure the appellant should be deemed to have abandoned his appeal. It was on the ground of a failure on the part of the Appellant to comply with Rule 8 of the Rules that the Respondents sought from this Court, last year, confirmation that the appeal had lapsed owing to a failure on the part of the would-be Appellant to comply with the terms of Rule 8 of the Rules to which I have referred. That application was heard and a decision reached on the 1st of April 1992.

The act of the Respondents in seeking such confirmation resulted in the putting in on behalf of the would-be Appellants of an application under Rule 17 for extension of time. By Rule 17(1), this Court or a judge thereof may, on such terms as the Court or judge thinks fit, by order extend or abridge the period within which a person is required or authorised by the Rules or by any order or direction, to do any act and may extend any such period although the application for extension is not made until after the expiration of that period.

When the matter came before this Court in April of 1992 there was discussion as to the obtaining of a transcript of the proceedings which had taken place at the trial. The President of the Court said this:-

> "There is no doubt that the terms of Rule 8 have not been complied with. However, today a cross-application was filed by the would-be Appellant asking us, in terms of Rule 17 of the Rules, to extend the period within which certain documents have to be filed.
>
> That application relies on an affidavit which has been filed by the original Counsel for the Appellant, Mr. Greenfield. It appears that although the appeal was set down in good time and although the transcript was ordered, it became necessary in order to complete the transcript of a long and apparently complicated trial, that the transcriber be furnished with clear copies of a very considerable number of exhibits which were put at the trial.
>
> "Now," continued the President, "it appears that the Greffier of this Court had from time to time asked Mr. Greenfield to provide, or at least settle a list of the exhibits which were required for the purposes of transcription. For various reasons these were not supplied in good time and in consequence the preparation of this very lengthy transcript has been unduly delayed. It is not yet complete. We are told that only 300 pages have been transcribed out of what are expected to be 1,000 pages.
>
> The circumstances of this delay," continued the President, "have in my opinion not been adequately explained by Mr. Greenfield"

and then examples are given by reference to correspondence to which I do not now specifically refer. Having made those references, the learned President continued in this way:-

> "At this stage," he said, "I can say no more than that the papers and correspondence as a whole leave me with the impression that there was a considerable degree of laxity on Mr. Greenfield's part, in complying with the very reasonable requests of the Greffier. However, it is not possible for us to find that Mr Greenfield or his client, at any stage, had any intention other than to prosecute the appeal."

The Court then went on to consider the circumstances further and to consider the terms of Rules 8, 9 and 17. Having done so it continued these terms:-

> "The question has been raised of the effect of Rule 9 (which provides for an automatic lapsing of an appeal) on the Orders made by this Court for a partial stay of execution."

And he continues with that as follows:-

> "I would also say," he said, "that, while what I would call comity between the Advocates in this jurisdiction is to be respected, and while we would not want to interfere with any conventions under which they operate, nonetheless, the expedition of appeals is not a matter simply for the parties; it is a matter in which the Court and the community at large have an interest. In my opinion, if there are difficulties in the prosecution of an appeal, due to delays in the filing of a transcript, it should not be taken for granted that any extensions of time will be given if it can be shown that either of the parties is at fault with regard to any delays in the making of the transcript."

And then after another paragraph, the Court continued thus:-

> "Now, in the circumstances, I would propose that the extension asked for be granted subject to the Appellant being put on terms to file the documents required by Rule 8 within 14 days of the receipt by the Appellant of the transcript which has been ordered.
>
> It would follow that the application which has been made by Mr Barnes for confirmation that the appeal has lapsed cannot be granted and should be stayed."

So the order of this Court was that the documents required by Rule 8 should be filed within 14 days of the receipt by the Appellants of the transcript which had been ordered. That also is an order which has not been complied with. It has not been complied with in a number of respects.

First of all certain of the items which are required to be filed under Rule 8(1), have still not, at this day, been delivered. I refer in addition to the Notice of Appeal, that has not been filed as required by Rule 8(1) until the 16th of November. It has been filed now but not until the 16th of November, but that is a somewhat academic breach in the sense that the Court already had the Notice of Appeal at the time it was originally filed. However, it is common ground that the judgment, order, decree or award under appeal has not yet been filed, that would in these circumstances be the Act of Court appealed against.

As to those items which have still not been delivered, it may be that the pleadings in the proceedings in the court below have not been filed in the sense that all amendments made to those pleadings do not appear to have been filed. This is not, however, a matter which I would place any weight on, in this respect, in that it appears that Mr. Greenfield was taken by surprise by Mr. Barnes' submissions in regard to the incomplete nature of the pleadings supplied, and so I would place that one on one side.

However, among the other matters which are required to be filed are "such affidavits or depositions, if any, as are relevant to the matters in controversy on appeal." We were informed that in fact the evidence of the various parties, and their witnesses, was for the most part preceded by the swearing of affidavits which were put in as part of their evidence at the trial and so therefore there would appear to be a breach of 8(1)(e). These have still not been filed.

8(1)(f) which refers to the "exhibits or parts of exhibits...as are relevant to the matters in controversy on the appeal", has also not been complied with. We were informed that as well as the correspondence there were also photographs and other physical exhibits which were produced in the course of the trial. In addition to that, of course, the correspondence has not been filed as required.

Now, the other respect in which the Order has not been complied with, is that the Appellants' Case was not filed until the 16th of November, that being just about exactly one month after the date upon which it was required to be filed by the Order of this Court. Mr. Greenfield has sworn an affidavit in support of the application which is before us now, and it is to be observed that that application refers only to the Appellants' Case, or in other words, the last of those matters which were required to be filed under Rule 8. It does not touch, in any way, the exhibits or the affidavit, namely the other matters in respect of which there has been a failure to comply with the Order.

However, taking the Affidavit as it stands with regard to the Appellants' Case, the situation would appear to be this: that the transcript arrived at Mr Greenfield's office, as he described it, "...at various times during the course of the summer," but he states in his affidavit that the last sections, namely pages 591 to 738, and 821 to 926, being some two hundred and fifty pages, were not received until the 1st of October of 1992. It follows that in accordance with the Order of this Court the documents generally and looking at his application and his affidavit, the Appellants' case in particular should have been filed 14 days later.

Mr. Greenfield's affidavit continued by giving an explanation as to how the matter came to be late in the sense that the Appellants' case was not lodged until the 16th of November. He referred, in paragraph 4 of his affidavit, to his engagement in other matters and in particular to a trial which started on Monday, the 28th of September, 1992 and continued until the 7th of October, 1992. Although he referred to that as a trial, it appeared that it was in fact a somewhat complex application to strike out certain civil proceedings involving a multiplicity of parties from different countries and involving also in particular the contentions as to the applicability of certain requests for further and better particulars. And then after that a shorter matter occurred in which he was involved, until the 9th of October, and then another matter until the 12th of October that he said that he was going to be involved in.

He then continued:-

> "The earliest date therefore in which I would be able to meet with my client and English Counsel to prepare the Appellants' case is Friday the 23rd of October, 1992 and I shall be personally out of the Island during the week commencing Monday, the 26th of October, 1992, for my children's half term holiday."

Now it was only when the Court raised with Mr. Greenfield the possibility that the Court might take the view that by relying upon his children's half term holiday he was preferring his own social convenience to obedience with the Order of the Court, that he put forward to us an explanation which he said indicated that although he was away from the Island it really made no difference. That explanation was that as soon as he obtained the final transcript of the appeal, he sent it straight off, without even taking a copy of it, to Counsel in England, that Counsel having been involved in proceedings in England in an arbitration involving certain of the same parties as those which are the subject of the litigation which is now the subject of this appeal. Having sent it over to Counsel he then left it with Counsel who he knew was himself busy and had a telephone consultation for several hours on the 23rd of October and received the papers back from Counsel on the 9th of November Counsel having drafted the Appellants' case and he then spent a few days looking it through and that is how he came to file it on the 16th of November.

Now it seems to us, that by acting in that way and sending the papers over to Counsel in the way in which he has describe, Mr. Greenfield effectively put it out of his own power to comply with the Order of the Court. That is something which he should not have done. It is to be observed, further, that when one looks at the Appellants' case filed on the 16th of November, it does not contain any detailed reference to the transcript or to the evidence which was given; in no instance does it refer to some matter of evidence whether given in the last transcripts or earlier, as having been evidence which was overlooked. The whole matter is put in very general terms and is directed to criticisms of the summing-up and that summing-up had been in the possession of Mr. Greenfield prior to the hearing of the matter before this Court on the 1st of April.

A It is clear that Mr. Greenfield would have known that the instalments of transcript would be arriving at various times and it is quite clear to us that he had ample opportunity to prepare the basis of such a document as forms the Appellants' case by way of draft before so as to put himself in a position to comply with the Order when he received the last tranche of transcript and that he could then have perfected what he could and should have been preparing earlier.

B So, we are satisfied that there was sufficient material before Mr. Greenfield to enable him to prepare at least preliminary drafts which he could then have confirmed as soon as he obtained the transcript. He was the person who had had the conduct of the proceedings throughout and had therefore an intimate knowledge of the case.

In those circumstances it falls to this Court to determine whether to exercise its discretion under Order 17 in deciding whether to grant the
C application to extend time, which is the application before this Court, namely the application of the 9th of October, 1992. That application is in fact expressed by way of an application for a variation of the Order of this Court, but in truth the substance of the application made was for a further extension of time under Rule 17 sub-rule (1), and in the exercise of this Court's discretion we do not think that this would be a proper case in which to extend time and accordingly the application is refused.

D Application refused; after an adjournment and further submissions by counsel, ordered that Respondents' costs be paid by the firm of counsel for the Plaintiff. (See para. 51).

79. [CIVIL DIVISION - APPEAL NO. 197]

1993 JANUARY 5

E **JOHN NIKOLAS VAN LEUVEN et al** Defendants
v.
NIELS CHRISTIAN NIELSEN Plaintiff

Before: COLLINS, HARMAN and FROSSARD, J.A.

Discovery - order for discovery before close of pleadings - principles upon which Court acts

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See paragraph 52 of this issue.

S.G. Denziloe, for the Defendants.
M.G. Ferbrache, for the Plaintiff.

COLLINS, J.A.:- This is an application for leave to appeal and for an extension of time within which to file a notice of appeal. The Court has
G heard the substance of the appeal in determining whether to grant such leave.

The appeal is against the decision of the learned Bailiff on 2nd September, 1992. Application was made to him for leave to appeal to this Court on 4th September and was refused. The matter then came before Sir Charles Frossard, sitting as a single member of this Court, and when it did so, he adjourned the applications for leave and for an extension of time to this sitting of the full Court. The Appellants are the defendants in the action, and I shall refer to the parties as the Plaintiff and Defendants. The action arises out of the relationship of solicitor and client.

The Cause alleges with some particularity that the Defendants were engaged by the Plaintiff as his solicitors to advise him as to whether he and a Mrs. Halvorsen would be entitled to settle and carry on business in Guernsey, and as to the necessary steps to be taken. It is then alleged that in reliance on advice given by the Defendants, the Plaintiff and Mrs. Halvorsen purchased a business, and in that connection obtained a liquor licence, and completed the purchase. It is alleged that, in fact, the Plaintiff was a Canadian citizen and, therefore, did not have the benefit of citizenship of a European Community country such as he would have enjoyed had he still been a Danish citizen, as he had been until February, 1987. Allegations were made as to advice given at a meeting, and "in or about January, 1985" as to telephone calls made on or about 2nd April and then on or about 6th or 7th April of the same year, and at a meeting on 19th April of the same year.

It is alleged that the sale was completed on the strength of repeated advice that in effect all was in order, and that it was only after the sale was completed that the Plaintiff was told that he would only be permitted to reside in Guernsey if he could show that he was a Danish citizen. Thereafter enquiries, it is alleged, show that this would require two years residence in Denmark, and in consequence it is alleged in the Cause that the business had to be sold at a loss, and other costs were thrown away in addition. The result was that there was a substantial claim for damages.

When Les Défenses were delivered, they comprised largely of Exceptions de Forme by which detailed particulars were sought, and although the pleading contained also both Niances and Prétensions, the denials were made in the customary form, and the affirmative allegations which followed in the Prétensions were of a somewhat formal character. In no case did Les Défenses attempt to plead to the specific facts which had been alleged, and alleged I repeat, with some particularity in the Cause. Inconsistencies as to dates were alleged as between a letter before action of 9th June, 1987 and of particulars delivered in respect thereof on the one hand, and on the Cause on the other, and particulars were further sought of the precise meaning of certain phrases such as 'To act generally' and 'To settle in Guernsey' and of the precise terms of certain telephone calls and conversations and as to who was present in certain instances. These were all particulars which were sought in the Exceptions de Forme. It was, and was clearly intended to be, a searching list of requests, and it was this which came before the Bailiff initially on 27th July of last year.

A Mr. Mark Ferbrache, on behalf of the Plaintiff, suggested that such particulars as should be thought appropriate should be ordered to be given only after discovery, but the Bailiff and Mr. Denziloe took the view that this was tantamount to ordering discovery prior to the close of pleadings, and the matter was then adjourned in order to determine whether discovery should be ordered at that stage. Thus it was that the matter came back before the Bailiff on an application for discovery prior to the delivery of particulars on 2nd September of last year. That application being made not merely prior to the delivery of the particulars but also prior to entry on the witness list, this being, we were informed, the equivalent of 'the close of pleadings' as that phrase is understood in England.

The learned Bailiff, having heard argument, reached a decision which is contained in the Act of Court dated 2nd September, 1992, and the Act of Court records that the Court, having heard counsel for the respective parties and considered written submissions, ordered that the Defendants, within 14 days, furnish the Plaintiff with a list of the documents which were or had been in their possession, custody or power relating to any matter in question between the parties, and it was further ordered that the Defendants verify such a list by affidavit. The Defendants have sought leave to appeal against that order on a number of grounds which are set out in their application for leave and which, we were informed, would have been repeated in a notice of appeal or grounds of appeal, had leave not been required, and I turn now to consider the various grounds which are raised by that notice.

First of all, it is contended that there had been an objection by Counsel for the Defendants made by letter of 19th August, 1992, to the Bailiff sitting on the second occasion - that is 2nd September - on the ground that in the earlier proceedings he had given a strong indication of prejudgment of the application without having first heard the same. In this respect, having read the transcript, it is apparent that the Bailiff made it clear, both when making the observation complained of itself, and later, that he had an open mind and was open to persuasion. We do not think, therefore, that there is anything in this ground, and we would add that it would, indeed, be unfortunate if any judge were to feel inhibited in expressing his initial reaction for the benefit of the advocates appearing before him, and in particular, for the benefit of the advocate against whose client's interests the observations are made. It is only in that way that such an advocate can know the matters upon which he is to concentrate his attention.

The second ground is that, having been so requested, the Bailiff declined to give a written judgment, and it is further said that he gave no reasons for his decision other than to say that he was satisfied that discovery was necessary for disposal of the issue of pleadings. What the learned Bailiff did say was:-

> 'I am satisfied that the Plaintiff's application for discovery is necessary for the fair disposal of the issue of the pleadings.

> In making this order, I take into account the relationship of advocate and client and, particularly, the fiduciary nature of that relationship. All the authorities that have been referred to me either pointed to that conclusion or do not point in the opposite direction when closely examined. I therefore have no hesitation in making the order requested.'

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And then when he was asked for a judgment with reasons, he made certain observations and then continued in this way:-

B

> 'I will just say this, that as far as I am concerned this case does not raise any new or unusual considerations, and that as far as I am concerned, I have made my decision based on the general direction of the authorities.'

Whilst in general it is desirable that a court exercising its discretion should give its reasons, we do not accept that it is necessary that such reasons be committed to writing or, indeed, that they take any particular form. The learned Bailiff had had all the relevant authorities cited to him, he had been taken extensively through the documentation, and while the reasons which he expressed were in short form, it is clear that he considered that the facts of the matter before him came within the scope of the discretion which the authorities supported, in particular, when he referred to the absence of any new or unusual considerations. He was, in our view, referring to the considerations before him as being of a nature which had already been the subject of high authority. We therefore do not consider that there is anything in the second ground of the application for leave to appeal.

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Thirdly, it is alleged that the learned Bailiff's decision was wrong in law. It is stated that such indications as to the reasons as were given, indicate that the Bailiff considered that the existence of a fiduciary relationship was in itself compelling and/or sufficient grounds for the order made. It is stated in the application that even in the case of a fiduciary relationship, the judge must exercise his discretion as to whether or not he makes the order, taking into consideration all the circumstances of the case. We do not find in the phraseology which we have already quoted from - the observations of the learned Bailiff of 2nd September, 1992 - any assumption that the existence of a fiduciary relationship necessarily requires the making of an order for discovery prior to particulars, and that ground we also conclude is without substance.

E

F

Fourthly, it is said in the application for leave that there is no indication of any finding by the Bailiff that he had a discretion to exercise in the giving or refusing of the order, and further or in the alternative, no indication as to the basis on which he exercised such discretion, and it is said that in exercising the discretion he did not indicate that he had taken into account all the circumstances of the case. We do not consider here that it is necessary for a judge to refer expressly to the fact that he is exercising a discretion when he is making his order and giving his reasons; it is something which, in our view, can go without saying.

G

Fifthly, the point is raised in the application that the ordering of discovery before close of pleadings and before the furnishing of particulars is wholly exceptional and it is said that there is no indication of any finding by the Bailiff, based on the circumstances of the case, that he found that exceptional circumstances justifying such an order existed. Further, it is contended that there is no indication that he applied his mind to the question of whether or not such exceptional circumstances applied. In considering this ground, we would say this; first of all, in Guernsey, there is still no rule for automatic discovery as there is in England; discovery requires an order. Indeed, until the coming into force of the Royal Court Civil Rules, 1989, there was no provision whatsoever for discovery in this island. By Rule 39(1) it is provided that:-

> 'The Court may, on the application of any party to the proceedings, order any other party -
>
> (a) to furnish the applicant with a list of the documents which are or have been in his possession, custody or power relating to any matter in question between them in the proceedings; and
>
> (b) to verify the list by affidavit.'

And then there are further provisions which permit of a limitation of an order of discovery to particular documents or classes thereof. There is not, however, any specific provision with regard to the obtaining of particular discovery of such documents as it is alleged or as might be alleged have been omitted from the list, and no doubt, that is a matter which the Royal Court would deal with on the making of a further application under Rule 39 for a further list.

Now, it would be apparent from the quotation which I have made that the order does not specify either that an order for discovery must be made or specify when it is to be made, and we find that in each case it is in the discretion of the Court to decide, first of all, whether to order discovery, and secondly, to decide the stage at which it shall be ordered. It is true to say that it will be most usual for discovery to be ordered after the close of pleadings, that is to say, after the entry of the case in the witness list. In passing, I would also observe that there can be no question in this Island of an order for discovery prior to the equivalent to a statement of claim and after writ because, in this Island, the Cause by which the action is instituted also constitutes the equivalent to both writ and statement of claim.

The effect of that is that the Plaintiff is required to have pleaded the substance of his case by the time any question of discovery can arise; he will have pleaded the substance of that case in his Cause. The essential question which will be likely therefore to arise in this Island, is as to whether or not discovery should be ordered before or after particulars or, putting it more formally, before or after the close of pleadings by entry in the witness list.

The problem is one which has arisen in England and is the subject of authorities going back to the 19th century. Those authorities have been carefully presented to this Court and, we believe, to the learned Bailiff by the advocates on behalf of the Plaintiffs and the Defendants, and no useful purpose would be served by any extensive quotation from the authorities cited in the course of this judgment. However, the effect of those decisions is to be found usefully expressed in the 1993 edition of the Annual Practice, at paragraph 18/12/43 at page 321. The paragraph in question is entitled "Particulars before Discovery or Discovery before Particulars" and it reads as follows, and we will leave out the reference to the authorities for present purposes:-

> 'In certain cases a party who is ordered to give particulars is allowed before giving them to interrogate his opponent and to obtain discovery of documents.'

There is then a quotation from Lord Justice Bowen in these terms:-

> 'It is good practice and good sense that, where the defendant knows the facts and the plaintiffs do not, the defendant should give discovery before the plaintiffs deliver particulars.'

A number of authorities are referred to and then the text continues:-

> 'But no hard or fast rule can be laid down to determine when particulars should precede discovery or discovery should precede particulars. The latter course is most frequently adopted in cases where a fiduciary relation exists between the parties ... But the practice is not restricted to such cases. ... Each case will depend on its own circumstances and must be decided on its own merits.'

And then certain particular instances are given. So far as the authorities are concerned, we would say that of those which have been brought together so helpfully by the advocates for the parties before us, the ones which appear to us to bear most succinctly on the issues which we are concerned with are the old case of Waynes Merthyr Co. v. Radford, (1896) 1 Ch. 29, and the more modern case of Ross v. Blakes Motors (1951) 2 All ER 689.

The upshot is that each case will depend upon its own circumstances and must be decided on its own merits, and against this background, we do not think that it is right to say that the ordering of discovery prior to particulars is properly described as being a wholly exceptional course. It is an alternative which is open to the Court in the exercise of its judicial discretion. Accordingly, we do not find that there is any substance in the criticism which is contained in the fifth of the grounds for obtaining leave to appeal.

Then, in the ensuing paragraphs 6 and 7, criticism is made of the actual decision of the learned Bailiff. In all the circumstances of the case it is said, even if he did have a discretion, he ought not to have exercised it, or he ought to have exercised it by refusing to order discovery and that he failed to exercise it reasonably. In considering those matters,

it is appropriate, of course, that we must bear in mind the principles which limit and govern the interference with the judicial discretion by an Appellate Court, which are well established in England and, we believe, have been applied in the past in this island. They derive from a number of cases of high authority of which the principal and most well known is Evans v. Bartlam (1937) AC 473. The principles can be usefully found in paragraph 656 of volume 37 of Halsbury's Laws of England (fourth edition) under the rubric "Appeal from the exercise of a judge's discretion."

Having looked at the pleadings in this case, and considered them with care, it appears to us that there is no reason for this Court to substitute an exercise of its own discretion for that of the learned Bailiff and, indeed, while there is in our view no ground to interfere with that discretion, it is a case in which it is appropriate that we should say that we wholly agree with and approve the exercise of the discretion which the learned Bailiff did exercise. We say this because of the nature of the pleadings, the relationship of the parties, and the fact that the Plaintiffs have already attempted to give further particulars in answer to a letter from the Defendants, and here and there have said that they do not know, for example, certain dates, and would have to await discovery for those dates.

Had the matter been sketchily pleaded or had it appeared a speculative action, our view might have been different. We are also influenced by the fact that the Defendants appear to have concentrated upon seeking to undermine the Plaintiff's case by their requests for particulars, and have contented themselves to remaining behind the barricades so far as any expression of their own substantive defence to the case is concerned, and bearing all those matters in mind, we certainly are not of the view that there is any ground to interfere with the proper exercise of the judicial discretion of the learned Bailiff in this case. Accordingly, the application for leave to appeal is refused.

Leave to appeal refused; the order for discovery, subject of the appeal, to take effect fourteen days from the date of this judgment; costs awarded to the Plaintiff in respect of the present hearing and the adjourned hearing before a single judge on 30th November, 1992.

80. [CIVIL DIVISION - APPEAL NO. 199]

1993 JANUARY 5, 6, 7

GUERNSEY STEVEDORES LIMITED	First Defendants
v.	
MICHAEL KEATES DUQUEMIN	Third Party
THE STATES OF GUERNSEY	Second Defendants
DAVID TREBERT	Third Defendant
ALAN WILLIAM SHORTO	Plaintiff

Before: COLLINS, HARMAN and FROSSARD, JJ.A.

Third-party proceedings - appeal against a direction of the Royal Court that a third-party should cease to be a party to an action - principles to be applied

See paragraph 54 of this issue.

J.P. Greenfield, for the First Defendants.
M.G. Ferbrache, for the Third Party.
P.T.R. Ferbrache, for the Second Defendants and the Third Defendant.
R.J. Collas, for the Plaintiff.

COLLINS, J.A.:- This is an Appeal by the First Defendants against the decision of the learned Deputy Bailiff, dated 18th September, 1992, ordering that Mr. M. K. Duquemin should cease to be a party to an action in which the Plaintiff had brought proceedings for damages for personal injuries and loss and damage against the First, Second and Third Defendants, arising out of an accident which is alleged to have occurred at the docks on 22nd September, 1988.

The accident involved a crane, which was on hire from the Second Defendants to the First Defendants, who were the employers of the Plaintiff. The Third Defendant was the crane driver, who himself was employed by the Second Defendants.

By the Cause, allegations of negligence were made against the First and Second Defendants, their servants or agents, and certain specific allegations of negligence were made also against the Third Defendant personally. In the case of the First Defendants, the case was put in the alternative in contract, the same facts being relied on as breaches of an implied term in the Plaintiff's contract of employment, relative to his safety.

Very substantial damages were claimed; these included general damages and certain items of special damage including, in particular, past and future loss of earnings and the cost of the full-time care, which it was alleged that the Plaintiff was to require, or is to require, for the rest of his life. The Plaintiff is alleged to have been severely disabled, being unable to walk more than ten yards without a zimmer frame, and it is alleged that he will never work again.

The action against the Defendants was commenced on 22nd September, 1988 and Les Défenses of the First Defendants, as well as asking for particulars by way of Exception de Forme, denied each and every allegation in the Cause and blamed the Second and Third Defendants.

Les Défenses of the Second and Third Defendants were filed on the same day, namely 7th November, 1991, and these contained denials and referred, in the case of the Second Defendants, to certain terms and conditions under which the crane and the driver, the Third Defendant, were hired out to the First Defendants.

It was not until two months later that the Defendants learned that there was evidence that the Plaintiff, in addition to having suffered the accident in September, 1988, which formed the basis of the claim, had suffered a further accident on 21st July, 1989, when attending what is described as the private physiotherapy department owned and run by Mr. Duquemin, and that there was evidence that his condition was, or may have been, substantially aggravated in consequence of that second accident.

A This came to the attention of the Defendants in consequence of a medical report obtained by them jointly from a Mr. Brice, a consultant neuro-surgeon of Southampton. His first report was dated 11th February, 1992, and in the course of that report, after describing the accident at the docks and the medical history which followed, he continued thus:

> 'On the 21st July he...'

B that is the Plaintiff,

> '...fell over whilst in the physiotherapy department and struck his head against a radiator. I was unable to find, either from his wife or himself, any reason for falling over other than the fact that his balance was poor. He was apparently rendered unconscious for a minute or two, and the medical notes suggest that after that he had very slurred speech but was fully conscious. His wife says that he
> C was much worse after the fall. He wasn't able to move his arms at all well, he couldn't lift his arms above horizontal level.'

Some further details were given, and Mr. Brice then continued:

> 'Since his second accident, his wife has had to do most of his dressing for him. She thinks he has improved somewhat, but the rate of recovery is nowhere near what it was after the first accident, and
> D she says that there has been no change in his general condition in the year prior to my seeing him and, in particular, there was no change what so ever in the six months prior to my seeing him.'

Mr. Brice reported further on 18th March of 1992, and his report included these two passages: First he said:

> 'In answer to your letter...'

E that is to say the letter written to him by the Second and Third Defendants,

> '...of the 3rd of March, 1992, I can first of all comment on the question as to why Mr. Shorto fell and struck his head against a radiator whilst in a private physiotherapy department in Guernsey. The reason for this, I am sure, is that his balance was extremely
> F poor prior to that second accident, and was occasioned by the accident that he had had on the container. As a result of this, he was liable to fall and he happened to fall whilst in the physiotherapy department.'

His report then went on to consider certain other matters and, in consequence of those matters, he expressed this conclusion:

G > 'It is therefore quite clear in my mind...'

said Mr. Brice,

'...that the second accident caused an increase in his neurological deficit which persists to this day, and my assessment of the relevance of the two accidents is that when we look at his present clinical picture, some sixty per cent of the neurological deficit that he currently shows can be attributed to the injury that occurred in the first accident, and some forty per cent of the present picture is attributable to what happened during the second incident when he struck his head against a radiator.'

A

When the First Defendants learned of these alleged later events, and in particular the second accident, they attempted to make further enquiries in April and May 1992, as appears from the correspondence exhibited to the affidavit of Mr. Greenfield, and although this did not yield any more than a consent to obtain the relevant hospital notes, a third party notice was issued on behalf of the First Defendants against the third party, M. K. Duquemin, trading as M. K. Duquemin Physiotherapy and Sports Injury Clinic, who thus became a third party in the action.

B

C

Under the Royal Court Civil Rules, 1989, no leave is required prior to the issue of a third party notice, even though that notice be issued or served after delivery of defence in the main action. This is in contrast to the practice in England, where leave is required once a defence has been served.

As a further consequence of the information contained in the medical reports to which I have referred, each Defendant amended his defence to raise the issue of the second accident. A re-amended defence was filed on 7th November, 1991, by the Second and Third Defendants, and a further re-amended defence on 20th February, 1992, by the First Defendant.

D

Technically the Pleadings were first closed on 1st October, 1992, when the First Defendant first filed a re-amended defence and at that stage the matter was placed on the Witness List by Act of Court, this constituting the equivalent to the close of Pleadings in this Island. However, thereafter there were the re-amendments to which I have referred.

E

By those re-amendments the Defendants have alleged as against the Plaintiff, that his injuries have been caused, or partially caused, by the negligence of Mr. Duquemin, leading to the second accident, and by their Pleadings they raise the allegation that the second accident constituted a Novus Actus Interveniens.

F

The Plaintiff's action against the Defendants has been fixed for trial in March 1993, and it is to be observed first that the Defendants have made no application to adjourn that trial, and secondly that, there being no provision for the ordering of interim payments on account of damages in this Island, the Plaintiff is in the position of having suffered loss over a considerable number of years, without having had the opportunity as yet of obtaining an award of damages against anyone.

G

A While his delay in instituting proceedings until a very short while before the expiry of the three year limitation period has, of course, contributed to this passage of time, it is clearly nonetheless likely to be to his prejudice if he has to suffer anything more than a trifling delay in achieving his trial date.

The summons by which the third party proceedings was instituted refers to the proceedings against the First, Second and Third Defendants, in the sum
B of £483,124.19, and asserts that such injuries, disability and consequential loss and damages the Plaintiff may prove, were caused by, or alternatively contributed to, by the negligence of the physiotherapy staff and/or other staff of or at the M. K. Duquemin Physiotherapy and Sports Injury Clinic, of La Couperderie, St. Peter Port, on or about 21st July, 1989.

There are particulars of negligence, and it is pleaded that such
C negligence was in the following respects. First, in causing and/or permitting the Plaintiff to fall over and strike his head against a radiator, whilst undergoing physiotherapy at the said clinic on the said date. As a result of this fall, the Plaintiff was rendered unconscious and sustained further head injuries and/or exacerbation of his existing head injuries. Then it is alleged that there was negligence in failing to take any or any sufficient or adequate care of the Plaintiff whilst he was undergoing physiotherapy at the said clinic on the said date, in
D consequence whereof he fell as aforesaid.

In addition to alleging the application of the doctrine of Res Ipsa Loquitur, the third party notice concludes by alleging a failure to exercise or provide any sufficient or adequate supervision of the Plaintiff whilst he was undergoing physiotherapy at the clinic, in consequence of which he sustained the accident.

E On the 13th of August, 1992, the Third Party made application to the Court for an Order that he should forthwith cease to be a party to the action. This Order was sought under the terms of Rule 34 of the Royal Court Civil Rules, 1989. By Rule 34(1), the Court may in any proceedings order that any person who has been improperly or unnecessarily made a party, or who I observe in passing that that is a general power and not specifically directed to, or indeed limited to, the position of a third party.

F The Application came before the Deputy Bailiff and resulted in the Order which is now under Appeal. The learned Deputy Bailiff, who delivered a formal judgment, gave his reasons for granting Mr. Duquemin's Application. They can be summarised as follows: first, he held that the claim was not in truth a claim for indemnity or contribution, and thus was not suitable for third party proceedings; secondly, he held that the first of those reasons, the first ground, was based upon the principle that where different damage is caused to the same Plaintiff by two separate causes of
G action, there is no room for indemnity or contribution.

The learned Deputy Bailiff made reference to paragraph 2/220 of Charlesworth & Percy on Negligence, 8th Edition, in these terms: "where two or more tortfeasors cause different damage to the same Plaintiff, the causes of action against each wrongdoer are quite distinct and are required to be kept separate from one another. A Plaintiff is only able to recover from each tortfeasor that part of his damage which is attributable to the negligence of the particular Defendant concerned."

Thirdly, the learned Deputy Bailiff expressed the view that it would be open to the Defendants themselves to call Mr. Duquemin or other witnesses at the trial of the action between the Plaintiff and the Defendants in order to support or make good their case.

Fourthly, the learned Deputy Bailiff observed that had the Plaintiff sued the Defendants and the Third Party in separate actions, or were he to do so, there could have been or could be a joint hearing on the issue of damages as distinct from liability.

It was not asserted by Mr. Duquemin's advocate, before the learned Deputy Bailiff, that the First Defendants were acting other than bona fide in having joined the Third Party. Indeed, in view of the contents of the medical reports, from which I have quoted, I do not consider that it would have been open to them to do so before the learned Deputy Bailiff, or indeed before this Court. The Defendants are clearly seeking to protect a potential legitimate interest by making the allegations which they do.

It is, however, to be observed that in consequence of questions and observations addressed by this Court to the advocate for the First Defendant in the course of the Appeal, that the First Defendant has, as have indeed the other Defendants, very real evidential problems. This arises from the fact that to this date they have no information as to the nature or the circumstances in which the accident happened, beyond that contained in those medical reports from which I have quoted, and in another medical report which was obtained for the Plaintiff and which was placed before us, which in our view added very little to the content of the other reports.

I consider, however, that it would be setting a potentially dangerous precedent for a Court to look, in cases in which there is no application to have proceedings dismissed as vexatious or frivolous or as disclosing no reasonable cause of action, at the chances of success of one party against the other, and in this case of a Defendant against a Third Party, on the evidence as it stands at the time when such an interlocutory application comes to be made. The purpose of the rule is not to provide for a preliminary trial on the merits. Support for this approach is to be found in the decision of the Court of Appeal in England in the case of Carshaw -v- North Eastern Railway, (1885) 29 Ch. 344.

Turning then to the grounds upon which the learned Deputy Bailiff allowed the application, we deal first with his conclusion that this was not a case of two tortfeasors liable in respect of the same damage. That was the basis of the first two heads of the summary which we have given of the effect of his judgment.

A The Law Reform (Tort) (Guernsey) Law, 1979, section 18 provides for contribution between joint and several tortfeasors in identical terms to whose which have, since 1934, formed a part of the law of England. Taking the relevant passage from section 18 it reads as follows:

> 'Where damage is suffered by any person as a result of a tort, (whether a crime or not)....any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise....'

B

Where the section refers to damage having been suffered by any person as the result of a tort that, of course, is a reference to damage suffered in this instance by the Plaintiff, and when reference is made to any tortfeasor liable in respect of that damage, then that is a classification in to which any of these Defendants may fall, in the event of their being held liable to the Plaintiff in this action. And if they are liable, or are held liable, then they are able to obtain contribution from any other tortfeasor who is or would if sued have been liable in respect of that same damage. It is clear from the language of the section, and from the phrase 'whether as a joint tortfeasor or otherwise' that the tort committed by the respective tortfeasors may be separate and distinct; the essential identity is one of damage.

C

D It would not be appropriate to burden this judgment with extensive quotations from the cases so helpfully cited to us by the advocates, those cases including Baker -v- Willoughby (1970), A.C. 467, and Jobling -v- Associated Dairies (1991), 3 W.L.R. 135, which consider the difficult issues of causation and foreseeability which occur where there are successive accidents or where there is some supervening illness or condition, and it would not be appropriate for us to do so in the course of what is, after all, an Interlocutory Appeal.

E It is sufficient if we say that depending, of course, upon the evidence which emerges at the trial, there could, in this instance, be circumstances in which the Plaintiff could recover against the First, Second and Third Defendants or any of them in respect of the totality of his claim subject, of course, to any deduction for contributary negligence if there were to be any such finding, and in which Mr. Duquemin could be held liable to contribute in respect of any share on his part of any blame for any aggravated condition or loss which may be held to stem from the second accident.

F

It was submitted to us at one time via counsel that, in the event of any negligence being held to have been committed by Mr. Duquemin, this would inevitably constitute a Novus Actus Interveniens irrespect of the nature, setting and causation of the second accident, but we consider this to be contrary to authority.

G

Accordingly, we do not consider that this is a case in which necessarily there will be no identity of damage as between any liability which may be found to attach to the First and Second and Third Defendants on the one hand, and to the Third Party on the other. The Plaintiff may - and I stress the word 'may' - be able to recover his full damages against the Defendants, or any of them, on the basis that he was predisposed to have just the kind of accident as occurred in the case of the second occurrence, and it could be that the negligence, if any negligence comes to be established against the Third Party, could be of such a nature and effect as not to constitute a break in the chain of causation. We do not propose in this Interlocutory Judgment to develop this by way of factual examples, and it would be undesirable to do so prior to the trial.

A

B

At this stage, therefore, we do not think that it can be said that there is no substantial possibility of there being such an identity of damage, as to satisfy the Law of Contribution. While, therefore, the evidence could produce a situation such as that considered in the Australian case of Dillingham Construction Property Limited -v- Steel Mains Property Limited (1975), 49 Australian Law Journal, page 233, and in the passage from Charlesworth cited in the judgment of the Learned Deputy Bailiff, it will by no means necessarily do so.

C

Those conclusions would themselves be sufficient to determine this Appeal but we make reference also to the further observations of the learned Deputy Bailiff which we have summarised above.

D

The learned Deputy Bailiff referred to the possibility that the Defendants, or one of them, could call Mr. Duquemin or other witnesses at the trial. That, of course, may be, we do not know, but the conduct of the Defendant's case at the trial, whether Mr. Duquemin were to be a Third Party, and whether he were to be taking part in the trial itself or not, would essentially be a question for the Defendants. One observation we would make in this respect is that we do not consider it material to take in to account whether a Defendant's case is strengthened or weakened by a Third Party being or not being a party to the action or present taking part in the trial - strengthened or weakened, that is to say, against the Plaintiff. It is not the purpose of Third Party proceedings to improve a Defendant's case against the Plaintiff.

E

Finally, the learned Deputy Bailiff referred to the Judgment of the Court of Appeal of British Columbia in Long -v- Thiessen and Others, (1968), 65 WWR, page 577. He did so in the context of a possible separate action by the Plaintiff against Mr. Duquemin, and it is right to indicate that it seems clear by now that the Plaintiff does not intend to institute any such proceedings, indeed he might have some problems in doing so, having regard both to limitation and to the state of the evidence.

F

It is to be observed, however, that the machinery which was operated in the Long and Thiessen case could - and again I stress the word 'could' - become relevant in contribution proceedings, assuming a finding that there is some identity of damage. The Court, as part of the assessment of any contribution which might fall to be assessed as between any one of the

G

A Defendants and the Third Party, might wish to adopt some such mathematical approach as that adopted by the Court of Appeal of British Columbia in that case, and to take that in to account when reaching its conclusion as to what the proper contribution, having regard to all the circumstances, was to be.

Accordingly, we give leave to appeal and we allow the Appeal and we set aside the Order of the learned Deputy Bailiff. The effect of that is that
B the Third Party remains a party to the action.

In reaching that conclusion we have not considered, and it was right that we should not consider, the position of the Plaintiff, and in particular, the possible prejudice to him in the event of any delay to his action, consequent upon the necessity to vacate the March 1993 trial date if the Third Party proceedings are to proceed.

C It is the function of directions to avoid any unnecessary prejudice to the Plaintiff of that kind in so far as it is fair to do so. In this connection, it is to be noted that, if the Third Party were to take part in, and to be bound by, the hearing of the action, the action would be delayed until at least November of 1993, and there is good ground for suspecting that the delay might go in to 1994.

Clearly if the learned Deputy Bailiff had disallowed the application and
D retained the Third Party as a party in the proceedings, he would have had jurisdiction to go on to give directions, no specific summons being required for that purpose. Accordingly, this Court has power to make such directions as it would have been in the power of the learned Deputy Bailiff to make, had he decided the issue which he did decide, the other way.

Taking into account the importance to the Plaintiff of maintaining his
E trial date, and the present state of evidence in the possession of the Defendants, which we do think it proper to take in to account for this purpose, we direct the following: first, that the Third Party plead to the Third Party summons within sixty days; secondly, that the action between the Plaintiff and the Defendants do proceed on the date listed for trial; thirdly, that the Third Party proceedings be not heard until a date to be fixed by the Royal Court, such date not to be before the date of final determination of all issues between the Plaintiffs and the
F Defendants in relation to liability; fourthly, that the Third Party be not bound by the decision of the Court as between the Plaintiffs and the Defendants, and do not take part in the action between them, (other than as a witness if called by one of the parties) unless with the consent of all parties to the action; fifthly, we direct that all further applications for directions be made to a judge of the Royal Court to whom there shall be liberty to apply.

G Leave to appeal granted, appeal allowed, the Third Party ordered to pay the costs of the First Defendants in respect of the application and of this appeal and no order made as to the costs of the Plaintiff.

81. [CIVIL DIVISION - APPEAL NO. 164/2] A

1993 JANUARY 6, 18

HAVILLAND ESTATES LIMITED et al. Appellants

v.

CHANNEL ISLAND CERAMICS LIMITED et al. Respondents

Before: COLLINS, HARMAN and FROSSARD, JJ.A. B

Court of Appeal - application for leave to appeal to Privy Council - powers of the Court

See paragraph 50 of this issue.

I.H. Beattie, for the Appellants.
N.J. Barnes, for the Respondents. C

The following reserved Judgment was issued on 18th January, 1993:-

On 4th January, 1993 this Court refused an application on the part of the Appellants further to extend time for filing the Appellants' Case, this being one of the documents called by Rule 8 of the Court of Appeal (Civil Division) (Guernsey) Rules 1964, to 16th November, 1992, time having already been extended by this Court at a previous hearing. The powers of extension arise under Rule 17 of the same Rules. D

The effect is that the Appellants are no longer able to prosecute their appeal from a final decision of the Royal Court as a result of a refusal to grant interlocutory leave. It is to be observed also that even at present the Appellants have not filed all the documentation required by Rule 8.

E

The Appellants now make application for leave to appeal to Her Majesty in Council and this application is made pursuant to section 16 of the Court of Appeal (Guernsey) Law, 1961.

By that section it is provided as follows:-

> "No appeal shall lie from a decision of the Court of Appeal under this Part of this Law without special leave of Her Majesty in Council or the leave of the Court of Appeal except where the value of the matter in dispute is equal to, or exceeds, the sum of five hundred pounds sterling". F

The effect is that there is an appeal as of right from "a decision" of the Court where the matter in dispute exceeds the financial limit expressed.

Nonetheless the application for leave before us contains the following words in parentheses, "notwithstanding that the matter in dispute exceeds the sum of £500 sterling". G

A The reason for this is that by the Notes on Procedure in Commonwealth Appeals (October 1983) issued by and containing the substance of the procedure adopted by the Judicial Committee of the Privy Council it is stated that:-

> "Even where the instrument governing the admission of appeals from the territory concerned refers to an appeal being "as of right" (or similiar words) it is still necessary for leave to be obtained. The court from which leave is sought has to be satisfied that the appeal falls within the category of cases for which it may (or must) grant leave and it also imposes conditions as to security for costs, arranging for dispatch of the record to London and (if appropriate) as to stay of execution; it will probably grant conditional leave in the first instance and only grant final leave when the conditions as to security for costs and arranging dispatch of the Record have been fulfilled".

B

C

We observe that this has been the procedure adopted by this Court in consequence of those Notes and that such procedure was explained and considered in this Court in Taylor -v- States Board of Health and Parsons, 9.GLJ 54, on 3rd April, 1990.

The prime question for this Court to determine is as to whether the Appellants have any right of appeal under the Guernsey Appeal Law.

D

The construction and application of an equivalent provision couched to all intents and purposes in the same terms as section 16 of the Appeal Law has been considered by the Court of Appeal in Jersey.

In Forster (trading as Airport Business Centre) v. Harbours and Airport Committee , 1990 Jersey LR 82, the Court of Appeal in Jersey considered an application under that virtually identical provision (being Article 14 of the Court of Appeal (Jersey) Law, 1961), and under Rule 2 of the Judicial Committee (General Appellate Jurisdiction) Rules Order 1982. The case was one which proceedings were stayed by order of the Court of Appeal pending the decision of related proceedings in the Petty Debts Court. The Court of Appeal concluded that leave could not be granted because the decidion was "not a final or definitive decision" but merely an interlocutory decision.

E

F

The words in quotation marks derived from a decision of the Privy Council in Esnouf v. Attorney General of Jersey (1883) 8 App. Cas. 304, a criminal matter, in which Lord Blackburn in delivering the Opinion of the Board said that they were unable to see how it could be said that the matter had ended in a definitive sentence, the decision complained of relating to the mode of trail. The words "definitive sentence" derive from an Order in Council of 1572, which provided that "no appeal in any cause or matter great or small be permitted or allowed before the same matter be fully examined and ended by definitive sentence". It has of course to be borne in mind that such Order is not a part of the Law of Guernsey and that we have to apply and interpret the current Order relating to this island.

G

The Court of Appeal of Jersey prefaced its reference to the Esnouf case by saying:-

"In our judgment the reference in that article to a decision means a final decision of the Court of Appeal and not an interlocutory decision; a decision that is to say by which the rights of the parties are finally decided". A

We do not accept that a refusal by this Court to extend time finally decides the rights of the parties; the rights of the parties were finally decided by the Royal Court and all that has happened by reason of the refusal to extend time is that those rights have become unappealable, B

Further, the grant or refusal of an application to extend time is in our view of an interlocutory nature, applying the test in Salter Rex v. Ghosh (1971) 2 QB 597, which was expressed as follows in the 1988 edition of the Annual Practice para. 59/1/25, "In deciding whether an order is final or interlocutory the Court of Appeal applies the test in (the Salter case). To determine whether an order is final or interlocutory regard must be had to the nature of the application made in the Court below. An order is not final unless it would have finally determined the proceedings whichever way the application in the Court below had been decided." We draw additional comfort from the fact that the statutory provisions now prevailing in England classify an application for extension of time as being of an interlocutory nature; those provisions have not been adopted in Guernsey and our decision is based on the practice of the Court of Appeal in England as expressed in the passage from the 1988 Annual Practice above. C D

We have had our attention drawn to the Privy Council case of Haron v. Central Securities (1983) AC 16, and note that there is no such settled practice in Guernsey as that which had pertained in the Federal Court of Malaysia.

We were alternatively invited to consider a separate application under Rule 2 of the Judicial Committee (General Appellate Jurisdiction) Rules Order 1982, and have already stated that if we had jurisdiction to give leave under that Rule or any other Rule we would refuse it in the exercise of our discretion. Having taken time to consider the matter fully, we are satisfied that we in fact have no such jurisdiction. E

In this respect we would follow the decision of the Court of Appeal in Jersey in the Forster case. Sir Godfray Le Quesne in the giving of the judgment of the Court therein said :- F

"However these two provisions (that is the provisions of the equivalent Jersey Appeal Law and the Judicial Committee Rules), so far as we are aware, have always been interpreted and reconciled in the same way. The substantive right of appeal is granted in this jurisdiction by article 14 of the Court of Appeal Law. In a case in which the matter in dispute is worth £500 or more, there is therefore a right of appeal to Her Majesty in Council. The Judicial Committee Rules are simply laying down the procedure by which that right is to be pursued, or to use the language which has been used recently by the Judicial Committee itself, are merely machinery for putting into effect the substantive right of appeal conferred". G

A Thus, there being in our judgment no right of appeal under section 16 of the Guernsey Appeal Law, there is no separate jurisdiction to be exercised under Rule 2 of the Judicial Committee Rules.

The conclusions which we have reached have, of course, no effect on the right of the Appellants to apply to the Judicial Committee for special leave to appeal.

B Leave to appeal refused.

82. [CRIMINAL DIVISION - APPEAL NO. 161]

1993 APRIL 19, 20

THE LAW OFFICERS OF THE CROWN

C **v.**

KERRY JOHN BENFORD

Before: COLLINS, DOREY and FROSSARD, JJ.A.

Evidence - Hearsay - Res Gestae - Maker of Statement available to give evidence

D See paragraph 16 of this issue.

N. Le Poidevin, for the Appellant.
A.C.K. Day, Q.C. (H.M. Procureur), for the Crown.

COLLINS, J.A.:- Kerry John Benford was convicted by the Royal Court on 4th December, 1992 of an offence of burglary, in that he entered The Manor House, Mount Row, St. Peter Port, on 8th October, 1992 with intent to
E steal. To this he had pleaded 'not guilty' and he was found guilty by verdict of the Court. From this conviction he now appeals.

The principal ground of appeal is that which is set out as item 1 of the Grounds of Appeal against Conviction, lodged on his behalf. It is expressed in these terms:-

> '1. The trial judge misdirected himself in law by admitting hearsay
F evidence by the Prosecution witness, Detective Constable Yabsley of an alleged statement by the co-accused Jones "Run, Kerry, run" which inculpated the Accused when it would have been possible to call the maker of that statement.'

Associated with that was a further ground that the admission of such hearsay evidence was contrary to article 6(3)(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

G

The background to the circumstances which led to the learned Deputy Bailiff being asked to determine whether this evidence, namely, that of Constable Yabsley as to the making of the remark, should be admitted, can be shortly stated. It is apparent that the police had received certain information which led them to believe that a burglary might take place at The Manor House, a substantial dwelling, on the night in question. In consequence, two detective constables and one police constable took up a position in the drawing room of the house from which they could make observations.

A

B

Their observations started at 10 o'clock on the night in question, Wednesday 7th October, and their patience was rewarded when, at about 11.55, Constable Yabsley saw two figures appearing at the front of the premises. These two persons made various efforts to enter the premises and eventually did so at a window and gained entrance to the room where the officers were stationed.

C

Constable Burnard then put his torch on and he shouted "Police, you are under arrest." At the same time Constable Yabsley said that he shone his torch on the second of the two entrants, who was the shorter in stature, and noticed that his balaclava was not pulled wholly down, and that this revealed a tattoo which he described as the tattoo of a scorpion on his neck. The constable's evidence continued:-

'I then heard the taller of the two figures shout "Run, Kerry, run."'

D

And then in his evidence he said:-

'From the tattoo, and together with the name, I identified the shorter of the two people as being Kerry Benford, the Defendant, whom I now identify. Mr. Benford is well known to me.'

He said that he had a clear view of the man for some two or three seconds, the light from his torch, he said, was excellent, and that he was only some eight or ten feet away. Constable Burnard then grabbed hold of the other man, the taller man, and he was arrested and then later taken into custody, and he was identified as Alan Wynn Jones. Jones pleaded guilty to the burglary, having been indicted in the same count as the Appellant.

E

Legal submissions were addressed to the learned Deputy Bailiff as to the admissibility of the evidence and to the use of the words "Run, Kerry, run." After hearing submissions and considering the authorities, he expressed his conclusion in these terms:-

F

'Well, I'm satisfied that this evidence does fall within the exception to the hearsay rule as forming part of the res gestae. The Jurats will, of course, have to be carefully directed by me as to what weight they put on this evidence when they have heard it.'

G

In the course of his summing-up the learned Deputy Bailiff directed the jury as to identification evidence generally, and then in relation to the words "Run, Kerry, run" he directed them in these terms:-

A '... you must approach that statement with caution, as firstly, you must be sure that Detective Constable Yabsley was not mistaken in what he heard, and in this regard you will note that the two other officers did not hear what was said, although DC Burnard has said that there was- Jones did say something. Secondly, you must be sure that Jones did not address his companion with a false name in order either to harm the Accused, or some other person with the name Kerry, or, more importantly, to help his actual companion hide his true
B identity.

The primary evidence is what? Detective Constable Yabsley saw the tattoo, and you must consider to what extent, if at all, his evidence on identification has been influenced by the words spoken by Jones which, for the reasons I have just explained to you, are to be treated with caution.'

C Once the decision was made to admit the evidence, we find that this was a full and proper warning. However we have concluded in the circumstances of this case, and having regard to the authorities to which I will shortly refer, that the learned Deputy Bailiff did fall into error, in not exercising a separate discretion in determining whether it was right to admit that evidence despite the fact that the maker of the statement was not called.

D We have had cited to us a number of authorities which have been carefully presented to us by Mr. Le Poidevin. The modern analysis of the circumstance in which statements which would otherwise offend against the hearsay rule can be admitted as part of the res gestae started with the case of R. v. Ratten (1972) A.C. 378, PC, and then took its most authoritative form in a decision of the House of Lords in R. v. Andrews, (1987) A.C. 281. We were referred to the report in the Criminal Appeal Reports at (1987) 84 Cr. App. R. 382. The decision of the House was
E given in the speech of Lord Ackner who summarised the position in five paragraphs. First he said:-

'1. The primary question which the judge must ask himself is - can the possibility of concoction or distortion be disregarded?'

Secondly, he stated that:-

F '2. To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim...

And he then went on to expand upon that factor. Thirdly, he stated
G that:-

'3. In order for the statement to be sufficiently "spontaneous" it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event...'

And then fourthly, he referred to the possibility of special features in a case which could relate to the possibility of concoction or distortion, and finally, he said:-

> 'As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied upon, this goes to the weight to be attached to and not to the admissibility of the statement and is therefore a matter for the jury...'

A

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So in summary, those were the five matters to which Lord Ackner averted, giving the decision of their Lordships' House, and he went on to say that:-

> 'Where the trial judge has properly directed himself as to the correct approach to the evidence and there is material to entitle him to reach the conclusions which he did reach, then his decision is final, in the sense that it will not be interfered with on appeal...'

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And it seems quite clear to us that thus far the learned Deputy Bailiff correctly applied those tests in determining that the matters in question did fall within the res gestae principle.

However, the matter does not stop there because Lord Ackner concluded his speech in these terms:-

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> 'My Lords...' he said '... the doctrine of res gestae applies to civil as well as criminal proceedings. There is, however, special legislation as to the admissibility of hearsay evidence in civil proceedings. I wholly accept that the doctrine admits the hearsay statements, not only where the declarant is dead or otherwise not available but when he is called as a witness. Whatever may be the position in civil proceedings, I would, however, strongly deprecate any attempt in criminal prosecutions to use the doctrine as a device to avoid calling, when he is available, the maker of the statement. Thus to deprive the defence of the opportunity to cross-examine him, would not be consistent with the fundamental duty of the prosecution to place the relevant material facts before the court, so as to ensure that justice is done.

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That passage was later referred to and applied by the Court of Appeal in Tobi v. Nicholas, (1988) Cr. App. R. 323. This was a case in which a statement as to the identification of the Defendant as the driver of a car involved in an accident had been admitted in a breathaliser case, despite the fact that twenty minutes had elapsed since the accident, and despite the fact that the person who had made the statement was available as, but had not been warned or called as a witness, and Glidewell, LJ at page 335, having quoted the passage from the end of the speech of Lord Ackner, went on to say:-

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> 'I do not suggest that in this case the prosecution deliberately avoided calling Mr. Thomas in order to place the defence at a disadvantage, I am confident that there was some mistake on the part of the prosecution. But nevertheless the proposition from the speech of Lord Ackner, to which I have just referred, seems to me to apply exactly to the situation in the present case.'

He then went on to refer to various matters of detail, and he ended his judgment by saying:-

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'I conclude by saying this. Why the mistakes which undoubtedly were made by the prosecution in the handling of this case occurred we do not know and we should not guess. What the result would have been if they had not been made we cannot guess. But concepts such as the admissibility of hearsay statements as part of the res gestae must not in my view be stretched so as to cover a failure by the prosecution to call admissible evidence. For those reasons I would allow this appeal.'

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Mr. Justice McNeill, who also formed part of the Court said:-

> '... It is not so much that the witness of fact Mr. Thomas was not called but that he had not been warned to be called. If it were a practice to seek to establish the facts of a case by introducing the sort of hearsay evidence as was used here, when the witness of fact is available and could be cross-examined as to the facts, it is a practice which I would deprecate and I am sure that prosecuting authorities will bear in mind the concluding words of Lord Ackner's speech in the Andrew's case supra to which Glidewell, LJ has already referred.

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It is clear that the appeal was allowed not merely on the grounds that there was not sufficient spontaneity in the statement but also in view of the failure to comply with the principle which was expressed in that final paragraph from the speech of Lord Ackner.

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In many cases of course, the maker of the hearsay statement is dead, and we have in mind particularly cases of murder and manslaughter; indeed, both Andrews and Ratten were such cases. Where, however, the maker of the hearsay statement is alive, we conclude that the Court has to take two separate steps. First, it has to apply the tests set out in the five principles enunciated by Lord Ackner. If the circumstances satisfy those tests then the matter will fall within the principle of res gestae, but the matter does not stop there because, secondly, we conclude that having found that those tests are satisfied, which is a decision wholly for the trial judge, the trial judge has to go on to take a second step in circumstances where the person who had made the statement in question is still alive, namely, he has to decide whether, in his discretion, such a statement should be admitted despite the fact that the person in question is not to be called. Clearly, if such a person were not to be competent or compellable, for example by reason of their awaiting trial themselves for the same or some associated offence, the discretion would be likely to

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be exercised in favour of admission, although again, it must depend on the facts of the individual case. But the mere fact that a person whose evidence is under consideration has, for example, a criminal record or, indeed, is a co-accused who has pleaded guilty, does not, we find, take him out of the ambit of Lord Ackner's observations. Those observations apply to any witness who is competent and compellable.

We do not find in the reasons given by the learned Deputy Bailiff, which I have quoted above, for admitting the evidence that he approached the matter in this way or, indeed, that he sought to exercise that discretion one way or the other, and in this respect, we find that he has fallen into error; an error which is, unfortunately, not cured by his careful summing-up. Now, before turning to the proviso we would mention one or two other matters. First of all the passage quoted from Lord Ackner's speech and our application of it would seem to accord with the general principles set out in article 6 of the European Convention on Human Rights and Fundamental Freedoms, referred to in the second ground of appeal, and we say no more about that.

Secondly, we find no substance in the complaint that the Accused was prejudiced by the fact that his co-Accused had pleaded guilty having been mentioned to the jury. This had been ventilated at an early stage of the trial and it would appear that no objection had been raised on behalf of the Appellant and it is a matter which was dealt with properly in the summing-up; and thirdly, we find no substance in the complaints raised in paragraph 3(b) of the Grounds of Appeal against Conviction, either under sub-paragraphs (1), (2) or (3) and in that connection the aspect which was stressed before us was that it was contended that the learned Deputy Bailiff implied in some passages of his summing-up that the second person present in the premises was the Accused. We have carefully considered the text of the summing-up which is complained of and we find no substance in that complaint.

By section 25 of the Court of Appeal (Guernsey) Law, 1961, powers are conferred on the Court of Appeal to allow an appeal:-

> '... if it thinks that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal.'

There is, however, this proviso:-

> 'PROVIDED that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.'

A We were referred to a passage in the current edition of Archbold at paragraph 7-116 at page 1/1187 which is in these terms:-

> 'However, as with allegations of misdirection there are now well settled principles as to when the proviso will be applied. It is submitted that the test can be simply stated as follows: But for the error of law, would a reasonable jury properly directed undoubtedly have convicted. The most common error of law alleged is as to the admissibility of evidence and where evidence is either wrongly admitted or excluded, this is the test that will be applied...'

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and reference is made to a number of authorities.

We have come to the conclusion that this is a case where the Jurats, properly directed, undoubtedly would have convicted even without the
C evidence of which complaint is made. The evidence apart from that in relation to which that complaint is made, points, in our view, and presents an overwhelming picture. We refer in particular to the evidence of the tattoo clearly seen by Constable Yabsley; to the escape route of the Appellant and the timing of his movements; the lies that he told about it as the route was progressively revealed in his Questions and Answers; and his lies about his association with Jones as to whom there was evidence of his having been seen in company with him not very long before.
D We refer also to the unsatisfactory nature of his alibi which was not consistent with his replies to the police, and finally, to his remark to Constable Yabsley about his being released in time for Christmas. This appears to us to present a convincing picture, so that we have no hesitation in reaching the conclusion that this is a case in which the proviso should be applied, and accordingly, this appeal is dismissed.

E Appeal against conviction dismissed; after hearing further submissions by counsel, the Court refused leave to appeal against sentence. (see para. 18).

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RIGHTS TO WRECK IN NORMAN CUSTOMARY LAW.

by Sir Graham Dorey, Bailiff of Guernsey

The customary right to confiscate wreck (Le droit de Varech) only existed in France in the Province of Normandy. I refer to observations of *Basnage* drawn from the preface to his chapter on the subject of varech (Tome 11 p.548): "It is more difficult to discover the origin of this word Varech than to explain what it means. Me.G. Rouillé ... believed that Varech is a Danish word which is probable, ... what can be said with more certainty is that Varech is an old Norman word and that the passage of time has caused the loss of its true meaning." Then he continues: "The customs and laws of nations have differed on this subject, they were once cruel and barbarous ... now it is no longer permitted to profit from the misfortunes of others." In Normandy the Droit de Varech was not for those times unreasonable because the feudal lords, the Seigneurs, had duties to conserve as well as privileges of confiscation.

The word "Varech" denotes all those things which the sea has thrown ashore by chance or stress of weather or which come so close to land that a man on horseback can touch them with his lance. The Droit de Varech was a feudal right which belonged to all the maritime fiefs of Normandy, and as well as the rights of the seigneurs, there were also certain rights of the Duke, or the King, depending on the title of the person to whom the seigneur owed hommage; however in this paper the Droit de Varech means the right of a Seigneur to confiscate wreck which reaches the beaches and rocks of his fief.

It was a condition precedent to the exercise of the right that no person, nor any dog nor any cat should have survived the shipwreck; and in Normandy, (except in the Channel Islands), the Seigneur lost all right to confiscation if the true owner arrived before the lapse of a year and a day to claim his property. The Duke of Normandy, later the King of France, also had his own rights of confiscation over gold and certain precious goods. The Kings of England kept these same rights as respects Guernsey after the loss of mainland Normandy.

The text of the "Ancienne Coutume" explains the Droit in simple terms, which I précis as follows: After the Bailiff has inspected it, the Seigneur is required to keep the wreck for a year and a day. But those things which deteriorate should be sold and the proceeds kept in their stead. If within a year and a day someone proves his right of property in the wreck, it should be handed over to him, less the expenses of conservation. Otherwise the Seigneur obtains the absolute property in it. The Duke acquires absolute and immediate property in all gold, silver, certain horses, hunting dogs and hawks, ivory, coral, precious stones, scarlet cloth, dressed fur and sable, verdigris, and silk. It should be noted that the Ducal or Royal rights existed independantly of the Seigneurial rights and were not subject to the survivorship of dogs and cats, and were probably not subject to the survivorship of persons.

The "Coutume Réformée" only made small changes, and I imagine that the droit de varech in Normandy did not change again until it disappeared entirely.

The first record on the subject of varech in Guernsey is to be found in the document entitled "The Rights which the King of England has in Guernsey and those which the People of Guernsey have" dated about 1272 which I will refer to as 'Les Franchises'. The text is concerned with fiscal rights rather than seigneurial rights, and I quote that part of the work which relates to the droit de varech:

> "Our Lord the King has varech from the whole Island except for the rights of the Abbot of Mont St. Michel and of the Lady de Chesney and of Matthew de Saumarez. And the King takes the right of view of the whole Island and of the Vale, and of Lihou and of Jethou and he takes gold, and unworked silk and uncut scarlet cloth and scarlet cloaks without adornments and sturgeon".

It should be remembered that the northern part of the Vale was then an Island. The text is misleading, because the King happened to be at this time Seigneur of all the maritime fiefs except those of Saumarez, of the Abbé de Mont St. Michel and of Madame de Chesney and that it was in his capacity of Seigneur and not of King that he enjoyed the Seigneurial Droit de Varech. But he also enjoyed the right to confiscate the precious objects everywhere over the Island in his capacity of King.

The second authority for Guernsey wreck law is found in the 'Etente' of King Edward III of the year 1331. The Etente, like Les Franchises, does not tackle rights of wreck from a general standpoint, the object was rather to evaluate the King's fiscal rights. However in 1583 the Approbation des Lois, an Order in Council which confirmed that certain provisions of Norman Custom, as stated by the French author Terrien, had the force of law in Guernsey, declared that the law concerning wreck was as it was set out in the Etente. The law remained thus until modern times.

We find in the Etente the same confusion which exists in Les Franchises. At the time of the Etente, the King, as Seigneur of several maritime fiefs, had already exchanged half of his rights to wreck with the Abbe of St. Michel and with Madame de Chesney and heirs, but this sharing of all seigneurial rights to wreck finished when these privately owned fiefs were taken by the King. Later the King transferred some of these fiefs with the totality of their rights to wreck restored, but he kept for himself the revenues of the right to wreck from the fiefs which he kept for himself. It is thanks to the researches of *Laurent Carey*, in his work "Essai sur les Institutions, Lois et Coutumes de Guernesey" of 1765 that the confusion between Royal rights and Seigneurial rights in the text of the Etente is resolved.

The right to wreck in Guernsey differed in two important respects from that right in the rest of Normandy; in Guernsey the Seigneur took a fixed portion of the wreck depending on the circumstances, even when the proprietor came to claim his property, and in that a salvor of the wreck was also able to take a fixed proportion, at the expense of both the Seigneur and the proprietor. I should add that in Normandy, but not in Guernsey, a salvor claimed his award on the basis of "quantum meruit", in Court if necessary, and the Seigneur had to cede his claim to a proprietor.

In Guernsey, the law provided for the division of the proceeds of wreck in different ways: firstly, if no proprietor nor any salvor made a claim within a year and a day, the Seigneur took all. Secondly, if there was a proprietor but no salvor, or if there was a salvor but no proprietor, that claimant took half and the Seigneur took half. Thirdly, if there were a salvor and a proprietor, one half went to the proprietor, one quarter to the salvor, and one quarter to the Seigneur.

The Etente also set out the method of division of the proceeds. Where, as an example, a division had to be made between a salvor and the Seigneur, the salvor was obliged to make an offer representing his estimation of half the value of the whole wreck value, if the Seigneur accepted the offer the salvor paid and took all. But if the Seigneur refused the offer, then he had to pay the salvor the amount of his offer. It was a practical procedure which avoided court action and which was fair to the parties. The procedure reflects Guernsey customary law relating to partage of real property where the younger son made lots, and the elder son had first choice.

Le Geyt comments on the method of division in the matter of wreck in his work "La Constitution, Les Lois, et Les Usages" of the Island of Jersey (Volume I page 338). It seems that in this respect the law of Jersey was similar to the Law of Guernsey:

> "The Custom in Normandy seems to have worked more fairly, in leaving matters to be settled judicially, the costs and risks (of salving) differ in each case, and cannot always be settled on a fixed portion. From the times of the Itinerant Justices, our Island authorities have stated that amongst other differences between the Custom of Normandy and that of Jersey there had always been the matter of rights to wreck, and that if the Proprietor came within one year and a day, he took half the property, and the Seigneur and the salvors took the other half. Whatever one's view of division as we practise it here, it must be regarded as a relic of the historic inhumanity shown to wretched shipwrecked mariners. It must have seemed to the Itinerant Justices to have been preferable to stay with the rule, than to have to submit to the delays and difficulties of Judicial process to settle the quantum and liquidation of the salvor's claim."

The feudal institution of a right to wreck could no longer exist in a modern society for the benefit of private Seigneurs. The right of a Seigneur to keep a portion of wreck in all circumstances does not fit the image of an Island to which is entrusted the holding of substantial funds. As *Basnage* said "It is no longer possible to profit from the misfortune of others." The Order in Council entitled "The Feudal Dues (Guernsey) Law 1980" transferred the right to Wreck (along with other feudal rights, but without abolishing them) to Her Majesty in perpetuity, and the Order in Council entitled "The Wreck and Salvage (Vessels and Aircraft) (Bailiwick of Guernsey) Law 1986" created the office of "Receiver of Wreck", the office holder is charged with conserving wrecks and consigning them to owners who come to claim them within the twelve months that follow the date on which the Receiver recovers or takes possession of the wreck. If no one claims it, the Receiver has to sell it and transmit the

proceeds to H.M. Treasury which in turn will forward the funds to the Guernsey Treasury. This law also provides, at last one may say, that a salvor is entitled to remuneration on the basis of "quantum meruit" in the absence of agreement.

Although it might be said to exist more in theory than in practice the Right to Wreck still does exist vested in Her Majesty, including as it does Her Majesty's rights, unaffected by recent legislation, to take the same precious objects as are declared in the "Ancienne Coutume", Les Franchises and the Etente.