

## SHORTER ARTICLES

### WHATEVER HAPPENED TO PROMULGATION?

**Steven Pallot**

*The formalities of promulgating legislation have gradually ceased to be part of Jersey's legislative tapestry.*

1 It is fair to say that no one—no one, that is, outside the law drafting office—was enthused by the passing of the Interpretation (Amendment) (Jersey) Law 2003.

2 The law made certain things crystal clear when construing Jersey enactments, *e.g.* that—

“where an enactment which has been amended by any other enactment is repealed, such repeal shall, unless the contrary intention appears, include the repeal of all those provisions of other enactments by which the first-mentioned enactment was amended.”<sup>1</sup>

Another provision laid down that—

“where, in an enactment, more than one penalty is specified for an offence, the use of the word ‘and’ shall, unless the contrary intention appears, mean that the penalties may be imposed alternatively or cumulatively.”<sup>2</sup>

There were other provisions in similar vein.

3 Behind one provision, however, lay an interesting history—

“Where the time at which an enactment, whenever passed or made, is to come into operation is expressed or calculated by reference to its promulgation, and the date of promulgation is unknown, that date shall be deemed to be the day the enactment was passed or made.”<sup>3</sup>

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<sup>1</sup> Article 6(3).

<sup>2</sup> Article 13(3).

<sup>3</sup> Article 1(7).

Why would the date of promulgation be unknown? What constituted “promulgation” in Jersey law and custom?

4 How a country proclaims its laws to its population is more a matter of history and tradition than of law. Dictionary definitions disclose little not already known *viz.*—

*Shorter Oxford English Dictionary:*

“put (a law, decree, *etc.*) into effect by official proclamation.”

*Dictionnaire Quillet:*

“*on désigne ainsi la publication officielle ou solennelle d’une loi.*”

5 Writing on the subject by Jersey legal commentators has been meagre. Promulgation seems to have been part of the Island’s legislative furniture, commented upon as much by travel writers as by lawyers. Auguste Luchet, the 19th-century French playwright, journalist, novelist and writer, published his *Souvenirs de Jersey* in 1846. Describing the Statue of King George II in the Royal Square, he observed that—

“*Au pied de la statue est une pierre où se font les publications légales: la promulgation des lois, décrets, ordonnances; l’annonce de la paix et de la guerre.*”

[At the foot of the statue is a stone from which legal announcements are made: the promulgation of laws, decrees and ordinances; declarations of peace and of war.]

6 According to Abraham Jones Le Cras in 1839<sup>4</sup> Orders in Council when registered by the Royal Court were subscribed by the Greffier “and given to one of the Denunciators who reads it aloud under the statue in the Royal Square on a Market day”. Jurat Charles Le Quesne explained<sup>5</sup> that a *dénonciateur* was an executive officer of the court. Two of them were appointed by the Bailiff—

“but the office is subordinate to that of Vicomte . . . They are often called Sergens (*sic.*) de Justice. To them, equally with the Vicomte, is the duty confided of summoning witnesses. They may also, on a writ from the Bailiff, seize property for debt, and persons themselves who are expatriables.”

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<sup>4</sup> *The Laws, Customs, and Privileges . . . in the Island of Jersey*, Longman, 1839. (*Le Cras* was a political activist, sometimes described as an “agitator”, but there is no reason to question his description of the process here.)

<sup>5</sup> Le Quesne, *A Constitutional History of Jersey*, London, Longman, 1856, at 26.

7 Helier Simon gave evidence to the 1861 Civil Commissioners.<sup>6</sup> Mr Simon was described in the Report of the Commissioners as being the deputy Viscount<sup>7</sup> and had been a practising *écrivain* for some 25 years, including as *stipulant dénonciateur*. He described in his evidence how Orders in Council were “read in Court, and given to the Officer to be read in the square, and affixed to the pedestal of the statue there”.

8 The statue of George II was erected in 1751. The commentaries above paint a 19th century picture of the Viscount—or more particularly an officer subordinate to the Viscount *i.e.* a *dénonciateur*, but commonly called a *Sergent de Justice*—reading aloud Orders in Council from the step at the base of the statue in the Royal Square. How were *publications légales* done in earlier days?

9 George Reginald Balleine<sup>8</sup> described the Royal Square as—

“The open space east of St Helier Parish Church, once . . . much larger than it is now,<sup>[9]</sup> [which] was for at least 600 years the shopping centre for the Island. It was known as le Marché, the Market. Before the Reformation its central feature was the Market Cross, where public proclamations were made and all new laws were published. The surrounding space was filled with stalls, piled with goods of every description . . . The fish was laid out on flagstones, where the statue now stands. The corn market was on the site of the present Union Club.”

10 Saturday was market day (*jour de marché*). It was also the day from which the *Cour du Samedi* derived its name. Hemery and Dumaresq<sup>10</sup> described how the Saturday Court had “the most business of any”, and how—

“the various kinds of actions that affect personal property; as also, contested elections, repeals of wills, admiralty causes, matters which concern the Police, the Poor, the militia service, and the King’s revenue”

were brought before it.

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<sup>6</sup> *Report of the Commissioners appointed to enquire into the Civil, Municipal and Ecclesiastical Laws of the Island of Jersey*, HMSO 1861.

<sup>7</sup> The office of Deputy Viscount did not exist in statute until 1965 (see *infra* paras 24 and 25).

<sup>8</sup> GR Balleine, *The Bailiwick of Jersey: the King's Channel Islands*, London, Hodder and Stoughton, 1951.

<sup>9</sup> Balleine was writing in 1951.

<sup>10</sup> Hemery and Dumaresq, *A Statement of the Mode of Proceeding, and of Going to Trial, in the Royal Court of Jersey*, at 7.

“*Bénéfice d’Inventaire*<sup>11</sup> is also granted here. Actions that are of a mixt nature . . . are likewise of the cognizance of this Court; and all prosecutions are commenced, and sometimes ended here.”

11 Jean Poingdestre offers us further historical insights. Poingdestre was appointed Lieutenant-Bailiff in 1668 by the then Bailiff, Sir Edouard de Carteret. Because the latter did not reside permanently in Jersey, the responsibilities of the Bailiff fell upon Poingdestre, who remained as Lieutenant-Bailiff until 1676 and as a Jurat until his death in 1691. His *Lois et Coutumes de l’Ile de Jersey*<sup>12</sup> dealt with the office of *Vicomte*. He described (with apparent regret) how in Jersey it was but “*le Squelet*” of the *Vicomte* of mainland Normandy, the office of *Bailli* in Jersey having eclipsed that of the *Vicomte*. The latter’s powers and functions were “*plutôt [ceux] de Sergent de l’Espée ou de simple sergeant, que de juge*”. But among these functions was—

“*recevoir les Commandements de la Justice, publier à la Croix les ordres de la Cour, et donner autres advertissements au public, selon les exigents.*”

[receive the judgments of the Royal Court, make public the orders of the Court at the Cross, and give any other notices to the public as may be required.]

The reference to publication *à la Croix* is a 17th century reference to the action which Auguste Luchet was describing in the 19th century *i.e. publication légale*, except that, instead of promulgation being done from the stone at the base of a statue in the Royal Square, it was done in front of the Market Cross.

12 Poingdestre also tells us the Bailiff had the—

“*nomination d’un Officier subordonné au Vicomte, lequel nous appellons Dénonciateur: Anciennement on l’appellait Bedeau: lequel fait ordinairement les menus exploits, & assiste en la place du Vicomte à la Cour, et meme il exerce toute la charge dudit Vicomte, en son absence, sans autre commission.*”

[nomination of an officer subordinate to the Viscount, called the *Dénonciateur*: formerly he was called the Beadle: who would ordinarily draw up the list of writs, and assist the Viscount in the Royal Court, and indeed exercise all the functions of the Viscount, in his absence, without any other authority.]

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<sup>11</sup> *I.e.* a procedure giving an heir time to assess the value of an inheritance before electing between taking as heir or repudiating the inheritance.

<sup>12</sup> JT Bigwood Ltd, 13 Broad Street, 1928, at 27.

It is not clear whether publication *à la Croix* and giving of other notices to the public ordinarily fell within the remit of a *dénonciateur* at that time. Certainly by the 19th century it appears to have done so, albeit that *Le Quesne* did not list it among the functions of the *dénonciateurs/Sergents de Justice*.

13 A pre-19th century picture emerges of the Viscount or quite possibly a *dénonciateur* (discharging what Poingdestre saw as a function of *sergent*) standing before the Market Cross, the focal point of a crowded Saturday morning market, proclaiming in the French language that, pursuant to an Order in Council, a *Loi* had been registered by the Royal Court. He would not have read out the *Loi* itself, presumably, but rather the text of the covering Order in Council which was the instrument that had actually been registered by the court. At all events his audience would for the main part have been illiterate. Undoubtedly his proclamation would have been *à haute voix* [in a loud voice]. Laws and ordinances were not passed with anything like the frequency that laws and subordinate legislation are passed in the 21st century. The proclamation of an enactment in the Royal Square would have been a notable public event.

14 What of the 20th century? In the earlier part of the century, promulgation was very much alive and well and ingrained in the public consciousness. The *Morning News* reported that on Saturday 24 February 1917 a crowd gathered in the Royal Square to hear the promulgation of the *Loi sur le service militaire* (relating to conscription in the First World War).

15 After the Second World War, promulgation by an officer of the Viscount's Department was a normal (albeit closing) step in the legislative process. Acts of the Royal Court recording the registration of an Order in Council expressly mandated that—

*“ledit Ordre soit enregistré sur les records de l’Île et publié par l’Officier au lieu ordinaire à jour de marché, afin que toutes personnes puissent en avoir connaissance.”*

[the said order shall be registered on the records of the Island and made public by the Officer in the usual place on market day, so that all persons may have knowledge of it.]

or, in the case of an Order in Council granting Royal Assent to an Act of the States, that—

*“ledit Ordre soit enregistré dans le livre des Ordres du Conseil et publié, ainsi que ledit Acte des Etats, au lieu ordinaire à jour de marché, afin qu’il tire son plein et entier effet selon son teneur.”*

[the said order shall be registered in the book of Orders in Council and made public, as well as the said Act of the States, in

the usual place on market day, so that it may take effect according to its terms.]

16 Indeed Jersey laws, when passed by the States Assembly as Acts of the States, invariably concluded with the direction that the act was “To be printed, published and posted” (a translation of the time-honoured formula for laws drafted in French: “*Ce qui sera imprimé, publié et affiché*”).

17 Increasingly also, regulations and acts were made by the States which did not need to be registered by the Royal Court. They too invariably carried this direction. But this was not the case with lesser delegated legislation in the form of orders made by Committees of the States.

18 The direction—

(a) that the enactment be *imprimé* (printed) was complied with by the Greffier of the States, who saw to the printing of the enactment;

(b) that the enactment be *publié* (made public) was complied with by the Viscount, who saw to the promulgation of the enactment; and

(c) that the enactment be *affiché* (posted) was complied with by the Parish, who saw to the enactment being posted in the box—*la boîte grillée*—set up at the principal entrance of a parochial cemetery in accordance with the *Loi* (1842) *sur les publications dans les Eglises*.

19 The certification by the officer of the Viscount’s Department was in the following form (this example was for the promulgation of the Paid Police Force (Policing of Public Gardens) (Jersey) Act, 1954):

*Ce 3eme Avril 1954.*

*J’ai publié l’Acte ci-dessus au lieu ordinaire, à jour de Marché.*

*De quoi j’ai donné ce record.*

“H. V. Benest”

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*Sergent de Justice*

20 3 April 1954 was a Saturday (hence *jour de Marché*).

21 The standard direction that a law or regulations be *printed, published and posted* fell away with the passing of the Official Publications (Jersey) Law 1960. Under this law the Jersey Gazette was established. *The Jersey Evening Post*, published by WE Guiton & Co Ltd, was designated as the newspaper in which the Jersey Gazette was to be published; and the Gazette was headed with the arms of the Bailiwick.

22 The law required the Greffier of the States, following—

(a) the promulgation of—

(i) any law passed by the States and sanctioned by Her Majesty in Council,

(ii) any regulations made by the States,

(b) the making of any order by a Committee of the States,

to print the enactment, and to publish in the Jersey Gazette a notice stating that it had been passed, when it came into force and where printed copies could be purchased.

23 Promulgation, in the case of laws and regulations made by the States, was not therefore supplanted by the notice in the Jersey Gazette. In the case of Committee orders, the law of 1960 presupposed that promulgation was not required. Thus promulgation remained part of the legislative process in relation to enactments made by the States Assembly; and the Viscount (or *Sergent de Justice*) was still to make a proclamation in the Royal Square, and to provide a certificate of having done so *au lieu ordinaire, à jour de Marché*.

24 Changes were afoot in the Viscount's department in the 1960s. The Department had been constituted by the *Loi* (1930) *constituant le Département du Vicomte*.<sup>13</sup> This *Loi* had removed the power of the Bailiff to appoint two *dénonciateurs*, and had provided for the Viscount's department to be composed of the Viscount, a *Sergent de Justice* and a deputy *Sergent de Justice*, along with a sufficient number of *clercs* for the department to operate.

25 The *Loi* of 1930 was repealed and incorporated into the Departments of the Judiciary and the Legislature (Jersey) Law 1965 under which the department consisted, and consists to this day, of the Viscount and the Deputy Viscount. The Law of 1965 also enabled the Viscount and the Judicial Greffier, with the consent of the Bailiff, to designate one or more officers of their respective departments to discharge functions attributed under the law to sworn members of those departments, the officers so designated being known as "Viscount Substitute" and "Greffier Substitute" respectively.

26 Thus from 1966 onwards promulgation on a Saturday morning in the Royal Square was no longer able to be done by the *Sergent de Justice*. Instead the task fell to the *Vicomte*, the *Député Vicomte* or a *Vicomte substitut*.

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<sup>13</sup> *Recueil des Lois* Tome VII, at 67.

27 The realities of daily life in the Royal Square had of course changed. There was no market there on a Saturday, or on any other day. The Royal Court (Samedi Division), as it was termed by the 1960s, now sat on Friday mornings. Anyone interested in any of the growing number of enactments emanating from the Jersey legislature would have purchased an *Evening Post* and consulted the Jersey Gazette. Promulgation is understood to have been done as early as possible (*de bonne heure*) on the Saturday morning the day after the Friday sitting of the Royal Court. The Viscount's officer promulgating—to take a random example—the Air Navigation (Noise and Vibration on Aerodromes) (Jersey) Regulations 1966 early on Saturday morning, 1 October of that year must have cut a lonely figure. It is doubtful whether any of the few members of the public who would have been in the Square would have known what was happening. The time 50 years earlier, when crowds had gathered in the Royal Square to witness the Military Service Law being promulgated, was long gone. By the 1960s, one either read the *Evening Post* or watched the television.

28 Another 50 years has now elapsed since the 1960s. It is not clear for how long precisely the Viscount's Department soldiered on with formal promulgation. Time has not permitted an exhaustive trawl of departmental files to establish when publication *au lieu ordinaire à jour de marché* finally petered out altogether. But peter out it had done by the turn of the century; and this reality was acknowledged by the provision in the Interpretation (Amendment) (Jersey) Law 2003, referred to at the beginning of this article.

29 The world of communications has of course moved on further since 2003. An order—the Official Publications (Publication of Jersey Gazette) (Jersey) Order 2018—came into force on 14 July 2018. It provided, curtly, that—“The Jersey Gazette shall be published on the States of Jersey website at gov.je/gazette”.

30 All the vivid history of promulgation of Jersey legislation before the Market Cross (*à la Croix*), and *au lieu ordinaire, à jour de Marché*, leads us to the 21st century and . . . a website.

31 The demise of promulgation in Jersey contrasts with its entrenchment by statute in the Isle of Man. An Act of Tynwald must be promulgated (read out in Manx and English) within 18 months on Tynwald Hill, St. John's, or it ceases to have effect.<sup>14</sup> It is important to note, however, that the Isle of Man has no counterpart to the requirement for registration of United Kingdom Acts and Orders if

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<sup>14</sup> Legislation Act 2015 (of the Isle of Man) s 12.



they are to be of any effect in the Island.<sup>15</sup> Registration by the Royal Court is part of its public business when it sits (*en séance publique*) on Friday mornings. In constitutional and legal terms, registration has always been key, rather than promulgation; and the demise of the latter is understandable in the modern age. Still, there is a tinge of sadness that promulgation is no longer part of Jersey's legislative tapestry.

32 This is not to say that proclamations of any sort by the Viscount in the Royal Square are a thing of the past. The last Accession Proclamation was read out by the Acting Viscount<sup>16</sup> to an impressive gathering in the Royal Square on 09 February 1952. The next such Proclamation, hopefully still many years away, will presumably be made in the same way.

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<sup>15</sup> See Pallot, "Aucuns Ordres, Warrants, ou Lettres de quelque nature qu'ils soient" (2014) 18 *Jersey & Guernsey Law Review* 312 <https://www.jerseylaw.je/publications/jglr/Pages/JLR1406-Pallot.aspx>

<sup>16</sup> HV Benest (see *supra* para 19).

## EXTENSION OF THE BAILIWICK OF GUERNSEY'S TERRITORIAL SEAS

**Jon McLellan**

1 On 23 July 2019, the territorial waters adjacent to Guernsey, Alderney and Sark were extended from 3 to 12 nautical miles (nm). This change, which was many years in the making, belatedly brings the Bailiwick in line with Jersey and the great majority of coastal states.

2 The basis of the extension in international law is the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS),<sup>1</sup> which provides that—

“Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.”

3 The change was effected by an Order in Council made on 10 July—the Territorial Sea Act 1987 (Guernsey) Order 2019—made in exercise of powers conferred on Her Majesty by the Territorial Sea Act 1987 (“the 1987 Act”)<sup>2</sup> and registered on the Records of the Island of Guernsey on 22 July. This Order, which repealed two earlier Orders made under the 1987 Act, extends that Act to the Bailiwick, subject to specified exceptions, modifications and adaptations set out in a Schedule to the Order and representing the bulk of its text. It specifies the “seaward limit of the territorial sea adjacent to the Bailiwick of Guernsey” by reference to a list of coordinates (as defined on the World Geodetic System 1984 Datum, which, it should be noted, is a different system from that used in the equivalent Jersey Order), providing that when the territorial sea adjacent to the Bailiwick and the French Republic would otherwise overlap, the Bailiwick’s territorial sea extends to the median line between the baselines from which both jurisdictions’ territorial seas are measured. (This is consistent with the rule in international law that where the coasts of two states are opposite or adjacent, the general rule is that neither is entitled, unless they agree otherwise, to extend its territorial sea beyond the median

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<sup>1</sup>

[https://www.un.org/depts/los/convention\\_agreements/convention\\_overview\\_convention.htm](https://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm)

<sup>2</sup> <http://www.guernseylegalresources.gg/CHttpHandler.ashx?id=120279&p=0>

line.) It also has some specific savings in relation to the operation of fisheries legislation. The drafting of the Order was a team effort between lawyers at the Foreign and Commonwealth Office and the Law Officers' Chambers.

4 The sovereignty and right to legislate that come with extension have important implications for the future of the Bailiwick. For example, it creates opportunities for greater environmental controls in respect of the waters around the Bailiwick, and significantly increases the extent of legislation that is expressed to extend to the territorial seas (including criminal justice legislation, with the associated implications for law enforcement). It is also clearly relevant in the context of Brexit and particularly the UK's decision to withdraw from the London Fisheries Convention; clear domestic control over the 3–12 nautical miles ("nm") band in these circumstances is seen in political and policy terms as a distinct advantage. Other potentially affected areas of activity include maritime traffic control, the management and control of wrecks (which is going hand-in-hand with work to have the Nairobi Wrecks Convention extended to the Bailiwick), hydrographic surveying, infrastructure management (electricity cables, pipelines), and renewable energy. With Brexit, the greater focus on and perceived importance of environmental management, and the increased importance of marine spatial planning and the "blue economy" generally, the extension feels as if it has come at a very apposite moment.

5 Before the extension, the area from 3–12nm was, in international law, high seas where foreign vessels enjoyed freedom of navigation (as opposed to the lesser right of innocent passage through another state's territorial waters). Such a busy and strategically important area of water was never going to be wholly uncontrolled, however, and it was regulated for fisheries management purposes and subject to various international agreements, including in respect of search and rescue (under the longstanding MANCHEPLAN arrangements with the French authorities). Clearly that has not all fallen away with the extension; rather, it represents a base on which to build in the years ahead.

6 While undoubtedly seen as a generally positive development, the Bailiwick's authorities are aware that the extension is not without potential disadvantages. With greater control and legislative competence comes greater responsibility and, more prosaically, potentially increased costs and resources. From the possibility of greater resource requirements in relation to law enforcement and the investigation of deaths at sea, to the need for a potentially much greater pollution response capability in the future, there is no doubt

that the extension is likely to have some resource and financial implications, and new potential for reputational risk.

7 Jersey made the move “from 3 to 12” in 1997;<sup>3</sup> so why did it take Guernsey so long? The answer to that lies at least in part in the extra complexity of legislating in respect of three separate jurisdictions (Guernsey, Sark and Alderney) and ensuring the interests of each are properly represented, especially in the context of increasing politicisation of, and sensitivity around, issues such as fishing rights. Each jurisdiction has its own territorial sea, in respect of which it has legislative competence (subject to pre-existing conventions, for example in respect of criminal justice), and the boundaries between them after extension will be defined by formal agreement, though it is inevitable that, looking forward, work will be undertaken by the three islands to agree various combined, or Bailiwick-wide, management plans. There was also the added complication of the Hurd Deep, a seabed channel within the northern fringe of the extended territorial sea, into which toxic materials and munitions were dumped for many years, any prospective clean-up of which would have been prohibitively expensive.

8 It may also be asked why three miles was the previous limit. The standard extent of nations’ territorial seas from the 1700s until the mid- 20th century, *viz.* three miles, is said to represent the reach of cannons fired from land. In this way, the extension of the Bailiwick’s territorial seas, while clearly a positive development in terms of the continuing development of the Bailiwick’s international identity and in many other ways, can also be seen as the loss of an interesting piece of customary international law.

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<sup>3</sup> <https://www.jerseylaw.je/laws/revised/Pages/15.800.aspx>