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CONTENTS

HERALD

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SIXTEENTH ISSUE

Introduction

This edition covers the six month period from 1st July, 1993 to 31st December, 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 16.GLJ. followed by the paragraph number.

Editorial Committee

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 July to December 1993.

30th June, 1994

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In memoriam

ERNEST PATTISON SHANKS, C.B.E.; Q.C. (SINGAPORE)
1911-1994.

Ernest Shanks, Deputy Bailiff of Guernsey from 1973 to 1976 died on 17th January, 1994. He was called to the Bar as a Member of the Inner Temple in 1936. After distinguished war service he joined the Colonial Legal Service, where he rose to the Office of Attorney General and Minister of Legal Affairs in Singapore immediately prior to that country attaining its independence. At the age of 48 he had to look for a new career and in 1960 he was appointed to the office of H.M. Comptroller. This was the third time in the period after the war that the Island had had to look outside Guernsey to find someone to fill the post of second Law Officer and the Bar Ordinance makes specific provision for persons appointed by the Crown to the Office of Law Officer to take the oath of an Advocate of the Royal Court on presentation of his warrant of appointment. In 1969 he was appointed H.M. Procureur when the then Procureur was appointed the Island's first Deputy Bailiff. On Sir John Loveridge being appointed Bailiff in 1973 Mr. Shanks became Deputy Bailiff which Office he held until the 31st December, 1976.

HEADINGS USED IN THIS ISSUE

ADVOCATES

Bar Council

1. Order of the Royal Court: Enables the Bar Council (constituted by resolution of the Bar dated the 25th June, 1993) to make regulations binding upon all members of the Bar in respect of matters of professional conduct provided that such regulations must be approved by a Law Officer and sanctioned by the Bailiff.

   Made 30.11.93. In force 1.12.93. (ORC No. II of 1993).

Duty to Court - duty when other party unrepresented

2. R was in dispute with his tenant V who had not paid rent due under a lease. V paid certain monies to A, a chartered accountant, who put himself forward as a stakeholder in order to assist in resolving the differences between R and V. R refused to accept A as a stakeholder and obtained an arrest of monies in the hands of A. R who was represented by an Advocate then brought proceedings in the Court of Alderney to confirm the arrest and the Court made an order directing A to pay a fixed sum in respect of the monies arrested to R. A appealed but before the appeal was heard the arrest was lifted as a result of separate proceedings between R and V. A however pursued the appeal on the question of costs alone including the costs of a lengthy transcript.

   In allowing A's claim for costs the Deputy Bailiff found that the decision of the Court of Alderney which had been the subject matter of A's appeal was wrong. In his view the Court had fallen into error as a result of R's counsel losing sight of the special responsibilities of Counsel when appearing in a Lay Court against an unrepresented opponent. After reviewing a number of points where the Court fell into error the Deputy Bailiff concluded by expressing the hope that in future Counsel appearing in the Alderney Court will at all times remember their special duties as ministers of justice when appearing in that Court against parties who are unrepresented and that this duty was no way diminished by the presence of a Clerk of the Court who happened to be an English Solicitor.

   [Leopard v. Kay-Mouat - Appeals 30.7.93 (NJB/PTRF)].

AGRICULTURE AND ANIMALS

Control of poisonous substances

3. Projet de Loi: The Poisonous Substances (Guernsey) Law, 1993. - Enables the Board of Employment, Industry and Commerce by regulation to control the importation, production, storage and other uses of any poisonous substance for use in agriculture or horticulture. The substances covered are to be determined by regulation. Regulations can lay down requirements as to training, etc, of persons who use such substances. The Board can also prepare codes of practice containing recommendations for the guidance

of such persons.

Approved by the States 11.08.93. Awaiting Royal Sanction.

AVIATION AND AIRPORTS

4. Projet de Loi: The Detention of Aircraft (Guernsey and Alderney) Law, 1993. - Where default is made in the payment of airport fees incurred in respect of an aircraft at Guernsey Airport or Alderney Airport, the Law enables the appropriate authority (the Board of Administration, in relation to Guernsey Airport, and the States of Alderney, in relation to Alderney Airport) to detain, pending payment, the aircraft in respect of which the fees were incurred (whether or not incurred by the present operator) and any other aircraft operated by the person in default. If the fees are not paid within 56 days, the aircraft can be sold, with leave of the Court, to satisfy the fees. The order in which the proceeds of sale are to be applied is specified in the Law. The powers of detention and sale also extend to the equipment, stores and documents of the aircraft.

Approved by the States 11.08.93. Awaiting Royal Sanction.

BANKING, INSURANCE AND FINANCE INDUSTRIES

Banking supervision

5. Projet de Loi: The Banking Supervision (Bailiwick of Guernsey) Law, 1993. - Prohibits in the Bailiwick the acceptance of deposits in the course of carrying on, whether in the Bailiwick or elsewhere, a deposit-taking business except under the authority of a banking licence granted by the Commission. Replaces the Protection of Depositors (Bailiwick of Guernsey) Ordinance, 1971 and Part I of the Protection of Depositors, Companies and Prevention of Fraud (Bailiwick of Guernsey) Law, 1969.

"Deposit" and "deposit-taking business" are defined. Certain specified bodies are exempt. Detailed provisions made as to applications for banking licences, grant or refusal thereof, fees, revocation and conditions of banking licences, procedure for refusal, etc, of banking licences and the surrender of banking licences. Rights of appeal are also conferred.

The Commission is empowered to give directions to an institution where it intends to revoke its licence to protect depositors or potential depositors. The Commission is to effect publication of names of licensed institutions.

The Commission can object to the involvement of persons with specified degrees of control (whether by means of shareholdings or otherwise) over institutions. Such persons must notify their interest to the Commission.

The projet confers power to make regulations controlling invitations to make deposits by controlling advertising and unsolicited calls. It will

be an offence to make a fraudulent or misleading inducement to make a deposit.

Certain matters are to be notified to the Commission. These include change of director, etc, the acquisition of significant shareholdings and any large exposures to risk, in respect of which the Commission can impose safeguards.

There are detailed provisions as to the obtaining of information. Persons authorised by the Commission can obtain information and documents and exercise rights of entry. Investigations by inspectors with specified powers can be undertaken in the event of suspected offences. Falsification, etc, of documents during an investigation is an offence.

Audited accounts are to be available for inspection by the Commission and depositors. Notification of auditors is to be made to the Commission. Regulations can require certain matters to be communicated by auditors to the Commission.

The Commission will have certain miscellaneous powers for the protection of depositors. These include the power to apply for the repayment of unauthorised deposits and profits, the power to apply for injunctions to restrain unlawful deposit-taking, etc, and the power to apply for the winding-up of a company.

New restrictions are imposed on the use of certain descriptions and names (such as "bank" and "banking", etc). The Commission can grant permission to use these descriptions and names. The Commission can also object to the use of any business names; a right of appeal is given against such objections. The Commission can also intervene upon the incorporation and change of name of companies.

Restrictions are placed on the disclosure of information by the Commission. Except with the consent of the person in question, disclosure is permitted only in certain specified cases.

Power is conferred on the States by Ordinance to establish a compensation scheme for the protection of depositors.

General provisions of the Law deal with offences and penalties (e.g. for the giving of false or misleading information and as to the criminal liability of directors, abettors, etc).

Approved by the States 25.11.93. Awaiting Royal Sanction.

Bills of Exchange

6. Order in Council: The Bills of Exchange (Amendment) (Bailiwick of Guernsey) Law, 1993. - See 15.GLJ.4.

Royal Sanction 20.7.93. Registered 4.10.93. In force 11.10.93. (No. XI of 1993).

7. Projet de Loi: The Bills of Exchange (Amendment) (No. 2) (Bailiwick of Guernsey) Law, 1993. - Amends the Bills of Exchange (Guernsey) Law, 1958 by repealing sections 56(2) and 71(5) thereby removing the requirement for claims in respect of bills of exchange drawn or dishonoured abroad to be converted into sterling.

Approved by the States 25.11.94. Awaiting Royal Sanction.

BASTARDY AND LEGITIMATION

Bastardy proceedings in the Magistrate's Court - refusal of respondent to submit to blood tests - whether refusal constitutes corroboration of mother's evidence

8. In proceedings under the Loi relative a l'Entretien des Enfants Illégitimes 1927 the Respondent refused to submit to a blood test for the purpose of establishing paternity. The Royal Court held, as a preliminary issue (see 15.GLJ.9), that the court had no power to direct scientific tests as to parentage. In the resumed proceedings in the Magistrate's Court the Respondent argued that his refusal to submit to such a test could not amount to corroboration of the mother's evidence as to the paternity of her child. HELD, that the respondent's refusal to be tested could (depending upon the evidence to be heard and reasons to be given) amount to corroboration of the mother's evidence. Such refusal (unless good reasons were adduced for it) would clearly have some relation to the probability of the person being summoned being the father.

[A. v. B. - Magistrate's Court 15.6.93 (ADL/NJB).]

COMPANIES

Memorandum of Association - copy filed with H.M. Greffier defective - application for rectification

9. C Limited was registered as incorporated in 1989. The copy of the Memorandum registered with H.M. Greffier failed to include the final page which inter alia contained the conclusion of the objects clause, particulars of the share capital and the signature of the company. The shareholders sought rectification of the public record.

HELD by the Deputy Bailiff that it was not possible to rectify the Memorandum of association retrospectively and therefore he could make no order in respect of the application, but he granted leave to register the missing page of the Memorandum of association together with affidavits from a shareholder and the director confirming that at all times the company had been administered on the premise that the Memorandum had contained a page in the form now filed and that it had been the intention of the shareholders to subscribe to a memorandum containing that page in that form.

[In re Charwell Holdings Limited (RAP/HMC (amicus)) - Plaids de Meubles 25.11.93.]

CONSTITUTIONAL LAW

Elections of Conseillers and Deputies

10. Ordinance: The General Elections Ordinance, 1993. - Prescribes 16.3.94 as the date for the general election of Conseillers and 20.4.94 as the date for the general election of People's Deputies.

In force 29.9.93. (No. XV of 1993).

11. Ordinance: The Elections (Variation of Hours of Polling) Ordinance, 1993. - Sets the hours of polling for St. Peter Port and (as respects Conseillers) Alderney.

In force 24.11.93. (No. XXVIII of 1993).

Electoral Expenditure

12. Ordinance: The Electoral Expenditure Ordinance, 1993. - Sets the maximum expenditure permitted by candidates at elections for Conseillers, Deputies, Constables, Douzeniers, Procureurs of the Poor and Overseers of the Poor.

In force 24.11.93. (No. XXVII of 1993).

States of Deliberation

13. Rules of Procedure: Providing for the issue of a Billet giving 12 days' notice of a meeting at which the only business is Committee elections.

Approved by the States 24.11.93.

CRIMINAL LAW AND PROCEDURE

Court of Appeal - Advocates' fees on legal aid

14. The following Practice Direction was issued on 25th August, 1993:-

"1. The fees payable are governed by the Criminal Appeal (Fees and Expenses) (Guernsey) Ordinances, 1964 and 1981.

2. The fee note submitted by the Advocate assigned must stipulate the number of hours spent on the matter. The hourly rate should not exceed £60.

3. The Court is aware that in exceptional cases, e.g. trial for murder, opinion may be sought from Counsel in London. Advocates should bear in mind that such fees will not be met under the legal aid procedure without the prior leave of a single Judge of the Court having been obtained before such fees are incurred."

Practice Direction No. 3 of 1993.

Court of Appeal - appeal against judgment of Royal Court on appeal from Magistrate's Court - principles upon which the Court of Appeal acts - procedure on appeals in the Royal Court - desirability of magistrate giving reasons

15. See report of judgments of the Court of Appeal, paragraphs 86 and 87.

[Law Officers of the Crown v. Diment; Law Officers of the Crown v. Whales; 2.8.93. (HMC/PTRF; HMP/AMM).

Drug trafficking - computation of benefit therefrom - value of seized drugs to be disregarded

16. See report of judgment of the Court of Appeal, paragraph 88.
See also paragraph 20.

[Law Officers of the Crown v. White 7.12.93 (JRF/PAA)].

Sentence - burglary

17. A pleaded guilty to one count of burglary of commercial premises and asked for twenty-six like offences to be taken into consideration. He applied for leave to appeal against his sentenced of 18 months' imprisonment with activation of two suspended sentences of one month. Leave was granted and his sentence was reduced from eighteen months to twelve months in view of the fact that the premises burgled were commercial rather than personal premises, the fact that the cumulative benefit obtained in terms of money or valuables from the premises burgled was fairly limited in extent, the voluntary nature of his admissions in respect of the offences taken into consideration and the fact that although A had an unsatisfactory record his conduct since 1984 had improved. However, the Court stated that this should not be understood as regarding that sort of criminal behaviour as acceptable.

[Law Officers of the Crown v. Hall - Court of Appeal 6.12.93 (JRF/EAGP)].

Sentence - conspiracy to possess and supply a controlled drug - disparity of sentences between co-accused.

18. A and X had pleaded guilty to counts of conspiracy to supply a class A drug. X was given 12 months' youth detention suspended, whilst A was given an immediate sentence of 18 months' youth detention, against which he sought leave to appeal. HELD, granting leave and substituting an immediate sentence of 12 months youth detention, that although the Royal Court had been justified in drawing a distinction between A and his co-accused in that X had named his supplier, whereas A had not, and because A had had a previous conviction for betrayal of trust in a public office, the disparity was such as to justify the reduction of the sentence although it would have been unobjectionable if it stood by itself.

[Law Officers of the Crown v. Gaudion - Court of Appeal 3.8.93. (JRF/CMF)]

Sentence - importation of a controlled drug of Class A

19. A sentence of five years' imprisonment was upheld in the case of a 31 year old man without relevant previous convictions who pleaded guilty to importation of a Class A drug after being found at the airport with 200 'Ecstasy' tablets in his underwear.

[Law Officers of the Crown v. Fallaize - 3.8.93 (HMP/CMF)]

Sentence - possession of a controlled drug of Class B with intent to supply

20. Three years imprisonment reduced to two in case of a guilty plea by a small scale retailer of cannabis resin.

See report of judgment of the Court of Appeal paragraph 88.
See also paragraph 16.

[Law Officers of the Crown v. White 7.12.93 (JRF/PAA)]

Sentence - suspended sentence supervision orders

21. Resolution of the States of 16.12.93: Directing the preparation of legislation amending the Criminal Justice (Suspended Supervision Orders) (Bailiwick of Guernsey) Law, 1984 by increasing the maximum fine for failing to comply with the requirements of the supervision order from level 1 on the uniform scale to level 4.

DIVORCE AND MATRIMONIAL CAUSES

Former matrimonial home - termination of undivided ownership - licitation of property vested in former spouses which had already been subject of vesting order in the Matrimonial Causes Division

22. See de Garis v. de Garis paragraph. 39.

ECCLESIASTICAL LAW

Jurisdiction of Ecclesiastical Court

23. Projet de Loi: The Ecclesiastical Court (Jurisdiction) (Bailiwick of Guernsey) Law, 1993. - Declares for the avoidance of doubt that the jurisdiction of the Ecclesiastical Court in respect of the inheritance of personal property is limited to the grant of probate of wills and the grant of letters of administration of estates of deceased persons. The Ecclesiastical Court has no jurisdiction in a case in which there is a dispute of fact or law (whether as to the content, construction, application, validity or admissibility to probate of any will or otherwise) and a caution has been entered with the Registrar. The Royal Court can make rules requiring the Ecclesiastical Court to refer any

specified matters to it for directions.

Approved by the States 25.11.94. Awaiting Royal Sanction.

EMPLOYMENT

Employers' liability insurance

24. Order in Council: The Employers' Liability (Compulsory Insurance) (Guernsey) Law, 1993. - See 15.GLJ.25.

Royal Sanction 27.10.93. Registered 14.12.93. In force on a day to be appointed. (No. XIII of 1993).

Industrial disputes

25. Ordinance: The Industrial Disputes and Conditions of Employment (Commencement) Ordinance, 1993. - Brings the Industrial Disputes and Conditions of Employment (Guernsey) Law, 1993 (see 15.GLJ.24) into force on the 1st October, 1993.

In force 1.10.93. (No. XVII of 1993).

ENVIRONMENTAL LAW

26. Agreement: London Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer. - Notification of extension to the Bailiwick effective from 8.9.93.

Registered 30.11.93.

EUROPEAN COMMUNITIES

Implementation of Community law

27. Projet de Loi: The European Communities (Implementation) (Bailiwick of Guernsey) Law, 1993. - Enables the States (or, in relation to Alderney, the States of Alderney or, in relation to Sark, the Chief Pleas) by Ordinance to make such provision as they may consider necessary or expedient in order to implement any provision of Community law (including any provision contained in or arising under the Community Treaties or any Community instrument and any decision of the European Court).

Approved by the States 11.08.93. Awaiting Royal Sanction.

HEALTH AND MEDICINE

28. Ordinance: The Health Service (Benefit) (Amendment) Ordinance. -

Increases prescription charges for Guernsey and Alderney.

In force 1.1.94. (No. XXI of 1993).

29. Resolution of the States of 29.7.93: Directing the preparation of legislation providing for a total ban on smoking in all public transport vehicles and requiring designated smoking areas to be provided in all public eating places.

HEALTH AND SAFETY AT WORK

Fees

30. Projet de Loi: The Health and Safety (Fees) (Guernsey) Law, 1993. - Empowers the States Board of Employment, Industry and Commerce by order to specify fees to be payable to the Board for the purposes of the Explosives (Guernsey) Law, 1905, the "Loi relative aux Huiles ou Essences Minérales ou autres substances de la même nature, 1924", the Health, Safety and Welfare of Employees Law, 1950 and the Health and Safety at Work etc. (Guernsey) Law, 1979 (and any Ordinance under them).

Approved by the States 11.8.93. Awaiting Royal Sanction.

Inflammable oils

31. Ordinance: The Inflammable Oils (Amendment) Ordinance, 1993. - Amends article 8 of the 1925 Ordinance entitled "Ordonnance relative aux Huiles ou Essences Minérales ou autres substances de la même nature" by making provision as to the prescribing of fees by order of the Board of Employment, Industry and Commerce.

In force 11.8.93. (No. XII of 1993).

HIGHWAYS

32. Ordinance: The Public Highways (Amendment) Ordinance, 1993. - Amends the Public Highways Ordinance, 1967, by enabling the Board of Employment, Industry and Commerce by order to prescribe fees for the granting of permissions for the erection of scaffolding.

In force 11.8.93. (No. XIII of 1993).

HORTICULTURE

33. Projet de Loi: The Poisonous Substances (Guernsey) Law, 1993. - see paragraph 3.

HOUSING

34. Ordinance: The Housing (Control of Occupation) (Extension) Ordinance, 1993. - Extends the lifetime of the Housing (Control of Occupation) (Guernsey) Laws, 1982 to 1990, until the 31st October, 1994.

In force 29.9.93. (No. XVI of 1993).

INCOME TAX

Penalties - procedure - validity of a notice under section 200 of the Income Tax (Guernsey) Law, 1972

35. The States of Guernsey instituted penalty proceedings against D, a company which was a legal personal representative of L deceased, under section 200(2) of the Income Tax (Guernsey) Law, 1975. The Assistant Administrator of the Income Tax Authority had sent a letter to D pursuant to section 68 of the 1975 Law requesting certain information, which D failed to comply with within the specified period. The Administrator had then purported to serve notice pursuant to section 200 instituting penalty proceedings. D alleged as a preliminary issue that -

(1) The letter did not comply with the provisions of section 68(1) of the 1975 Law because it was sent by the Assistant Administrator and not the Administrator and because it was not addressed to D itself, but to a firm of Chartered Accountants. Further, the letter contained the words "formally request" rather than the word "require" which was used in section 68; and

(2) The notice sent by the Administrator did not comply with section 200 because it did not specify a section under which the penalty was sought.

HELD by the Bailiff:-

(1) First, that as section 205 of the Law of 1975 provided that the Administrator could be assisted by an Assistant Administrator in his judgment a notice under section 68 might be properly issued by an Assistant Administrator. Secondly, that the question of whether or not D had waived its entitlement to receive in person all official correspondence in favour of its accountants would be a question of fact to be determined when the evidence was heard. Thirdly, the letter as a whole had made it perfectly clear that the recipient was receiving a formal request enforceable in law under the terms of section 68 and that section had been correctly applied by the Administrator.

(2) Section 200 did not require the Administrator to name any particular section under which he wished to recover a penalty.

[The States of Guernsey v. Hillcrest Executor and Trustee Company Limited - Plaids de Meubles 18.10.93 (HER/PJGA.]

Pensions

36. Order in Council: The Income Tax (Pension Amendments) (Guernsey) Law, 1993. - See 15.GLJ.31.

Royal Sanction 20.7.93. Registered 24.8.93. In force 31.3.93. (No. VIII of 1993).

ISLAND DEVELOPMENT

Detailed Development Plans

37. DDP2 Review 1: Redevelopment of the Royal Hotel site. - Addition to DDP2, Review 1 to facilitate the redevelopment of the Royal Hotel site, primarily for tourist purposes, within the context of a Design and Development Brief.

Approved by the States 28.7.93.

38. Rural Area Plan (Phase 1): Golf Course at La Grande Mare. - Amendment to the draft Rural Area Plan (Phase 1) and direction that it take effect as an approved Detailed Development Plan relating solely to the proposed development of a golf course at La Grande Mare pending the States' consideration of the Rural Area Plan (Phase 1) as a whole.

Approved by the States 24.11.93.

LAND LAW

Licitation - property vested in former spouses which had already been subject of vesting order in the Matrimonial Causes Division - power of Ordinary Division

39. H and W were divorced and in 1983 the Matrimonial Causes Division ordered the revesting of their dwelling (bought jointly and for the survivor) in the parties and their respective heirs in equal undivided half shares and gave a droit d'habitation to the wife enabling her to reside there until the date when the youngest of the two children of the marriage attained the age of sixteen (7th March, 1995).

W now sought a licitation. On behalf of H it was argued that notwithstanding the maxim "Nul n'est tenu de rester dans l'indivision" the proper forum for dealing with the matter was the Matrimonial Causes Division and that the Ordinary Court should not be ordering a licitation and further without prejudice to the jurisdictional argument the licitation should be adjourned until the 7th March, 1995.

HELD by the Deputy Bailiff:

1. Rejecting the argument that this was a matter for the Matrimonial Causes Division, that wherever property was held in indivision the Ordinary Court had jurisdiction to order a licitation. Indeed the

Matrimonial Causes Division, having already adjudicated on the matter, might be functus.

The position of the Ordinary Court might be different in a case after divorce where there had been no application to the Matrimonial Causes Division for revesting of the property and it might well be that in such a case the Ordinary Court would decline to order any licitation until the necessary application had been made for the matter of the parties' interests in property to be resolved in the Matrimonial Causes Division, where other issues would come into play.

2. Were it not that W accepted that at the moment of licitation her "droit d'habitation" would be surrendered he would have been sympathetic to H's argument that to do justice between the parties any licitation should be deferred until March 1995.

With the agreement of the parties the Deputy Bailiff ordered that both their respective interests to be offered for sale to a third party by private treaty. If this did not prove possible either party could come back before the Court and ask for a sale of the whole property before commissioners of the Court.

[de Garis v. de Garis - Plaids de Meubles (Interlocutories) 3.8.93. (AJA/PTRF).]

LANDLORD AND TENANT

Rent Control

40. Order in Council: The Rent Control (Amendment) (Guernsey) Law, 1993. - See 15.GLJ.39.

Royal Sanction 20.7.94. Registered and in force 24.8.93. (No. IX of 1993).

LIQUOR LICENSING

41. Ordinance: The Liquor Licensing Ordinance, 1983. - Repeals the Liquor Licensing Ordinances, 1984 to 1989 and sets up a reformed system for the licensing of the sale or supply of intoxicating liquor and the regulation of premises concerned therewith.

The principal changes are the reduction in the number of categories of liquor licence to five and the introduction of "Meal Permits" for suitable premises which permit access by young persons and the sale of liquor (with a meal) on Sundays. In addition a category of "Nightclub Permits" is introduced, in respect of which one of the conditions is the approval of doormen by the Chief Officer of Police.

The Ordinance is divided into sixteen Parts with four Schedules.

Part I (Section 1) contains the general prohibition on the sale or supply of liquor without a licence. Part II (Sections 2-7) sets out the procedure in applications for the grant of liquor licences and lays down the requisite formalities. Part III (Sections 8-14) deals with the grant, supervision, variation and forfeiture of liquor licences.

Part IV (Sections 15-19) deals with alterations to premises and additional hours. Section 17 makes provision for General Orders of Extension which, on application by the Committee for Home Affairs, will enable the Royal Court to grant general extensions for all licensed premises within the relevant category or categories.

Part V (Section 20) prohibits the sale etc. of intoxicating liquor other than during permitted hours and subject to the conditions in the 2nd Schedule. Part VI (Section 21) controls persons under 18 in bars and Part VII (Sections 22-24) prohibits the sale, supply and consumption of intoxicating liquor by young persons aged under 18.

Part VIII (Sections 25-42) contains general provisions, including those relating to absence, death or incapacity of licensees, and various offences are set out, including the prohibition of undue noise.

Part IX (Sections 43-52) regulates access to bars by young persons and institutes a system of Meal Permits permitting access to premises covered by such permits for young persons, and opening of such premises on Sundays, provided meals are consumed.

Part X (Sections 53-62) deals with Nightclub Permits, which allow the opening of premises until 1.45 a.m. on a weekday or Saturday running into Sunday morning. Doormen must be approved by the Chief Officer of Police.

Part XI (Sections 63-94) deals with the licensing of vessels, and is taken in substance from the 1984 Ordinance.

Part XII (Sections 95-98) deals with clubs and Part XIII (Section 99) with fees.

Part XIV (Sections 100-102) covers offences and penalties. It is worthy of note that Sections 100 (3) and (4) provide for discretionary suspension of liquor licences after conviction for various infractions of the Ordinance.

Part XV (Sections 103-110) is the part dealing with savings and transitional provisions, including the conversion of existing licences into licences covered by the new Ordinance. Part XVI (Sections 111-115) deals with the service of notices, interpretation, repeal, extent and citation.

There are four Schedules. The 1st Schedule lists the five categories of liquor licence set out in the Ordinance. The 2nd Schedule lists permitted hours for the categories of liquor licence and the conditions attached to such licences; the 3rd Schedule prescribes the warning notice on under-

age drinking, and the 4th Schedule is a table of fees.

In force 29.9.93. (No. XXV of 1993).

PAROCHIAL MATTERS

Collection of refuse

42. The Parochial Collection of Refuse (Saint Martin) Ordinance, 1993. - Applies the Parochial Collection of Refuse (Guernsey) Law, 1958 to St Martin's with effect from 1.1.94, thereby enabling the parish to levy a separate refuse rate on dwelling houses and tenement houses.

In force 24.10.94. (No. XXVI of 1993).

PRACTICE AND PROCEDURE (CIVIL)

Arrest - disclosure order - application by fiduciary for the order to be discharged - circumstances where duty of confidentiality to client can be overridden

43. P was suing F, its former Managing Director, in Ireland alleging breach of trust and breach of duty as a director in regard to various matters where allegedly unauthorised payments were made to F. Certain funds emanating from P had after passing through a number of accounts arrived in the hands of M, a Guernsey Company. P obtained an ex parte order arresting the funds in the hands of M and, if they had been paid away, directing M to disclose where they had been sent.

M applied for the disclosure order to be set aside, citing the decision of Morgan, Stanley International v. Puglesi (see 14.GLJ.43). P argued that in any event the rules concerning confidentiality and obligation not to disclose in circumstances such as these extended only to banks and not to fiduciary companies such as M.

HELD BY THE DEPUTY BAILIFF:

1. That he would decide the case on the basis that M did owe a duty of confidentiality to F, leaving open the question of whether there was a distinction to be drawn between cases involving banks and those involving other fiduciaries.

2. Adopting the approach of Lord Denning in Bankers Trust Co. v. Shapira [1980] 1 WLR at p.1282, an allegation against a former director of a company that he has paid to himself funds of the company without the approval of the company is the kind of wrongdoing Lord Denning had in mind enabling the latch of the banker's door to be opened and that accordingly M would be ordered to provide information as to where the money had gone, notwithstanding the fact that there was no allegation of fraud.

3. Two further considerations reinforced his view:-

(a) That with the increasing practice of money being moved around offshore jurisdictions with considerable rapidity, the Court should not be seen by taking an over-sensitive appreciation of the rules of confidentiality to be blocking plaintiffs in circumstances such as these from tracing what they allege are their assets.

(b) The balance of convenience. P would only be entitled to its moneys if it succeeded in its action in Ireland. If the moneys are arrested in another jurisdiction, F, if embarrassed, could make an application in Ireland or in the jurisdiction where the funds are eventually found to be to have money released to him on the reasoning of the Court of Appeal in PCW Underwriting Agencies Ltd v. Dixon [1983] 2 AER 158.

Application to set aside dismissed.

[Irish Permanent Building Society v. Farrell, Montoire Limited intervening - Plaids de Meubles (Interlocutories) 4.10.93 (JPG/RJC)].

Arrest - application release of funds to enable defendant to employ counsel to represent it - allegations that funds arrested were proceeds of fraud

44. See Culture Farms Inc. v. Balestra, paragraph 49.

Costs - appeal against decision of Royal Court to award costs to a successful party - principles on which of Court of Appeal acts - difficulty arising in the course of proceedings for which neither party to blame - Royal Court directing that each party bear his own costs

45. The applicant in the case reported at 13.GLJ.1 unsuccessfully appealed against the Deputy Bailiff's refusal to make an order for costs in its favour. See report of judgment of the Court of Appeal, paragraph 89.

[Loyalty Brokers Ltd. v. Cockram: Court of Appeal 3.8.93. (JPG/JMW).]

Costs - leave to appeal against refusal to award costs to a co-defendant where other defendants have settled - exercise of judicial discretion.

46. P, a building labourer, sued D1, his employer, D2, an independent contractor and D3, D2's employee, in respect of an accident at work. D2 and D3 compromised the claim to P's satisfaction without any contribution from D1, whereupon P sought leave to withdraw against D1. D1 would only agree if an order for costs were made in its favour. The Deputy Bailiff declined to award costs against P, who was no longer able to work as a result of his injuries, holding that it had not been unreasonable for P to have joined D1. D1 sought leave to appeal against that decision.

APPLICATION REFUSED by the Deputy Bailiff, on the basis that, notwithstanding the provisions of section 15 of the Court of Appeal (Guernsey) Law which provided that no appeal should lie to the Court of

Appeal in a matter relating to costs without the leave of the judge in the court below, there was a fundamental principle that there should be finality in litigation and he did not consider that there were any circumstances which pointed to it being in the public interest that the question of costs be further litigated. The only funds available to P to pay any award of costs would come from the compensation that he had properly received from D2 and D3. There was nothing unusual or extraordinary in the Bill of Costs that D1 would be entitled to deliver if it was awarded costs.

[Barnes v. Cobo Building Services Ltd. and others - Plaids de Meubles (Interlocutories) 18.11.93. (EAGP/MGF)]

Discovery - requirement for affidavit in support of list of documents - Rule 39 of the Royal Court Civil Rules 1989.

47. P was suing D for loss of salary and commission following termination of P's employment with D. P asked the Court to order that D through one of its officers confirm on affidavit the completeness of the discovery that it had made. D argued that based on the English decision of Allen v. Swan Hunter Shipbuilders Ltd. June 23rd 1983 (reported in the New Law Journal for that year at page 894) the Court should not automatically order the filing of an affidavit but should do so only in its discretion where it was necessary in the particular circumstances of the case and that it was for P to show that an affidavit should be ordered.

The Deputy Bailiff after observing that the English Rules with regard to discovery are different to the 1989 Rules and that they are somewhat more complex as they deal with discovery in varying circumstances and under varying Rules accepted that under Rule 39(1) of the 1989 Rules that the whole question of discovery and verification by affidavit is a discretionary matter for the Court.

Whilst there could be circumstances where the Court felt that there was good reason for not requiring a party to verify a list of documents by affidavit, his view was that just as a witness at the trial must give evidence on oath a party is entitled if he is so minded to ask for his opponent to support the production of documents and the fact that the discovery is complete by a statement on oath to that effect. On this basis the onus must be on the party resisting the request for an affidavit to show grounds why an affidavit should not be produced rather than the party asking for the affidavit to show grounds why it should. Affidavits of documents ordered to be filed by both parties.

[Birch v. Islands' Insurance Company Ltd. - Plaids de Meubles (Interlocutories) 31.12.93 (JPG/PTRF)].

Judgments - reciprocal enforcement

48. Projet de Loi: The Judgments (Reciprocal Enforcement) (Amendment) (Guernsey) Law, 1993. - Repeals section 4(3) of the Judgments (Reciprocal Enforcement) (Guernsey) Law, 1957 thereby enabling a foreign judgment expressed in a foreign currency to be registered in Guernsey without

conversion to sterling.

Approved by the States 25.11.94. Awaiting Royal Sanction.

Mareva injunction - application for release of funds to pay defendant's legal fees

49. D was a Liberian company with a local presence which had allegedly received part of the proceeds of a fraud that had been perpetrated on investors in the United States. P was the liquidator of the vehicle that had been used to receive the proceeds of investments fraudulently induced. At an early stage in proceedings P had arrested all funds in D's hands. D applied to the Court for release of part of these funds to pay certain administrative fees, filing fees in Liberia and its Advocate's fees. P objected to release of funds to pay Advocate's fees.

HELD by the Deputy Bailiff it was clear from the papers before him that the funds in the hands of D had originated from S, a former U.S. Attorney who had been party to the fraud and had entered into some plea bargaining arrangement with the prosecuting authorities resulting in his spending time in an American penitentiary. It was clear from the judgment of Lloyd J. in PCW Underwriting Agencies v. Dixon [983] 2 AER 158 that a Mareva injunction is only to prevent a Plaintiff being cheated out of the proceeds of an action should it be successful by a Defendant transferring his assets abroad or otherwise dissipating his assets. The remedy was not intended to enable a Plaintiff to put pressure on a Defendant to settle an action. Whilst this case tended to support D's contention that funds should be released, the pleadings in this case showed clearly that the funds in question were alleged to be the proceeds of a serious fraud and nothing that D had produced by way of affidavit threw doubt on this. D was taking the line that it was up to P to prove his case perhaps in the hope that the costs of doing it will deter P from further laying claim to the funds in question. In his view it was contrary to public policy that the Courts of this Island should be seen to be shielding possible fraudsters in this way and therefore he considered it incumbent on the Court to make some further inquiry as to the genuineness of the defence to the action before releasing any funds to the Defendant. In particular the affidavits so far produced were wholly silent on the identity of the alleged true owner of the funds in question. The matter would therefore be adjourned for D to produce further evidence in this regard, but as D's Advocate was already allegedly out of pocket in respect of work done for D and not paid for the fees for D's Advocate in making reasonable further inquiries and presenting further evidence to the Court should be paid out of the funds under arrest in any event.

[At a resumed hearing further evidence was produced on behalf of D, but the Deputy Bailiff was still not satisfied that D had made a case out to have funds released to pay its Advocate's fees and rejected its application.]

(See previous report at 14.GLJ.46).

[Culture Farms Inc. v. Balestra - Plaids de Meubles (Interlocutories) 28.9.93 (NLP/JPG).]

Recusation de Juge - action against States Committee - objection to Bailiff presiding in view of his being President of the States.

50. The plaintiff in the case reported at 14.GLJ.44 unsuccessfully appealed against the Bailiff's refusal to uphold the plaintiff's objection to his sitting in the proceedings it had instituted.

See report of judgment of the Court of Appeal, paragraph 85.

[Bordeaux Vineries Limited v. the States of Guernsey - Plaids de Meubles 13.11.92 (CMF/HER)].

PUBLIC ASSISTANCE

51. Ordinance: The Central Outdoor Assistance Board Regulations (Amendment) Ordinance, 1993. - Increases ordinary maximum rates of outdoor assistance and the income limits above which such assistance is not payable.

In force 9.12.94. (No. XXXI of 1993).

PUBLIC HOLIDAYS

52. Ordinance: The Public Holidays Ordinance, 1993. - Stipulates days which (in addition to the days stipulated in the Bank Holidays (Guernsey) Ordinance, 1979) are to be public holidays over the Christmas 1993 and New Year periods.

In force 11.8.93. (No. XXX of 1993).

ROAD TRAFFIC AND PUBLIC TRANSPORT

Driver licensing

53. Resolution of the States of 28.10.93: Directing the preparation of legislation consolidating with substantial amendments the legislation relating to the licensing of drivers of all categories of vehicles.

Registration numbers - sale

54. Resolution of the States of 28.10.94: Directing the preparation of legislation enabling the States Traffic Committee to make arrangements for the sale of special registration numbers.

Road humps

55. Resolution of the States of 16.12.93: Directing the preparation of legislation amending the Road Traffic (Road Humps) (Guernsey) Law, 1983 making provision, inter alia, for the construction in a road of temporary road humps.

SHIPPING

Admiralty jurisdiction

56. United Kingdom Statutory Instrument : The Admiralty Jurisdiction (Guernsey) Order 1993.- Updates the admiralty jurisdiction of the Royal Court, the Court of Alderney and the Court of the Seneschal of Sark.

Made by Her Majesty in Council 27.10.93. Registered 16.11.93. In force 1.12.93 (UK S.I. No. 2664 of 1993).

Wreck and salvage

57. Ordinance: The Wreck and Salvage (Amendment) Ordinance, 1993. - Amends sections 6(1) and 8(1)(a) of the Wreck and Salvage (Vessels and Aircraft) (Bailiwick of Guernsey) Law, 1986, by increasing maximum value of wreck which the Receiver of Wreck can dispose of without taking steps to ascertain ownership from £400 to £5,000.

In force 29.9.93. (No. XVIII of 1993).

SOCIAL SECURITY

Attendance allowance and invalid care allowance

58. Order in Council: The Attendance and Invalid Care Allowances (Amendment) (Guernsey) Law, 1993. - See 15.GLJ.60.

Royal Sanction 20.7.93. Registered and in force 24.8.93. (No. X of 1993).

59. Ordinance: The Attendance and Invalid Care Allowance Ordinance, 1993. - Increases amount of income disregards and increases rates of attendance allowance and invalid care allowance for the purposes of the Attendance and Invalid Care Allowances (Guernsey) Law, 1984.

In force 1.11.93. (No. XIX of 1993).

Authority - transfer of functions

60. The Guernsey Social Security Authority (Transfer of Functions) Ordinance, 1993. - Amends the Family Allowances (Guernsey) Law, 1950, the Supplementary Benefit (Guernsey) Law, 1971, the Social Insurance (Guernsey) Law, 1978, the Attendance and Invalid Care Allowances (Guernsey) Law, 1984 and the Health Service (Benefit) (Guernsey) Law, 1990 by transferring the functions of the States Insurance Authority under them to the Guernsey Social Security Authority.

In force 29.9.93. (No. XIV of 1993).

Family allowance

61. Ordinance: The Family Allowances Ordinance, 1993. - Increases rate of allowance in respect of children, and amount of contribution for cost of providing for children, to £8.50 per week.

In force 4.1.94. (No. XX of 1993).

Social insurance - Guernsey Insurance Fund

62. Projet de Loi: The Social Insurance (Permitted Investments Amendment) (Guernsey) Law, 1993.- Amends section 100 of the Social Insurance (Guernsey) Law, 1978 so as to place beyond all doubt, in relation to the Guernsey Insurance Fund, the power of the States to authorize any description of investment and the ability of the Social Security Authority to delegate its management functions to professional fund or investment managers.

Approved by the States 29.9.93. Awaiting Royal Sanction. (Deemed to have come into force on 15.7.93.)

Social insurance - increase of rates

63. Ordinance. - The Social Insurance (Rates of Contributions and Benefits, etc) Ordinance, 1993. - Specifies new rates of social insurance contributions, new upper weekly and monthly earnings limits, the amount of the States Allocation to the Fund and all new rates of social insurance benefits and grants.

In force 1.1.94. (No. XXII of 1993).

64. Ordinance: The Social Insurance (Rates of Contributions and Benefits, etc.) (Amendment) Ordinance, 1993. - Corrects an error in the Social Insurance (Rates of Contributions and Benefits, etc) Ordinance, 1993 (see paragraph 63) as to the weekly rate of guardian allowance payable.

In force 29.11.93. (No. XXIX of 1993).

Social insurance - legislation

65. Order in Council: The Social Insurance (Amendment) (Guernsey) Law, 1993. - See 15.GLJ.61.

Royal Sanction 20.7.93. Registered 4.10.93. In force 1.11.93. (No. XII of 1993).

Social insurance - reciprocal agreement with Canada

66. Ordinance: The Social Insurance (Reciprocal Agreement with Canada) Ordinance, 1993. - Gives effect to the 1993 Agreement between the Government of Canada and the Government of the United Kingdom on Reciprocity in Social Security between Canada, Jersey and Guernsey.

In force 11.8.93. (No. XI of 1993).

Supplementary benefit

67. Ordinance: The Supplementary Benefit (Implementation) (Amendment) Ordinance, 1993. - Increases limits of weekly income beyond which benefit is not payable; and increases the weekly amounts of normal monetary requirements for specified classes of person.

In force 5.11.93. (No. XXIII of 1993).

TORTS

Damages - fatal accident - Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1936 - right of administrator to claim for damages for loss of earnings of the deceased

68. V aged nineteen was killed when his motorcycle was in collision with a car driven by D. P, V's father, brought an action under the Law Reform (Miscellaneous Provisions) (Guernsey) Law, 1936 for the benefit of his son's estate including therein a claim for loss of future earnings of the deceased. At the same time he brought a claim under the Fatal Accidents (Guernsey) Laws, 1900 and 1960 in respect of the loss of dependency of V's illegitimate son aged two.

On the application of D the Court agreed to determine the question as to whether P could recover from D under the Law of 1936 damages in respect of V's loss of future earnings.

HELD BY THE DEPUTY BAILIFF that the Law of 1936 was in identical terms to the Law Reform (Miscellaneous Provisions) Act 1934 as it stood when the case of Gammell v. Wilson (1982) AC 27 was decided. That although the decision in that case was not binding on him the Deputy Bailiff, after reviewing the way the Law had developed in England, thought that the decision in Gammell v. Wilson correctly represented the current Law of Guernsey on the matter and that therefore P was entitled to include on behalf of V's Estate a claim for V's future loss of earnings. The consequence of this was that the law in Guernsey was more generous to plaintiffs in situations such as that of P than the law of England because section 4 of the Administration of Justice Act 1982 had substituted a new section 1(2)(a) to the Law Reform (Miscellaneous Provisions) Act 1934 wherein it was provided that damages recoverable for the benefit of the Estate of a deceased person shall not include "any damages for loss of income in respect of any period after that person's death". Apart from the claim for loss of income in respect of "lost" years it had been urged on behalf of D that to follow Gammell v. Wilson could result in an element of double damages being payable first to the Estate of the deceased under the Law of 1936 and secondly to his dependant under the Fatal Accidents legislation. The Deputy Bailiff expressed the view that the Jurats who would have to be directed to apportion the total amount of damages under the two heads of claim would be able to take a realistic view of the situation when appraised with the peculiar difficulties of assessing damages in this case and so as to minimise the risk of the wrongdoer being

penalised into effectively paying the same damages to two parties.

[Vidamour v. Hood - Plaids de Meubles 31.12.93 (LLeRS/JMW)].

WILLS AND ADMINISTRATION OF ESTATES

69. Projet de Loi: The Execution of Wills (Bailiwick of Guernsey) Law, 1993. - Makes provision in the Bailiwick equivalent to that set out in the Wills Act 1963; accordingly a will, whether disposing of real or personal property or both, shall henceforth be regarded as properly executed if its execution conforms to the internal law of the territory where it was executed, the territory where (at the time of execution or death) the testator was domiciled or had his habitual residence, the state of which, at either of those times, the testator was a national or, so far as the will disposes of real property, the territory where the property is situated. Additional provision is made as to the execution of wills on board a vessel or aircraft and as to wills which revoke former wills or which exercise a power of appointment.

Approved by the States 25.11.94. Awaiting Royal Sanction.

GUERNSEY STATUTORY INSTRUMENTS

70. 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 Milk (Retail Prices)(Guernsey) Order, 1993	2.7.93	4.7.93	12
The Gambling (Channel Islands Lottery)(Bailiwick of Guernsey) (Draws by Computer) Order, 1993	12.7.93	13.7.93	13
The Electoral Roll (Specified Sum for Candidates' Copies) Regulations, 1993	16.7.93	1.8.93	14
The Parking Place (Amendment) Order, 1993	21.7.93	26.7.93	15
The Weights and Measures (Weighing Equipment) (Non-Automatic Weighing Machines)(Amendment) Regulations, 1993	26.7.93	27.7.93	16
The Weights and Measures (Designated Countries) Regulations, 1993	26.7.93	27.7.93	17
The Boats (Amendment)(Guernsey) Regulations, 1993	6.9.93	27.7.93	18

Title	Date Made	Coming into force	No.
The Rent Control (Registration Notice) Order, 1993	2.9.93	1.10.93	19
The Health Service (Medical Appliances)(Amendment) (No 2) Regulations, 1993	14.9.93	1.10.93	20
The Industrial Disputes (Recoverable Costs) Order, 1993	13.9.93	1.10.93	21
The Industrial Disputes (Summonsing of Witnesses and Documents) Order, 1993	13.9.93	1.10.93	22
The Import and Export of Goods (Control)(Guernsey) (Amendment No 2) Order, 1993	28.9.93	28.9.93	23
The Social Insurance (Increase of Benefit) Regulations, 1993	1.10.93	1.11.93	24
The Social Insurance (Classification)(Amendment) Regulations, 1993	1.10.93	1.1.94	25
The Social Insurance (Contributions)(Amendment) Regulations, 1993	1.10.93	1.1.94	26
The Parking Places (Amendment)(No 2) Order, 1993	6.10.93	10.10.93	27
The Non-Business Days Order, 1993	15.10.93	16.10.93	28
The Non-Business Days (No 2) Order, 1993	15.10.93	28.12.93	29
The Social Insurance (Married Women and Widows) (Amendment) Regulations, 1993	28.10.93	1.11.93	30
The Social Insurance (Contributions)(Amendment) (No 2) Regulations, 1993	28.10.93	1.11.93	31
The Social Insurance (Benefits)(Miscellaneous Provisions) (Amendment) Regulations, 1993	28.10.93	1.11.93	32
The Parking Places (Amendment)(No 3) Regulations, 1993	26.11.93	27.11.93	33
The Health Service (Medical Appliances)(Amendment) (No 3) Regulations, 1993	6.12.93	1.1.94	34
The Income Tax (Guernsey) (Settlements) Regulations, 1993	2.12.93	3.12.93	35
The Income Tax (Guernsey) Annuity Scheme Contribution Limits) Regulations, 1993	2.12.93	1.1.94	36

UNITED KINGDOM STATUTORY INSTRUMENTS

71. 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 Haiti (United Nations Sanctions) (Channel Islands) Order, 1993	1793
The Admiralty Jurisdiction (Guernsey) Order, 1993 (see paragraph 56)	2664
The Arms Control and Disarmament (Privileges and Immunities) Act 1988 (Guernsey) Order, 1993	2666
The Treaty on Open Skies (Privileges and Immunities) (Guernsey) Order, 1993	2669
The Libya (United Nations Sanctions) (Channel Islands) Order, 1993	2811

ALDERNEY

BANK HOLIDAYS

72. Ordinance: The Bank Holidays (Alderney) Ordinance, 1993. - Declares 28th December, 1993 and 3rd January, 1994 to be bank holidays.

Ordinance of the States of Alderney of 3.11.93.

BUILDING AND DEVELOPMENT CONTROL

73. Ordinance: The Building and Development Control (Designated Area) (Alderney) Ordinance, 1993. - Designates those areas of the Island within which development permission under the Building and Development Control (Alderney) Law, 1975 may not be granted. Repealed by the Building and Development Control (Designated Area) (No. 2) (Alderney) Ordinance, 1993 (see paragraph 74).

Ordinance of the States of Alderney of 1.9.93.

74. Ordinance: The Building and Development Control (Designated Area) (No. 2) (Alderney) Ordinance, 1993. - Designates those areas of the Island within which development permission under the Building and Development Control (Alderney) Law, 1975 may not be granted. Repeals the Building and Development Control (Designated Area) (Alderney) Ordinance, 1993 (see

paragraph 73).

Ordinance of the States of Alderney of 6.10.93.

DANGEROUS WEAPONS

75. Ordinance: The Dangerous Weapons (Alderney) (Amendment) Ordinance, 1993. - Amends the Dangerous Weapons (Alderney) Ordinance, 1965, by providing that a person may, without holding a weapons certificate, have in his possession and use a long-bow and arrows provided that he is either a pupil or teacher of St Anne's School or Ormer House Preparatory School or a member of a school party visiting either of those schools. The bow and arrows must be used only in the course of an activity officially organised by either school and there must be supervision by a teacher.

A similar exemption, subject to similar conditions, is provided for members of properly constituted archery clubs formed in the Island or formed outside the Island and visiting an Island club.

Ordinance of the States of Alderney of 17.12.93.

HOUSING

76. Projet de Loi: The Housing (Control of Occupation and Development) (Alderney) Law, 1993. - Imposes new controls on the construction and occupation of dwellings in Alderney.

Under section 1, the Building and Development Control Committee is prohibited from granting any application for permission for the construction of a dwelling unless the applicant fulfils certain residential criteria (for example, unless he is aged at least 21, has been ordinarily resident in Alderney for 10 out of the preceding 15 years, and has neither previously been granted any such permission nor owned a dwelling in Alderney). The controls do not apply to an application entered in the Register before the 10th December, 1992 (publication date of the Billet).

Under section 2, no person may occupy a dwelling in Alderney unless he fulfils certain residential criteria (for example, unless he is aged at least 21 and has been ordinarily resident in Alderney for 10 out of the preceding 15 years, or unless he acquired an interest in the dwelling concerned by inheritance, or unless he is a member of the household of a person who fulfils the criteria). The controls do not apply in relation to the occupation of a dwelling where the construction of the dwelling was lawfully completed before 10th December, 1992, or where the application for permission to construct the dwelling was entered in the Register before that date.

The States are empowered to provide exceptions from the Law by Ordinance. The provisions of the Law do not apply in relation to the construction of dwellings, but do apply in relation to the occupation of dwellings, owned

by, or on land owned by, the States.

Approved by the States 17.12.93. Awaiting Royal Sanction.

INDIRECT TAXATION

Leasehold duty

77. Projet de Loi: The Duty on Long Leases (Alderney) Law, 1993. - Creates a new duty to be called leasehold duty payable on any dealing in a long lease of land. Leasehold duty is payable within 28 days beginning on the date of the dealing and is payable at the rate of 5½ per cent of the value of the dealing. The value of a dealing in a long lease of land is a sum equivalent to the aggregate of any premium in respect of the dealing plus eight times the average annual rent.

Dealings in long leases must henceforth be registered in the Alderney Land Register. Failing that they are invalid. Registration cannot be effected until the leasehold duty has been paid and unless there has been delivered to the Registrar, not less than 21 days previously, a return completed by an individual resident in Alderney or an Advocate. The Registrar may refuse to register a dealing if he has reasonable cause to believe that the amount of leasehold duty payable in respect of the dealing has not been paid to him.

Interest and penalties are payable on unpaid duty. There are legal avoidance provisions. Where, in respect of a dealing, a person is convicted of an offence under section 10(1) (false statement in return), the dealing is void ab initio.

Leasehold duty is not payable in respect of any exempt dealings (e.g. a dealing to which the States is a party).

"Dealing", in relation to a long lease, means any grant, assignment or surrender thereof (but certain other transactions are included). "Long lease" basically means a lease for a term of years certain of 21 years or more.

Approved by the States 1.9.93. Awaiting Royal Sanction.

Transfer duty

78. Projet de Loi: The Duty on Share Transfers (Alderney) Law, 1993. - Creates a new duty to be called transfer duty which is to be payable on any transfer of the share capital of a land holding corporation. The rate of duty is to be 5½ per cent of the assessable value of the transfer. The assessable value of a transfer is a sum equivalent to the proportion of the market value of all the land of the corporation at the time of the transfer which the nominal value of the share capital transferred bears to the nominal value of the whole of the issued share capital of the corporation.

On the making of a transfer of any share capital of a land holding

corporation, a return of the transfer (completed by an individual resident in Alderney or an Advocate) must be delivered to the Clerk of the Court; the duty must be paid within 28 days. Interest and penalties are payable on unpaid duty.

There are legal avoidance provisions. As well as criminal sanctions, it is provided that a transfer of any share capital of a land holding corporation, other than an exempt transfer, shall not have legal effect unless and until the Law is complied with in all respects. Similarly, where in respect of a transfer of share capital of a land holding corporation a person is convicted of an offence under section 12(1)(b) (false statement in return), the transfer is void ab initio.

Certain transfers are exempt (e.g. no change in beneficial ownership).

"Corporation" means any company registered in Alderney and any corporation constituted in a jurisdiction other than Alderney, and "land" includes both freehold and long leaseholds (basically, a term of years certain of 21 years or more).

Approved by the States 1.9.93. Awaiting Royal Sanction.

RATING

79. Ordinance: The Occupiers' Rate (Level for 1994) Ordinance, 1993. - Sets the level of occupiers' rate under section 3 of the Alderney (Application of Legislation) Law, 1948 at 175 pence per pound of rateable value.

Ordinance of the States of Alderney of 3.11.93.

ROAD TRAFFIC

Sprint trial

80. Ordinance: The Corblets Sprint (Alderney) Ordinance, 1993. - Closes the public highway between Mannez Lighthouse and Whitegates on 17th September, 1993 for the purposes of holding a sprint trial.

Ordinance of the States of Alderney of 14.7.93.

SOCIAL SECURITY

81. Ordinance: The Alderney (Application of Legislation) (Supplementary Benefit) Ordinance, 1993. - Applies the Supplementary Benefit (Implementation) (Amendment) Ordinance, 1993 (see paragraph 67) to Alderney.

In force 5.11.93. (No. XXIV of 1993).

WATER

82. Projet de Loi: The Water (Control) (Alderney) Law, 1993. - Part I controls the construction etc. of wells by providing that no person shall, except under a licence of the States of Alderney Water Board, sink, construct or improve any well or instal any water abstracting machinery.

Part II controls water abstraction by empowering the Board, if there is in force a Resolution of the States declaring that there is a serious water shortage in the Island, by notice to regulate the drawing of water from any well.

Part III of the Law enables the Board itself to undertake works on private land, but again only if there is in force a Resolution of the States declaring the existence of a serious water shortage. Such works include the sinking of wells and the appropriation to public use of any water or well. The exercise of such powers is subject to the payment of compensation. There are appropriate rights of appeal to the Court of Alderney.

Approved by the States 17.12.93. Awaiting Royal Sanction.

83. Ordinance: The States Water Supply (Rates of Charge) (Alderney) Ordinance, 1993. - Sets the levels of water rates for Alderney for the calendar year 1994.

Ordinance of the States of Alderney of 3.11.94.

SARK

ELECTION OF DEPUTIES

84. Ordinance: The Deputies of the People (General Election) (Sark) Ordinance, 1993. - Fixes the date for a General Election to be held on 7.12.93 and provides that in the event of a tie a further election would be held on 4.1.94.

Ordinance of Chief Pleas of 6.10.93.

85. [CIVIL DIVISION - APPEAL NO. 200]

1993 AUGUST 2, 4

BORDEAUX VINERIES LIMITED Plaintiff

v.

STATES BOARD OF ADMINISTRATION Defendant

Before: LE QUESNE, V.-P., CRILL and CARLISLE, JJ.A

Recusation de Juge - action against States Committee - objection to Bailiff presiding in view of his being President of the States.

See paragraph 50 of this issue.

Advocate C.M. Fooks for the Plaintiffs.
Advocate H.E. Roberts for the Defendants.

THE VICE PRESIDENT: This appeal arises from the operation of the Bordeaux refuse site. That site has given rise to long standing complaints from occupiers of land bordering the site. They have complained of nuisance to them and their properties caused by the escape from the site of dust, smells and other things. Proceedings arising out of these complaints were before the Royal Court in January 1992, to which proceedings the Plaintiff company, which does occupy property adjacent to the site, was a party. On 16th January, 1992, in those proceedings, an Order was made by consent, requiring the Defendants to do certain things to abate this nuisance.

Later in the year it was alleged by the Plaintiffs that the Defendants had not complied with the terms of that Order. On 10th July, 1992, Advocate Loveridge wrote on behalf of the Plaintiffs to the Greffier about what he called, "the proposed hearing between my client and the States Board of Administration". That was to be a hearing of the complaint of the Plaintiffs, that the Defendants had, as I have said, failed to observe the terms of the Order of the 16th of January and ought, therefore, to be punished for contempt of court. That matter being, therefore, pending before the Court, Advocate Loveridge wrote to the Greffier in these terms:-

> "Under the Constitution of the Island of Guernsey, the Judicial and legislative functions are inextricably joined and reside in the Bailiff. The Bailiff is the President of the States of Guernsey and as such, presides over meetings of the States. The Bailiff is also the head of the administration. Concurrently the Bailiff is the President of the Royal Court and the Bailiff presides over sittings of the Royal Court. That has been the position for many years and whilst in the majority of situations it does not present a problem, there are some instances where it does.....In the present case the claim is against the States Board of Administration which is one of

the major States Departments. My client objects most strongly to the Bailiff, or the Deputy Bailiff, presiding over the hearing as the Bailiff is the President of the States of Guernsey and the action is against the States of Guernsey. The same principle applies to the Deputy Bailiff."

The objection to the Bailiff's presiding over the hearing and the grounds of that objection were formulated in an affirmation made on the 8th of September, 1992, by Mr Michael Paine, who is a director of the Plaintiff company. In that affirmation, he referred to Advocate Loveridge's letter, which I have just quoted, and went on:-

"As an additional point there is an acquaintance between my family and the family of the Bailiff. The Plaintiff is essentially a family-owned company and therefore any connection between the Bailiff and my family is extremely relevant to the issue of whether the Bailiff should hear the Plaintiff's application. Two of my sons and the Bailiff's two sons attended the same school and my wife and the Bailiff's wife are on friendly terms. In April of this year when the Bailiff's wife heard of the forthcoming marriage of my second son, she contacted my wife and me and said that she and the Bailiff wished to give a present to my son and his fiancée. Subsequently my son and fiancée received a gift.

Furthermore some years ago whilst the Bailiff, who was then the Deputy Bailiff, was walking with his wife towards the east side of the quarry, I met them. They were at that time picking blackberries. I made an observation that the blackberries were probably tainted by the dust from the quarry and I immediately realised that perhaps it was not proper for me to make such observations in view of the actions before the Court. The Bailiff told me that he would not embarrass either himself or me and my family by hearing the action. I would certainly feel some embarrassment were the Bailiff to preside over any hearing.

.....

In all the above circumstances, I am of the opinion that although there would be no intention to give the Plaintiff other than a fair hearing on the part of the above judges, [that is to say the Bailiff, the Deputy Bailiff and Sir Charles Frossard] their intimate connection with the States and with this matter generally would produce a risk of partiality on their behalf and I therefore do not feel confident that the Plaintiff would receive a fair hearing".

On the 14th of October the matter came before the Royal Court for consideration of the objection to the Bailiff presiding over the hearing. The Bailiff himself sat to consider this objection and at the end of the proceedings delivered a judgment which included the following passages:-

"....I do not dispute any of the facts which the director of the Plaintiff [Mr Paine].... has set out in his affidavit. As regards "the relationship", if you like, between himself and myself, what I do say is that the relationship is one which does not embarrass me in

any way that could effect my handling of the case or what advice I give to the Jurats or cause me to fail to undertake the proper duties of a judge in relation to the Cause. We all of us choose to live in a small island and living in a small island sometimes one is called upon to perform duties which in a larger community one might pass over to others, but even having said that, I am quite satisfied that I am not affected by the acquaintanceship which I accept as set out by the director of the Plaintiff in his affidavit. I don't think there is anything further I can say on that particular point.

Insofar as the constitutional position is concerned, in the functions that I exercise in the Royal Court and in the States of Guernsey, my first duty is to the Crown in all matters, and I do not espouse causes of the States. I have never known or heard of this objection being taken in legal proceedings before. The point has been raised as to my casting vote and I in fact had occasion to use the casting vote very recently, and the reasons I gave, or my comment on the use of the casting vote as called for in the circumstances, was that the vote is to be cast constitutionally. The way I defined that was to vote against any proposition before the States and only if that vote impinged on my conscience would I contemplate any other course.

The only real grounds of objection that one can find in the precedents and authorities on the subject is where the judge has a pecuniary interest in the matter, or his close friends or relatives have a pecuniary interest, or where he has a strong tie of friendship or he is a member of a close organisation in which he has occasion to espouse a common cause. Clearly the list of cases where it would not be proper for a judge to sit cannot be closed, but there are no circumstances in this case which cause me to decide that I should not sit".

The Bailiff subsequently intimated to the parties that he thought the necessary papers for raising an objection of this kind had not been filed. This omission was therefore repaired and the matter came before the Court again on the 13th of November, 1992, when the Bailiff repeated the judgment from which I have just quoted.

On the same day, the 13th of November, the Plaintiffs put in their Notice of Appeal. That may be summarised by saying that it raised two matters. First, the matter of procedure; they submitted that the Bailiff should not himself have considered the objection to his hearing the case. Secondly, there was an appeal on the question of substance; the Plaintiffs submitted that the Bailiff had been wrong in deciding that in spite of his personal connections and his constitutional position he was competent to hear this case. Subsequently a single judge of this Court granted permission to the Procureur, on 24th December, 1992, to intervene and the learned Procureur has appeared before us and has presented an argument relating to the constitutional part of the Appellant's argument.

Counsel told us that they did not know any modern case, in Guernsey, in which the Court had had to consider a submission that the Bailiff was disqualified by interest from hearing a case. Advocate Fooks cited us passages from Terrien, (Rouen 1654, at p. 365), Routier (Principes

Généraux du Droit Civile et Coutumier de la Province de Normandie, Rouen 1748, at p.580), and Pothier (Oeuvres Posthumes, tome 3: Traité de la Procédure Civile, Orléans and Paris 1778, at p.23) to show the procedure adopted for la récusation des juges and the circumstances which would justify it. These passages help us to see what the law was in Normandy in the 17th and 18th centuries. Of more relevance for our purposes is Thomas Le Marchant, who gives a reasonably clear picture of the practice of the Royal Court in his time. Commenting on chapter 20 of book 9 of Terrien (pp. 365-367 of the 1654 edition), Le Marchant writes in tome 2 at p.32:-

> "Remarque 1. Par le 1er et le 2e Article et l'annotation, lors que les récusations d'un Juge sont bien et deument proposées et baillées par escrit, si elles ne sont receues et admises pour le débouter de juger de la cause pendante, le récusant en peut appeller, ce qui n'est admis en la jurisdiction de la ditte Isle, où deux ou trois Jurés jugent souvent des causes de récusation contre le Baillif ou l'un des Jurés, sans appel, en causes de grande conséquence, et quant à passer outre sur l'instance après récusation sans délay il ne doibt estre approuvé. Approbation, ch.7.
>
> 2.....
>
> 3. Par le dit Article et l'annotation, le Juge récusé ne doibt non-seulement prendre la cognoissance par devers soi du fait de la ditte récusation, comme appartenant a son Lieutenant ou autre des Jurés le plus ancien en place et non récusable, mais mesme le dit Juge récusé (soit qu'il soit Baillif ou Juré) ne doibt pas estre présent lorsqu'on cognoist des causes de la récusation d'iceluy; laquelle chose, si elle estoit demandée par un récusant, seroit jugée non-seulement déraisonnable et impertinente, mais mesme presque criminelle."

Le Marchant wrote in the middle of the 17th century. In the second half of the 18th century, Laurent Carey, at p.223, says this of the procedure for récusation:-

> "Récusation contre un juge doit être baillée par écrit et au commencement de la cause, et, si elle est frivole, le juge récusé la pourra prononcer telle de l'opinion des jurés, et, si le récusant en appelle, le premier juge après le récusé ne laissera pas de passer outre."

Le Marchant and Carey agreed that récusation had to be claimed in writing and the decision upon it was made by Jurats. They differ about the possibility of an appeal from this decision. Le Marchant says there was no appeal, Carey contemplates the possibility.

Since the times of Le Marchant and Carey, the constitution of the Royal Court and the system of appeal have been changed significantly. In their days all the members of the Court, the Bailiff and the Jurats, were judges of law and of fact. The Bailiff could not sit alone. Appeal lay to the Royal Court sitting as the Cour des Jugements et Records which consisted of the Bailiff and at least seven Jurats. Now, the Bailiff is the sole judge of law and Jurats are judges only of fact. For consideration of

questions of law the Bailiff is authorised to sit, and does sit, alone. Appeal lies to this Court, which is a tribunal separate from the Royal Court. The Bailiff is President of both courts but this Court can be constituted, and often has been constituted, of judges other than the Bailiff.

These changes would by themselves justify questioning whether the practice followed under the old system is still appropriate under the new, yet there are two further considerations. First, the evidence for the old practice comes, as I have said, from the 17th and 18th centuries. There appears to be no record of any less antiquated case involving the submission that the Bailiff was disqualified by some interest, and therefore no evidence of a practice continuing unchanged into modern times. Indeed the difference between Le Marchant and Carey about the possibility of an appeal suggests that even by Carey's time the practice had changed. It is obviously less drastic to modify or depart from a practice shown only to have been followed two hundred years ago than it would be to do the same if the practice was shown to have been followed consistently up to recent times. Secondly, the practice described by Le Marchant and Carey would not now be lawful. They say that upon a Cause de Récusation the decision was made by Jurats. Such a decision is upon a matter of law or procedure. The Royal Court of Guernsey (Miscellaneous Reform Provisions) Law, 1950 provides expressly by section 6(2)(a) that:-

> "The Bailiff shall be the sole judge of Law and of questions of procedure in all causes and matters heard in a court over which he presides...."

A new practice must therefore be established. In view of the modern distribution of authority in the Royal Court and the modern system of appeal, the decision upon a submission that the Bailiff, or the Deputy Bailiff if he is presiding, is disqualified by interest from hearing any matter should in the first place be made by the Bailiff, or the Deputy Bailiff as the case may be. From that decision an appeal lies to this Court.

I have not overlooked the provision of the Court of Appeal (Guernsey) Law, 1961, section 13, that the jurisdiction of this Court in civil matters is the jurisdiction formally exercised by the Cour des Jugements et Records.

Laurent Carey's reference to appeal in cases of récusation is, in my judgment, sufficient warrant for holding that such an appeal was within the jurisdiction of the Cour des Jugements et Records and therefore is now within the jurisdiction of this Court. I accordingly consider that the procedure adopted by the Bailiff in this case was correct.

I now turn to the Appellant's criticisms of the substance of the Bailiff's decision that he was not disqualified from hearing the case. The objection to his hearing it rested, as I have said, on two grounds. First, his family's acquaintance with Mr Paine and his family who own the Appellant company; secondly, his connection with the States.

There can be no doubt that the blood relationship or personal friendship between the Bailiff and a party to a matter before the court can

disqualify the Bailiff from hearing the matter. Whether it does disqualify him depends upon whether the relationship or friendship is so close as to make it embarrassing for the Bailiff to sit or to create a reasonable suspicion that he would be incapable of impartiality or detachment.

When an objection is made on a ground of personal friendship, the Bailiff is peculiarly well placed to decide whether it is valid. He knows how close the friendship is and whether it would cause him any embarrassment if he were to hear the case. He has to exercise his discretion in deciding whether he is disqualified. If after weighing the circumstances of the friendship, which he knows better than does any third party, he decides to continue sitting, a strong case is needed to persuade an Appellate Court that his exercise of his discretion was wrong.

The facts of the acquaintance between the Bailiff's family and Mr Paine's family are set out in Mr Paine's affirmation. The Bailiff said in his judgment of the 14th of October, 1992 that he did not dispute any of the facts there set out. I have already quoted what Mr Paine, in that affirmation, said.

Whilst Mr Paine does say there that his wife and the Bailiff's wife are on friendly terms he does not mention any social contact of any kind with the Bailiff himself, except one chance meeting some years ago while the Bailiff and his wife were picking blackberries near the quarry. There then occurred the conversation in the course of which the Bailiff said, in reply to an observation by Mr Paine, that he would not embarrass himself or Mr Paine and his family by hearing the pending action. This seems to have been a casual remark rather than a considered and deliberate judgment. It obviously was not made in contemplation of any proceedings such as that now before us, for breach of an injunction, because some years ago no injunction had been granted.

Some years after this conversation when the Bailiff had to consider his position, not hypothetically but actually, he decided, after due consideration, that it would not be embarrassing for him to hear the contempt application. The casual remark made some years previously does not seem to me to provide any ground for rejecting this conclusion. In my judgment there is no ground for interference with the Bailiff's decision that personal acquaintance between his family and Mr Paine's family did not disqualify him from hearing this matter. This conclusion is in my view confirmed by another factor. The objection on the ground of personal acquaintance is an objection which, if it were to be taken at all, one would have expected to see taken by the Respondents. It was in fact put forward by the Appellants and the Respondents did not take it, even when the facts were presented to them by Mr Paine's affirmation. Mr Roberts, who appeared for the Respondents, told us they were quite content for the Bailiff to deal with this matter. Obviously they had no fear of partiality or lack of detachment.

I now come to the second ground of the Appellant's objection, the Bailiff's connection with the States. The Bailiff is a member of the States by virtue of the Reform (Guernsey) Law, 1948, section 1(1). He is, however, a member of a special and unique kind. He is President of the

States ex officio, section 1(2). He has no original vote, unlike all the other members, but only a casting vote, section 1(5). Occasions for the use of the casting vote arise only rarely and when they do arise it is used according to well established conventions. Apart from this the Bailiff has absolutely no part in the taking of decisions by the States, nor has he any part in the administration of agencies of the States such as the Respondents. A

The Bailiff is also the President of the Royal Court and indeed of this Court. Actions against the States or agents of the States are nowadays by no means rare in the Royal Court. Such actions are not the only way in which the jurisdiction of the Court is exercised over the States. Appeals against decisions of committees of the States are brought to the Court under certain statutes, notably the laws governing planning and housing. Agencies of the States are occasionally prosecuted. B

In all these cases the Bailiff's position in the court inevitably means that in the ordinary course of his duty it falls to him to preside at the hearing of matters affecting the States. Counsel told us that none of them were aware of any previous case in which it had even been suggested that the Bailiff's connection with the States disqualified him from sitting on such cases. C

In my judgment the true view of the position is that the Bailiff is invested by law with duties in the Royal Court and in the States. The consequence of this dual function is that he has on occasion to take part in the exercise by the court of jurisdiction over the States. I do not think that on these occasions his responsibility in the States disqualifies him from discharging his responsibility in the Court. He can properly discharge both responsibilities because although he is a member of the States his special position there means he is not responsible for the decisions of the States or acts of its agencies, nor has he any pecuniary interest, or indeed other interest, in those decisions or those acts. His connection with the States, therefore, is not such as to disqualify him from sitting in court on cases affecting the States. D E

Special cases may arise in which the Bailiff's position may be different. I have no doubt that in such a special case, the Bailiff of his own accord would arrange for someone else to take his place. The principle reason indeed for the paucity of examples of the kind of application now before us must be the discretion with which successive Bailiffs have themselves refrained from sitting in any case in which they could see a real possibility of conflict of interest or embarrassment. F

There is no special factor in this case and in my view there is no reason for criticising the Bailiff's conclusion that he was not disqualified from sitting.

As I have just said I have no doubt that in a special case in which the position were different, the Bailiff would, of his own accord, arrange not to sit. G

For the reasons which I have expressed I conclude that this appeal must be

dismissed.

A

Sir Peter Crill, who is not here today, asks me to say that he agrees with this judgment.

LORD CARLISLE: I also agree with the judgment that has been given and have nothing to add.

Appeal dismissed.

B

86. [CRIMINAL DIVISION - APPEAL NO. 165]

1993 APRIL 19, 20 & AUGUST 2

C

THE LAW OFFICERS OF THE CROWN
v.
TIMOTHY ROBERT DIMENT

Before: LE QUESNE, V.-P., COLLINS and FROSSARD, JJ.A.

D

Court of Appeal - appeal against judgment of Royal Court on appeal from Magistrate's Court - principles upon which the Court of Appeal acts - procedure on appeals in the Royal Court - desirability of magistrate giving reasons

See paragraph 15 of this issue.

P.T.R. Ferbrache for the Appellant.
G.R. Rowland, Q.C. (H.M. Comptroller) for the Crown.

E

THE VICE-PRESIDENT: This Appellant appeared in the Magistrate's Court on the 21st September, 1992 for trial on six charges. There was one charge of dishonestly obtaining benefit from the States Insurance Authority by deception, contrary to s.15 (1) of the Theft (Bailiwick of Guernsey) Law, 1983 (which we shall call 'the Theft Law'); three charges of dishonestly, with a view to gain for himself, furnishing to the Administrator of the States Insurance Authority documents which to the Appellant's knowledge

F

were misleading, false or deceptive in a material particular, contrary to s. 19(1)(b) of the Theft Law; and two charges of, for the purpose of obtaining benefit under the Social Insurance (Guernsey) Law, 1978 (which we shall call 'the Insurance Law'), producing or furnishing medical certificates which he knew to be false in a material particular, contrary to s.104 (2)(c)(ii) of the Insurance Law.

2. On the 23rd September, 1992, the Magistrate dismissed the four charges under the Theft Law, but found proved the two charges under the Insurance

G

Law. On each of these charges he fined the Appellant £300, with 30 days' imprisonment in default of payment.

3. The Appellant appealed to the Royal Court under s.1(a) of the Magistrate's Court (Criminal Appeals) (Guernsey) Law, 1988 (which we shall call 'the Law of 1988'). The Royal Court dismissed this appeal on the 18th December, 1992. The Appellant then appealed to this Court, with the leave of a single Judge, under s.7 of the Law of 1988. We heard the appeal on the 19th and 20th April, 1993, and reserved our judgment. A

4. We deal first with a preliminary point raised by the learned Comptroller at the hearing of the appeal. This concerns the interpretation of s.7 of the Law of 1988, and s.25 of the Court of Appeal (Guernsey) Law, 1961 (which we shall call 'the Court of Appeal Law') as applied by s.7. B

5. Before 1988 this Court had no jurisdiction to hear an appeal from a judgment of the Royal Court on an appeal from the Magistrate's Court. A right of appeal from such a judgment was introduced by s.7 of the Law of 1988. S.7 provides (so far as relevant for present purposes) as follows: C

> "7.(1) A person whose appeal is dismissed by the Royal Court, or the prosecution whose appeal against the acquittal of an accused person is dismissed by the Royal Court, may appeal to the Court of Appeal against that conviction or acquittal, as the case may be:
>
> PROVIDED that no such appeal may be brought without the leave of the Court of Appeal. D
>
> (2) The appeal may be:-
>
> (a) on any ground which involves a question of law alone; or
>
> (b) pursuant to a certificate granted by the Bailiff that sufficient grounds of appeal exist in the case.
>
> (3) ... E
>
> (4) Part III of the Law of 1961 shall apply to appeals to the Court of Appeal under this section."

6. Part III of the Court of Appeal Law is the Part which deals with appeals in Criminal Matters. In spite of the generality of the terms of s.7(4) of the Law of 1988, it is plain that some provisions of Part III cannot be applied to appeals under s.7. S.24 of the Court of Appeal Law, for instance, deals with the right of appeal, for which different provision is specifically made by s.7(1)(2) of the Law of 1988. F

7. S.25 of the Court of Appeal Law defines the powers of the Court. It must have been the intention to apply this section to appeals under s.7 of the Law of 1988, for without it there would be nothing to say what powers the Court of Appeal was to have in such an appeal. By s.25(1)(2), the Court of Appeal Law provides: G

> "25.(1) The Court of Appeal on any such appeal against conviction shall allow the 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:

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.

(2) Subject to the special provisions of this Part of this Law, the Court of Appeal shall, if it allows an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered."

8. It is upon s.25(1) of the Court of Appeal Law that the Comptroller's point arises. He submits that "the court before whom the appellant was convicted" is, in an appeal under s.7 of the Law of 1988, the Magistrate's Court, and "the verdict" is the Magistrate's verdict. Therefore, he contends, it is only the Magistrate's decision which has to be assessed, and it is not relevant for this Court to consider what the Bailiff said in the Royal Court. Advocate Ferbrache, on the other hand, submits that under s.1 of the Law of 1988 the appeal from the Magistrate's Court to the Royal Court in a case of a conviction is unrestricted, and this Court cannot ignore a failure of the Royal Court to handle the matter properly or to consider properly a question of fact.

9. In our judgment, the Comptroller's submission is right. It is critically important to observe the language of s.7(1) of the Law of 1988, viz. :

"A person whose appeal is dismissed by the Royal Court, or the prosecution whose appeal against the acquittal of an accused person is dismissed by the Royal Court, may appeal to the Court of Appeal against that conviction or acquittal."

"That conviction or acquittal" must be the conviction or acquittal in the Magistrate's Court. No other conviction or acquittal has occurred. In express terms, therefore, the Law confers a right of appeal against the conviction or acquittal by the Magistrate, not against the judgment of the Royal Court. The terms of s.25(1) of the Court of Appeal Law, interpreted as the Comptroller submits they should be in relation to such an appeal, are entirely consistent with s.7(1) of the Law of 1988.

10. The language of the statutes shows that the legislature's intention was to confer by s.7 of the Law of 1988 a second appeal against the decision of the Magistrate. This is not to say that the decision of the Royal Court is always irrelevant for the purposes of this Court's decision. This Court may have to consider the Bailiff's reasons for dismissing the appeal against the Magistrate's decision, or the Bailiff's directions to the Jurats, when considering what its own conclusion about the Magistrate's decision should be. In the end, however, the result must depend upon whether this Court considers the Magistrate's decision is open

to attack on any of the grounds set out in s.25(1) of the Court of Appeal Law, not upon whether it considers any criticism can be made of the proceedings in the Royal Court.

11. This is not only the correct interpretation, in our judgment, of the statutes. It is also the result which one would expect to arise from them. It would be entirely unreasonable for an appellant whose conviction by the Magistrate could not be attacked on any of the statutory grounds to be entitled to escape the consequences because the Royal Court, though coming to that conclusion, had made some mistake in the course of doing so.

12. We now turn to the issues in the appeal. The Appellant is a prison officer. He also worked in his spare time as a lorry driver and loader for R.F. Mills Ltd., collecting refuse. According to the Appellant, such second jobs were common among prison officers. There seems to have been nothing clandestine about the Appellant's work for R.F. Mills Ltd.; the company deducted States Insurance contributions and income tax from his wages each week.

13. In April, 1991 the Appellant was on leave from the prison. While on leave he felt a recurrence of some old back trouble. On the 10th April he went to see his doctor, Dr. Gibbs. Dr. Gibbs gave him a certificate that he was incapable of work, and would remain so for a week. He went back to the doctor on the 15th April, and Dr. Gibbs gave him another certificate in the same terms. On the 23rd April the Appellant signed the declaration at the foot of this second certificate, stating:

> "I declare that, because of incapacity, I have not worked since the date of the last medical certificate which I submitted.
> .....
> I claim benefit."

The Appellant handed these two certificates to the senior officer on duty at the prison when he returned to work on the 23rd April.

14. The certificate of the 15th April, 1991 was the subject of the first of the two charges under the Insurance Law. The Appellant had not worked at the prison between the 10th and 23rd April, but he had worked at his job as a lorry driver.

15. In September, 1991 the Appellant was again on leave, and again felt a recurrence of his back trouble. Dr. Gibbs gave him a certificate on the 20th September that he would be incapable of work for a week, and on the 24th September another certificate that he would be incapable of work for two weeks. On the 1st October, 1991 the Appellant signed the declaration at the foot of this latter certificate, in the terms set out in paragraph 14 above. The Appellant took these two certificates to the prison when he returned to work on the 1st October. He did resume work on that day, although a week earlier Dr. Gibbs had certified that he would be incapable of work for two weeks.

16. The certificate of the 24th September was the subject of the second charge under the Insurance Law. The Appellant had continued his work as a lorry driver between the 20th September and the 1st October.

17. The following are the terms of s.104(2)(c)(ii) of the Insurance Law, under which the Appellant was charged:

> "If any person ... for the purpose of obtaining any benefit or other payment under this Law, whether for himself or some other person, or for any other purpose connected with this Law ... produces or furnishes, or causes or knowingly allows to be produced or furnished, any document or information which he knows to be false in a material particular; he shall be guilty of an offence ..."

18. This is familiar statutory language, which has been interpreted in English authorities. Clear v. Smith (1981), 1 W.L.R. 399 arose from a prosecution under the closely similar language of the Supplementary Benefits Act, 1976, s.21. The Divisional Court of the Queen's Bench Division held that if it was established that the defendant had worked at the relevant time, and knew when he signed the declaration that it was false, the offence was made out. Wien, J. expressly said (at p.407) that intention to defraud did not have to be proved.

19. In Barrass v. Reeve (1981), 1 W.L.R. 408 the Divisional Court considered s.146(3) of the Social Security Act, 1975, the terms of which are for present purposes identical with those of s.104(2)(c) of the Insurance Law. The prosecution was brought under the words equivalent to s.104(2)(c)(i) - "knowingly makes any false statement or false representation".

Waller, L.J. said (at p.413):

> " ... the plain words of this subsection are covered if a person, for the purposes of obtaining any benefit or other payments under this Act, knowingly makes any false statement or false representation. There are no words to say "with intent to obtain money" or anything of that sort. In my judgment, the offence is committed when there is a false representation made which the person claiming benefit knows to be false."

20. The defence put forward by the Appellant at the trial was that he had no intention to deceive or mislead anyone. He thought when he signed the declaration that it related to his main employment. The physiotherapist had advised him to keep active, so he had continued to work as a driver.

21. Dr. Gibbs gave evidence that when he issued the medical certificates he meant that the Appellant was incapable of working as a prison officer. There was much discussion in the course of his evidence whether he would have advised the Appellant to continue working as a driver if he had understood the nature of that work, but it was not suggested that work had been discussed at all between Dr. Gibbs and the Appellant when the certificates were issued.

22. The Appellant said he was bound by his contract of employment to get benefit from the States Insurance Authority if he was off work for more than three days. He received a voucher from the Authority for £93.50 at the end of May, and subsequently handed it over to the prison. He said a prison officer who was off sick during leave would, if he applied to the prison department, be granted additional leave for a period equal to the period of his sickness; but he had not applied for this in relation either to April or to September.

23. In our view, the guidance of the English cases of Clear v. Smith and Barrass v. Reeve should be followed in the interpretation of the Insurance Law. If it is, there can be no doubt that there was evidence before the Magistrate on which he was entitled to find that the charges under the Insurance Law were proved. We do not consider it is clear that the Appellant's evidence, even if accepted, would have amounted to a good defence; but what is clear is that the Magistrate was not bound to accept it, and if he did not he had other evidence from which he could validly infer that when the Appellant signed the declarations he knew he had worked during the periods to which they referred.

24. The Magistrate did not give reasons for his decision. He confined himself to saying that he found the charges under the Insurance Law proved, and found the Appellant not guilty of the charges under the theft Law. There was no inconsistency in this decision. The criteria of the offences charged under the Theft Law were not the same as those of the offences charged under the Insurance Law, so the conclusion that the latter were proved but the former were not is not unreasonable or unintelligible.

25. The Magistrate's decision was not unreasonable nor insupportable having regard to the evidence, nor was it liable to be set aside on any of the other grounds stated in s.25 of the Court of Appeal Law. We add, however, that it is desirable that reasons be given for the Court's decision in a case involving, as this case did, lengthy evidence and legal argument.

26. It follows from this, in view of what we have said about the interpretation of the Law of 1988, that this appeal must fail. However, since argument was addressed to us about the proceedings in the Royal Court, we make some comments on them.

27. The grounds of appeal to the Royal Court alleged that dishonesty was an essential ingredient of the offence and had not been proved beyond reasonable doubt. The English cases, and in particular the judgment of Wien., J. Clear v. Smith at p.407, show that dishonesty is an ingredient of the offences under the Insurance Law only in the sense of producing a document with knowledge of its falsity. The learned Bailiff correctly said that the question was whether there was evidence before the Magistrate which, if he believed it, could have satisfied him of that beyond reasonable doubt. The grounds of appeal also alleged that the Magistrate had not been satisfied of dishonesty in relation to the charges under the Theft Law. The Bailiff again correctly said that this had nothing to do with the appeal against convictions under the Insurance Law.

28. After giving a summary of the evidence, about which we consider no complaint can be made, the Bailiff correctly told the Jurats that it was for him to direct them whether there was evidence on which the Magistrate could properly convict the Appellant. In his view, he said, there was. With this we respectfully agree.

29. We have made these comments on the proceedings in the Royal Court only out of consideration for the arguments addressed to us. We emphasise that the ground of our decision is simply that the decision of the Magistrate is not open to attack on any of the grounds set out in s.25(1) of the Court of Appeal Law.

30. The appeal must be dismissed.

Appeal dismissed.

87. [CRIMINAL DIVISION - APPEAL NO. 167]

1993 APRIL 20, 21 & AUGUST 2

THE LAW OFFICERS OF THE CROWN
v.
PAUL RAYMOND WHALES

Before: LE QUESNE, V.-P., COLLINS and FROSSARD, JJ.A.

Court of Appeal - appeal against judgment of Royal Court on appeal from Magistrate's Court - principles upon which the Court of Appeal acts - procedure on appeals in the Royal Court - desirability of magistrate giving reasons

See paragraph 15 of this issue.

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

THE VICE-PRESIDENT: The Appellant was convicted in the Magistrate's Court on the 16th October 1992, on three charges: one of stealing a cheque book, one of attempting to obtain £65 dishonestly from the National Westminster Bank by deception by use of the one of the stolen cheque forms, and one of actually obtaining £65 dishonestly from the National Westminster Bank by deception by the same means. He was sentenced to imprisonment of four months on the first of these charges, four months consecutive on the second and four months concurrent on the third.

2. The Appellant appealed to the Royal Court, where his appeal was dismissed on the 18th January, 1993. He then appealed to this Court. We heard his appeal at the last sitting of the Court on the 20th April, 1993. We dismissed the appeal, and said we would give our reasons for doing so subsequently. Those reasons we now give.

3. The case raises a question of evidence of identity. In the morning of 3rd March, 1992 a man entered the National Westminster Bank at St. Sampson's and presented a cheque bearing the printed name of Mr. S.L. Hantonne and apparently signed by him. The cheque was drawn to cash for £65. The cashier, Miss Davidson, knew Mr. Hantonne, and saw that it was not he who was presenting the cheque. She therefore asked the man for some identification. He produced a States Insurance card bearing the name "Whales P.R.". After consulting a superior, Miss Davidson told the man she could not cash the cheque. The same morning a man presented an identical cheque at the National Westminster Bank in the High Street at St. Peter Port. The cashier, Miss Colley, gave him £65.

A

B

4. The case for the prosecution was that the Appellant was the man who presented the cheque at both branches. The Appellant said he was not.

5. Mr. Hantonne gave evidence that he had not completed the cheque and the signature on it was not his. He had had a new cheque book in his desk at his house for about two years, never used. He had not authorised anybody to remove this book and he did not know when it had been removed. Paul Whales had stayed at his house from about Christmas time to the end of February; he had no authority to handle the cheque book.

C

6. Miss Davidson said she recognised the man who presented the cheque as one of the two Whales brothers. She knew the other brother, and saw him two or three times a week. The brothers were very similar; there had in fact been an incident in town of mistaken identity between them. The brother who presented the cheque had been pointed out to her once or twice in the street. She had been convinced that the man who presented the cheque was Mr. Whales.

D

7. After giving this evidence, Miss Davidson was asked in re-examination whether she saw the man in court. Advocate Merrien objected to this. Before any evidence was heard, he had told the Deputy Bailiff (who was sitting in the Magistrate's Court) that the police had refused his request for an identification parade. He had submitted that consequently a dock identification should not be allowed. The Deputy Bailiff had postponed a ruling on this. When the question was put in re-examination he allowed Miss Davidson to identify the Appellant, and said he would give to the identification such weight as he thought appropriate.

E

8. Miss Colley was unable to identify the man who had presented the cheque to her.

F

9. P.C. Bennington, the police fingerprint officer, said he found a mark on the cheque cashed by Miss Colley and compared it with the left thumbprint of the Appellant. He had found more than 19 characteristics in agreement, and had no doubt that both marks had been made by the same person.

10. The Appellant explained this thumbprint by saying that when police officers were interviewing him they had shown him the cheque, which was not in a bag, and had handed it to him. One of the two officers who interviewed him (W.P.C. Orton) could not remember whether the cheque had been in a bag when shown to the Appellant. The other officer (D.C.

G

Breban) said it had been in a clear plastic bag; normal procedure was for such a document to remain in the bag.

A

11. A distinction is now established between recognition and identification. If a witness says he saw something done by a person whom beforehand he knew well, that is recognition. An identification parade is normally unnecessary, nor is there any objection to recognition in court. On the other hand, if a witness says he saw something done by a person whom he had never seen before, that is identification; an identification parade is normally appropriate, and dock identification should not normally be allowed.

B

12. Between these two extremes lie a great variety of cases. This is one of them. Miss Davidson did not know the Appellant beforehand. On the other hand, she knew his brother well, and the two brothers look very much alike. The Appellant had been pointed out to her in the street by someone who had been present when one brother had been mistaken for the other. In the circumstances it is likely that she noticed his appearance particularly. She had much more than a fleeting glance of him in the bank, and was convinced that she recognised him then.

C

13. In the circumstances we regard the case as akin rather to recognition than to identification. In our judgment, the police were justified in refusing to arrange an identification parade, and the learned Deputy Bailiff was right to allow Miss Davidson to be asked whether she saw the man in court.

D

14. On all the evidence, including that of Miss Davidson, there was obviously evidence on which the Deputy Bailiff was entitled to reach the conclusion he did. His verdict was not open to any criticism. It was for these reasons that we dismissed the appeal.

15. As appears from our judgment in Law Officers of the Crown v. Diment, it is not necessary for the decision of this appeal to consider the course of the proceedings in the Royal Court. However, the learned Procureur drew our attention to a feature of the proceedings there, upon which we think we should comment.

E

16. The learned Bailiff invited the Jurats to decide (i) whether there was sufficient evidence for the Deputy Bailiff to find a conviction; and (ii) whether they had any doubt whether there had been a miscarriage of justice. It is well settled that the question whether in any case there is evidence to support a conviction is not a question of fact, but a question of law. The first of the questions left to the Jurats in this case was therefore a question of law. As such it was, under the Royal Court of Guernsey (Miscellaneous Reform Provisions) Law, 1950, s. 6(2)(a), within the sole competence of the Bailiff, and should not have been put to the Jurats. Since the Jurats were sitting with him, the proper course would have been for the Bailiff to decide whether there was sufficient evidence to support the conviction and then to direct the Jurats accordingly. (This is what the Bailiff did in Law Officers of the Crown v. Diment, as we have observed in our judgment in that case.)

F

G

17. The Procureur's submission to us went beyond this particular point and covered generally the powers of the Royal Court on appeals from the Magistrate's Court. We prefer to express no view about that without hearing full argument.

Appeal dismissed.

88. [CRIMINAL DIVISION - APPEAL NO. 172]

1993 DECEMBER 6, 7

THE LAW OFFICERS OF THE CROWN
v.
PAUL STEVEN WHITE

Before: HAMILTON, LE QUESNE, V.-P., and MACHIN, JJ.A.

Drug trafficking - computation of benefit therefrom - value of seized drugs to be disregarded

Sentence - possession of a controlled drug of Class B with intent to supply

See paragraphs 16 and 20 of this issue.

P.A. Allen, for the Appellant.
J.R. Finch, for the Crown.

HAMILTON J.A.:- This is an application by Paul Steven White for leave to appeal against sentence imposed on 6th October, 1993. The Applicant pled guilty, before the Royal Court, to a charge that on or about 14th May, 1993, he had in his possession a controlled drug, namely cannabis resin, with intent to supply it to another.

The court pronounced the following sentence: firstly it made a confiscation order under the Drug Trafficking Offences (Bailiwick of Guernsey) Law, 1988, whereby it ordered the accused to pay the sum of £1,810, with the alternative of three months imprisonment to be served consecutively to other sentences imposed or ordered to be served that day. Secondly, as respects the first count on the indictment, it sentenced the accused to undergo imprisonment for a period of three years from that day. Thirdly, it ordered the accused to serve a sentence of one months imprisonment, suspended for two years, which had been imposed by the Magistrate's Court on 21st October, 1991, such sentence to be served unaltered and in full and consecutively to other sentences imposed that day, and lastly, it ordered that scales, books, money-box and pipe, which had been found in the possession of the accused, be confiscated, and that cannabis resin, that had been the subject of the charge, be destroyed. The last aspect of that order made in terms of section 26 of the Misuse of

Drugs (Bailiwick of Guernsey) Law, 1974, which confers power of forfeiture and destruction in relation to drugs seized.

The circumstances of the offence were as follows:- on the afternoon of 14th May, 1993, a surveillance operation was mounted by police and customs officials at the premises where the Applicant lived with his mother and stepfather.

In the course of such surveillance the Applicant was seen to converse with a man, Justin Smith, who called at the premises and shortly afterwards drove away. Smith later gave a statement to the police that he had called to collect records but while there had asked the Applicant whether he could buy some cannabis. The Applicant, according to Smith, had told him that he did not have any. Smith was arrested shortly after leaving the premises. No controlled drugs were found in his possession.

A few minutes later another man, Mark Leadbeater, called at the premises. He was seen there in conversation with the Applicant. As Leadbeater began to walk away from the Applicant, he was beckoned back and shown something by him. As Leadbeater and the Applicant parted the former was seen to place something in his pocket. Leadbeater was arrested shortly thereafter and found to have seven grammes, a quarter of an ounce, of cannabis in his possession. He later gave a statement to the police that he had purchased it from the Applicant for £50.

A little later the Applicant drove his motor car away from the premises. His route was blocked by a police vehicle. The Applicant left his car and ran into and then out of a nearby field. He was then arrested. A search of the field revealed the presence of a quantity of cannabis resin, weighing in total about seventy grammes, made up of two pieces of about twenty-eight grammes each and a further two pieces of about seven grammes each.

There was material before the Royal Court on which it was entitled to conclude that these drugs had been placed in the field by the Applicant in a situation in which they could later be retrieved by him. There was also material to indicate that the composition of those drugs was in the form of deals in which a retail distributor of such drugs might be expected to hold them. A search of the Applicant's room at the premises revealed about £900 in cash, literature related to controlled drugs, scales capable of weighing in ounces and grammes and equipment for smoking cannabis.

Following his arrest, the Applicant was interviewed under caution by officers in relation to the drugs enquiry. His attitude, at that stage, can at best for him be described as "uncooperative". He ultimately pled guilty to the charge of possession with intent to supply. The Applicant is 25 years of age, of a similar age to Smith and Leadbeater. He has one previous conviction for a drugs related offence, namely on 21st October, 1991, when he was convicted of importing and being in possession of cannabis resin. The sentence included a term of imprisonment for one month suspended for two years. The period of two years had not expired when the present offence took place.

In pronouncing sentence the Deputy Bailiff said:-

> "...the Court is satisfied from the evidence that has been put before it that you deliberately set yourself up as a retailer of cannabis resin. You have only been detected as a result of a sophisticated and well organised operation by the police and customs. This Court is extremely concerned that despite a firm sentencing policy illicit drugs are still being made available in this Island.
>
> In your case the Court has been unable to identify any mitigating factors other than your plea. Had your plea been one of not guilty, the proper sentence, in the view of the Court, taking account of your record and your age, would have been imprisonment for between four and five years.
>
> In view of your guilty plea, the sentence of the Court is that you will undergo three years imprisonment. In addition the one month suspended sentence, imposed by the Magistrate's Court in October 1991, will be served consecutively and there will be a confiscation order in the amount of £1,810 under the Drug Trafficking legislation. If that is not paid there will be an alternative sentence of imprisonment of three months, consecutive.
>
> The scales, money-box, pipe and books will be forfeited. The cannabis resin will be destroyed."

In presenting the appeal, Mrs Allen submitted that the Royal Court was not entitled to conclude that the Applicant had deliberately set himself up as a retailer of cannabis resin. This Court is of the opinion that there is no substance in that submission. In the light of the Applicant's plea of guilty to the charge of possession with intent to supply the sentencing court required to consider the degree of seriousness of the circumstances of that offence. It was entitled in so doing to conclude that the Applicant had set himself up deliberately as a retailer of cannabis resin. That was consistent with the quantity of cannabis which he had in his possession on the day to which the charge related, the composition in trading deals of that cannabis and the scales found in his room. His observed activity that day, in transacting with Leadbeater, points to the same conclusion. The circumstance that the Applicant apparently declined to transact with Smith and did so with Leadbeater only after calling him back does not detract from that conclusion.

It was submitted that the Royal Court, in reaching this conclusion, must have taken into account matters disclosed in the inquiry under the Drug Trafficking Offences Law which had not been established sufficiently for the purposes of sentence under the Misuse of Drugs Law. We are unable to accept that submission. That the Applicant had in his possession cannabis resin with intent to supply it on a small scale commercial basis is amply demonstrated by the admissible material.

Mrs Allen went on to submit that even upon that basis the sentence of imprisonment imposed was excessive. She drew our attention to a number of cases decided in the Royal Court and in this Court over the last two years or so. These included Law Officers of the Crown v. Machon (14 GLJ 17), in

which a sentence of eighteen months for possession of 142.3 grammes of cannabis resin with intent to supply, pronounced in the Royal Court on 27th April, 1992, was reduced on appeal, in this Court, to twelve months on 3rd August that year; and Law Officers of the Crown v. Pearce, in which on 7th October, 1992, a sentence of one year Youth Detention, suspended, was imposed for importation of 115.653 grammes of cannabis resin. With these were contrasted sentences of four years and five years imprisonment imposed in Law Officers of the Crown v. Butcher on 1st December, 1992 and Law Officers of the Crown v. Fallaize on 8th June, 1993 for respectively importation and possession with intent to supply of Class A drugs. In all these cases guilty pleas had been tendered.

On 6th January, 1993 this Court heard applications for leave to appeal in three cases (reported together at 15 GLJ 20). In each case a plea of guilty had been tendered. In each case the application was dismissed. In Law Officers of the Crown v. Baines the sentence of fifteen months imprisonment for possession of a Class B drug (amphetamines) had been imposed. In Law Officers of the Crown v. Reidy, a sentence of eighteen months for a like offence had been imposed. In Law Officers of the Crown v. Goguelin concurrent sentences of eighteen months Youth Detention had been imposed in respect of each of several charges of supplying a Class A drug (LSD).

The appropriate sentence in a particular case will depend upon its own circumstances but in order to secure consistency it is right that the selected sentence should fall within the broad range of sentences appropriate for the particular class of drugs and the character and other circumstances of the offence. In the present case the drug was a Class B drug and the quantity involved was towards the lower end of that to be expected in cases of possession with intent to supply. On the other hand, the possession was had with a commercial purpose and this must be reflected in the sentence. Mr Finch, for the Crown, was unable to point to any recent decision in the Royal Court or in this Court in which a sentence of three years imprisonment, on a guilty plea, had been imposed in circumstances analogous to the present.

In our view it is not consistent with the range of sentences evidenced by the recent cases put before us. In all the circumstances, this Court is of the view that the sentence of imprisonment of three years was excessive. An appropriate sentence in the circumstances would be one of two years which is accordingly substituted.

In the case of Goguelin above referred to certain observations were made in this Court in relation to previous sentences and as to whether certain remarks made in Law Officers of the Crown v. Petit (10 GLJ 24), decided in the Royal Court on 1st October, 1990, continued to be applicable. We do not read these observations as indicating that it is no longer appropriate to have regard to the general range of sentences imposed in analogous cases. An excessive citation of cases which turn only on their particular facts is not helpful but consistency requires the identification of relevant principles. While alteration in circumstances will warrant alteration in sentencing practice to meet them, we are unable to find in the sentences recently pronounced a basis for imposing the sentence imposed in this case in the Royal Court.

In the course of her address Mrs Allen sought to introduce a further ground of appeal, namely, that in determining for the purposes of the Drug Trafficking Offences (Bailiwick of Guernsey) Law, 1988, the value of the defendant's proceeds of drug trafficking, the court had taken into account a value which it ought not to have taken into account. Mr Finch did not oppose the application being heard and provided the Court with helpful submissions in the matter. The matter was not argued in the Royal Court where indeed the Applicant accepted the calculation of value. As, however, the point raised is of some general importance we allowed the further ground of appeal to be argued.

The point is this: in calculating the relative value for the purposes of the 1988 law, the court had taken into account the cannabis which the appellant had had in his possession on 14th May, 1993 and had disposed of in the field. This cannabis had been taken possession of by the police, was produced in Court and ordered as part of the sentence to be forfeited and destroyed. It had been brought into account at its street value assessed at £525.

The relevant statutory provisions are complex but may be summarised as follows:- section 1 (1) of the Law lays down a procedure which the Royal Court requires to follow in circumstances in which a person appears before it to be sentenced in respect of one or more drug trafficking offences. A conviction in respect of possession with intent to supply is a drug trafficking offence within the meaning of that Law. In respect of that procedure, the court, under section 1 (2) requires first to determine whether the person before them has benefited from drug trafficking. Under section 1 (3), for the purposes of the Law, a person who has, at any time, received any payment or other reward in connection with drug trafficking carried on by him or another, has benefited from drug trafficking. Under section 1 (4), if the court determines that he has so benefited, the court is obliged, before sentencing or otherwise dealing with him in respect of the offence, to determine in accordance with section 4 of the Law the amount to be recovered by virtue of section 1.

Section 4 provides, so far as relevant for present purposes, that the amount to be recovered in the defendant's case under the confiscation order is to be the amount the court assesses to be the value of the defendant's proceeds of drug trafficking.

The value of the defendant's proceeds of drug trafficking is to be ascertained by consideration of section 2 (1). Section 2 (1)(b) provides that the value of a defendant's proceeds of drug trafficking is "the aggregate of the values of the payments or other rewards". The payments or other rewards there referred to are those mentioned in section 2 (1)(a) which are any payments or other rewards received by the person at any time, in connection with drug trafficking, carried on by him or another.

Section 2 (3) specifies certain assumptions which the court may make for the purpose of determining the value of the defendant's proceeds of drug trafficking. These include assumptions as to the source of property acquired by him. The definition of "property" is, in the circumstances, quite wide, and I shall refer to that shortly.

Under section 2 (2) the court is entitled, but not obliged, in determining whether the defendant has benefited from drug trafficking and in assessing the value of the proceeds of drug trafficking to make the assumptions identified in section 2 (3). The only other provision which it is relevant to mention at this point is section 1 (5) which identifies the interrelationship between the making of a confiscation order under the 1988 Law and the making of an order under section 26 of the Misuse of Drugs Law of 1974 in relation to the forfeiture of property.

As I have indicated section 2 (3) identifies certain assumptions which can be made for the purposes of section 2 (2). The definition of "property" applicable to those assumptions by virtue of section 26 (1) is sufficiently wide to include controlled drugs, although the assessment of value to be ascribed to such property for the purposes of the Law may give rise to some difficulty. However it is evident from section 2 (2) as read with section 2 (1) that the value of the proceeds of drug trafficking is the aggregate of payments or other rewards received in connection with such trafficking. While in certain circumstances controlled drugs may be rewards in connection with such trafficking, or may be property representing payments earlier received in connection with such trafficking, in other circumstances they will merely represent the stock-in-trade of a person acquired with other funds by him with a view to their onward disposal. Under section 2 (2) the court is entitled, but not bound, to make the assumptions specified in section 2 (3). In the present case the police report indicated that the defendant had had income from savings, unemployment benefit and other sources. The quantity of drugs seized (some 70 grammes of cannabis resin) was consistent with investment in stock-in-trade from such sources. In these circumstances we are of the opinion that it was inappropriate for the Royal Court in making an assessment of value to being into account the sum of £525 representing a value for the drugs recovered from the field. We shall accordingly vary the payment order by reducing the sum to be paid from £1,810 to £1,285.

The power to order forfeiture of and destruction of controlled drugs contained in section 26 of the 1974 Law remains, although it appears from section 1 (5) of the 1988 Law that the power to make a confiscation order under that Law has to be exercised before making any forfeiture order under the 1974 Law. It is clearly desirable that controlled drugs available for forfeiture and destruction should be forfeited and destroyed. Section 4 (3) of the 1988 Law provides that in certain circumstances the amount to be recovered is to be a lesser amount than that assessed under section 4 (1). Section 5 makes provision for determination of that lesser amount. No argument was addressed to us as to the application (if any) of those provisions to a situation in which the Court was minded in the same disposal to make an order under the 1974 Law for forfeiture and destruction of drugs seized from a defendant. We reserve our opinion on that matter.

This application accordingly succeeds to the extent of varying the confiscation order as indicated and reducing the sentence of imprisonment

from three years to one of two years. In all other respects the sentence is confirmed.

Appeal allowed to the extent that the calculation of benefit derived and the sum ordered to be paid under the drug trafficking confiscation order was reduced from £1,810 to £1,285 and the sentence of imprisonment was reduced from three years to two years.

89. [CIVIL DIVISION - APPEAL NO. 196]

1993 AUGUST 3

LOYALTY BROKERS LIMITED **Defendants**
v.
AUSTIN FREDERICK COCKRAM **Plaintiff**

Before: LE QUESNE, V.-P., CARLISLE and FROSSARD, JJ.A.

Costs - appeal against decision of Royal Court to award costs to a successful party - principles on which of Court of Appeal acts - difficulty arising in the course of proceedings for which neither party to blame - Royal Court directing that each party bear his own costs

See paragraph 45 of this issue

J.P. Greenfield, for the Defendants (Appellants in the present Appeal).
J.M. Wessels, for the Plaintiff (Respondent in the present Appeal).

THE VICE-PRESIDENT: The point which has to be decided arises in an action between the Plaintiff, Mr Cockram, and the Defendants, Loyalty Brokers Limited, but it is not any part of the main dispute between those parties.

When that action started, Mr Cockram was represented by Advocate Babbé, who at that time was practising in partnership with Advocate Le Poidevin. The Defendants were represented by Messrs. Carey Langlois & Company and in particular by Advocate Allez, who at that time was practising with that firm.

While the action was pending Advocate Allez left Carey, Langlois & Company and joined Advocates Babbé & Le Poidevin, thus with them setting up the new firm of Babbé Le Poidevin Allez.

This move naturally caused the Defendants, Loyalty Brokers Limited, some concern. It meant that somebody who had been acting for them, and had therefore necessarily been privy to a great deal of information, not only information which would be disclosed in the action but also information which would not, was now practising in partnership with the Advocate for the Plaintiff.

It has never been suggested that Advocate Allez would purposely or consciously have revealed to his new partner, Advocate Babbé, any knowledge which he had gained when acting for the Defendants, but the Defendants felt what must be regarded as a perfectly natural apprehension that unconsciously or by accident he might, at some stage, reveal to the Advocate for the Plaintiff some information which he had acquired on a confidential basis while acting for the Defendants.

In these circumstances the Defendants suggested to the Plaintiff that he should change his legal representative and move to another firm. This the Plaintiff was unwilling to do, and it is fair to say that from his own point of view this was a reasonable attitude. He had chosen the Advocate whom he wished to represent him and he, presumably, saw no reason why a change of the professional arrangements of the other side's Advocate should result in a change being forced upon him. Not being able to persuade the Plaintiff voluntarily to change his Advocate, the Defendants made an application to the court.

The application was made in the action, in other words it was made between the two parties to the action, nobody else was added as a party, and the application, so far as relevant for present purposes, read like this:-

> "Loyalty Brokers Limited...applies to the Court" for an order "that Messrs. Babbé Le Poidevin Allez cease from acting on behalf of the Plaintiff on the grounds that Advocate Allez has acted on behalf of the Defendant in this matter and is fully aware of the Defendant's instructions and of privileged information generally."

This matter came before the Deputy Bailiff, sitting alone in Chambers, on the 15th of June, 1992. He reserved his decision and delivered it on the 25th of June. In his judgment the Deputy Bailiff referred to two cases in which, in recent years, a similar question has come before the courts in England. He considered what had been established in those cases, then said that because of the very different circumstances of a large jurisdiction with many lawyers on the one hand and a small jurisdiction with relatively few lawyers on the other, it could not be assumed that the position in England would necessarily be reproduced here.

Having taken that into account the learned Deputy Bailiff did come to the conclusion which he stated in these words:-

> "...I consider that a reasonable man would say, to use Lord Justice Parker's words, "If I were in the position of the objector I would be concerned that however unwittingly or innocently, information gained while the solicitor was acting for me might be used against me." The very fact that Advocate Allez has at present, according to him, dismissed from his mind the details of what he did for Mr Moed and his company at Carey Langlois & Company, in some ways increases the risk that when, as all Advocates do, he is having his brains picked by one of his partners on some point, he may let slip something relating to a previous matter in which he has been involved and which turns out to be this very case.

I therefore make an Order in the terms sought by the Defendant company."

In other words the learned Deputy Bailiff made an Order that Messrs. Babbé Le Poidevin Allez cease from acting on behalf of the Plaintiff.

He then went on to say this:-

"I have not heard argument as to costs but my present view is that as neither of the parties are responsible for the situation that has arisen here and as there has been no case where such a situation has come before the Court previously, it would have been inappropriate, whatever had been my decision, to order that the unsuccessful party paid the costs of the successful parties. I accordingly propose to make no order as to costs."

Since he had not heard argument on costs the Deputy Bailiff gave the parties an opportunity to appear before him again and argue the issue of costs. That hearing took place on the 6th of August, 1992 and at the conclusion of the argument the Deputy Bailiff said this:-

"I still am not satisfied that I should order costs here."

There followed a reference to the English cases which I omit, and the Deputy Bailiff then went on:-

"I do not feel that...as the situation arose because of an Advocate moving from one practice to another and as, in my view, it was not improper for Mr Babbé to seek to serve Mr Cockram by...contesting your application, exercising my discretion, this is a case where there should be no order for costs. I am not ruling against the successful or unsuccessful party, it simply is not an appropriate case for costs."

The Deputy Bailiff then gave to Advocate Greenfield, who was appearing for the Defendants, leave to appeal against his decision on costs to this Court.

Advocate Greenfield has suggested to us today that the fact that the point in issue was one on which there was no local authority should not have led the Court to depart from the usual practice that the losing party has to pay the costs. It may be, Mr Greenfield says, that both parties were entitled to bring this point to the Court for decision, but only at the risk that whichever of them lost would have to pay the costs.

He submits that Mr Babbé must have appeared to oppose the application for costs on the instructions of the Plaintiff and therefore it was not unfair that the Plaintiff should be ordered to pay the costs. Mr Greenfield also pointed out that the Plaintiff could, without going to court, have acceded to the Defendant's original suggestion that he should change his legal advisors.

Before expressing any view on those arguments, I think it is very important to state that the order dealing with the costs of proceedings is

always an order within the discretion of the judge residing at the trial. Not only is this matter within his discretion, but it is a matter with which this Court will always be reluctant to interfere. If this Court does ever interfere with an order for costs, it will only be on the basis that it is satisfied that the judge has applied some wrong principle in making the order which he did. It is very important to emphasise these matters because the Court of Appeal Law itself, which provides that an appeal against an order for costs can only be brought with leave, suggests that such appeals are not to be encouraged. In my view it is important that it should be understood that this Court does not encourage such appeals and will only interfere with an order for costs in special circumstances such as I have described.

I go on then to consider whether such special circumstances have been established here. It is important to observe that the point which comes before us is not, as I said, part of the dispute between the parties which gave rise to the action. This is a difficulty which has arisen without either party being in any way responsible or to blame.

The Plaintiff chose his firm of lawyers and instructed them. It was no responsibility of his, but simply a misfortune for him that in the course of the action that firm was joined by the lawyer who up to then had been representing the Defendants. Equally, the Defendants chose their firm of lawyers and instructed them. It was no fault or responsibility of the Defendants that the gentleman in that firm who was in fact dealing with their case decided in the course of it to move from there to the firm instructed by the Plaintiffs.

I repeat therefore, that this is a point which has not arisen through the responsibility or fault in any way of either of the parties.

It is also important to note that the point is of some public importance. This is not the first occasion in recent years in which an Advocate here has moved from one firm to another. As the size of the bar increases, it is very likely that further such instances will occur. Whenever they do, one obvious problem which will arise is that of conflicts of interest of the kind which we have had before us in this case. It is therefore, as I say, of some public importance that it should be clearly established what the position is of an Advocate who moves from one firm to another, and whether he should continue to act if as a result of his move a conflict of interest arises in the firm to which he goes.

The problem has arisen in England, in recent years, as a result of the large number of mergers which have taken place between firms of solicitors there. It has come before the courts, notably in the two cases which have been cited to us. Those are the cases of Supersave Retail Limited v Coward Chance (1991) Ch 259, and In Re a firm of Solicitors (1992) 2 WLR 809.

This problem came before the English courts in those two cases and gave rise to some difference of judicial opinion. Before this case the question had not come before the Courts of Guernsey. There was therefore no local authority on this question which I have said to be a question of some public importance.

It was in those circumstances that the Deputy Bailiff had to decide whether he should make any order for costs. For the reasons which he explained in the words which I have quoted, reasons which to a great extent reflected the considerations which I have just attempted to express, he came to the conclusion that the proper order was that each side should bear their own costs. He adhered to this view after hearing further argument.

In my judgment it cannot be said that in doing so he followed any wrong principle or departed from principle in exercising his discretion in a way which would justify interference by this Court. I should go further than that and say that, had I been sitting as he was, I should have come to the same conclusion when asked to make an order for costs.

That is enough to dispose of the appeal, but I will mention one other matter which has caused us some mystification; that is that the application was made, as I said, in the original action with nobody else being added as a party. The order for which the Defendants asked, and which was granted to them by the Deputy Bailiff, was an order that Messrs. Babbé Le Poidevin Allez cease from acting on behalf of the Plaintiff. There has been some discussion before us whether that should be interpreted as an order addressed to the Plaintiff or an order addressed to Messrs. Babbé Le Poidevin Allez.

I mention the matter only in order to say that care should be taken, in all cases in which the Court is asked for an injunction, to specify the party to whom the injunction is to be addressed, and it necessarily follows that care should also be taken to see that that party is or becomes a party to the proceedings. If care is not taken over these matters, confusion in the enforcement of the order is almost certain to arise.

For these reasons, in my judgment, the appeal must be dismissed.

LORD CARLISLE: I agree and have nothing to add.

SIR CHARLES FROSSARD: I also agree and have nothing to add.

Appeal dismissed; costs awarded to the Plaintiff.