# SIMPLE INTEREST: THE 1962 AMENDMENT OF THE CODE OF 1771

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*For centuries, Jersey imposed caps on the interest rates that could be charged on money lent. By the early 1960s, a prohibition aimed at usury was looking increasingly outmoded in a world where financial services were increasingly sophisticated and internationalised and the States of Jersey wrestled with a growing population in need of housing and an updated infrastructure. This article examines the history of the prohibition and how it came to be removed in 1962.*

1 For Jersey Finance, at least, the year 2021 was a time to celebrate what it viewed as sixty successful years of the Jersey finance industry.[1] The reason for asserting 1961 as the start date for that industry is that it brought forth a—

> "series of legislative changes, led by Senator Cyril le Marquand and the Finance and Economics Committee, [which] modernised Jersey's financial regulations and created room for the first merchant banks to open in the Island."[2]

The legislative changes identified are an amendment to the Code of 1771 to remove a restriction on interest rates that may be charged on borrowed funds and a change brought about by the Income Tax Law 1961.[3] This article will look at the first of these changes which allows us an interesting journey into the history of usury in Jersey and the attitudes of Islanders on the cusp of the beginnings of Jersey's transformation into an international finance centre. It is as well to record at the start that the cap on interest rates was actually removed in 1962.[4]

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[1] As reflected in the special edition of its annual brochure, *Jersey. First for Finance* (13th edn, 2021–2022).
[2] Preface by Senator John Le Fondré, Chief Minister, Government of Jersey, *ibid*, p 10.
[3] It is unclear what the author had in mind. He refers to the Income Tax (Jersey) Law 1961, but the Income Tax (Jersey) Law was then dated 1937 and the only amendment to it in 1961 was the Income Tax (Amendment No 18) (Jersey) Law 1961which concerned sanctions for non-compliance in filing tax returns.
[4] For the pedant, one might also note that it was removed at the request of the Finance Committee, rather than the Finance and Economic Committee.

2 We start with the Code of 1771, an imperfect codification of Jersey law as at that date, which included the following provision:[5]

> "*Conformément à l'Ordonnance établie par l'acte de la Cour à heritage, le vingt-troisiéme Septembre mil sept cens quatorze, l'intérêt d'argent ne doit point excéder cinq par cent, sur peine d'être reputé usuraire, & les contrevenans punis accordamment.*"

3 The Ordonnance of 23 September 1714, actually described as an Act of the Cour de Héritage, was made at a time when the Royal Court shared with the States of Jersey the power to legislate for the Island. The Act records how the court's earlier Act of 27 September 1688 had found it necessary, for reasons unexplained, to reduce "*les interets d'argent*" to 6% per annum,[6] but contemporary experience indicated that ceiling was now too high and so it was ordered, in the public interest, that—

> "*toutes dettes et argents qui seront constituées et prevelés a l'interet a l'avenir ne les seront a plus haut de cinq pour cent pour an, a peine d'étre condamnés comme usuraires*."

4 Both statutes were aimed at usury, the lending of money at excessive interest. The concept has a long history, dating back to ancient civilisations. For the Christian Church, it was an object of moral anathema and, from its earliest beginning until the end of the medieval period, great efforts were devoted to its eradication, backed up by scholarly rationalisation and civil law. The prohibition was actually directed to excessive interest rather than the practice of lending money, the underlying principle being that it was immoral to ask for more than was given:[7]

> "The Latin noun usura means the 'use' of anything, in this case the use of borrowed capital; hence, usury was the price paid for the use of money. The Latin verb intereo means 'to be lost'; a substantive form interisse developed into the modern term 'interest.' Interest was not profit but loss . . . Compensation for loans was not licit if it was a gain to the lender, but became licit if the compensation was not a net gain, but rather a reimbursement

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[5] Code of Laws for the Island of Jersey 1771 (Jersey, Bigwoods Printers Ltd, States' Printers, 1968), p 84. All French text cited is in its original form and uncorrected by the author.

[6] Philippe Le Geyt indicates that interest was capped at 10% prior to 1628 and then 8% until 1688. *La Constitution, les Lois, et les Usages de Cette Ile* (Jersey 1847) Tome I, p 114.

[7] S Homer and R Sylla, *A History of Interest Rates* (New Jersey, 2005), pp 68–71.

> for loss or expense . . . interest was considered the compensation due to a creditor because of a loss which he had incurred through lending."

5 Attitudes varied as to what form of compensation was acceptable. Thus whilst compensation for a delay in repaying a loan was generally acceptable, compensation for the risk involved was generally not and gradually interest payable from the beginning of the loan until repayment came to be tolerated in certain cases, for example, where the money could have been used profitably by the lender for some other purpose.[8]

6 Over time, the approach to interest in Western Europe moderated and, following the Reformation, the opposition to usury was weakened, particularly for Protestants.[9] But the capping of interest at a fixed percentage was a feature of many countries in Western Europe until the late nineteenth century. In England the legal rate of interest between 1571 and 1624 was 10%; 1624 and 1651, 8%; 1651 and 1714, 6%, and from then 5% until the abolition of the cap in 1854.[10] By 1854, a number of exceptions to the cap had been allowed in England, notably for pawnbrokers, and by that date two factors joined to persuade Parliament to abandon it. The first was the concept of freedom of contract. The second was the evolution of the financial economy, particularly the treatment of money as—

> "a commodity which was allowed to find its own price in the market [and where] it was now possible to lend money to rich and poor at any rate of interest."

Unsurprisingly, there was opposition as to the negative effect such a free market approach could have on the poor and the vulnerable.[11] The courts shared this concern and by the 1860s the Court of Chancery had moved to expand the doctrine of undue influence to enable it to be used to vitiate an agreement. In *Barrett v Hartley*,[12] the court expressly noted that the abandonment of the usury laws had resulted in the bringing—

> "into operation, to a greater extent than formerly . . . that principle of the Court which prevented any oppressive bargain, or any

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[8] *Ibid*, p 77.
[9] *Ibid*, p 77.
[10] *Ibid*, pp 124, 184.
[11] *The Oxford History of the Laws of England*, Volume XII 1820–1914 Private Law (Oxford, 2010), p 859.
[12] (1866) LR 2 Eq 789, at 794–795.

advantage exacted from a man under a grievous necessity and want of money, from prevailing against him."[13]

7 Closer to home, the customary law of thirteenth-century Normandy reflected the general attitude of the Church at that time:[14]

> "The chattels of usurers are surrendered to the duke of Normandy by custom, so that as a result of this the wrongful striving of usurers should be bridled in future. Usury is committed in three ways. One mode is the over-calculation of the price of anything, where the borrower obliges himself to hand over the return to someone for the concession of a space of time for payment. For example, Peter calculates the price of his horse to Thomas at ten pounds of Tours in value, and they agrees to this, and because Thomas does not have the money, a term for payment of forty days is assigned, such that, at the term, twelve pounds is paid for the horse. In this usury is committed [in respect of] forty shillings. Money advanced is understood similarly. That which is paid because of an advance by agreement with the lender is known as usury. In the aforesaid sale of a horse, similarly money is made in setting the price and it is like an advance, when a term of forty days is given by agreement to pay forty shillings more. The second mode is when a thing of one type is exchanged for a thing of another type of a greater price in the same quantity for payment at a term, such as to advance oats for wheat, or beer for wine. The third mode is mortgage. It is called [literally] 'dead gage' when the fruit or issue of the thing mortgaged which the lender receives accounts for nothing [of the debt], such that if someone transfers his land to anyone for twenty pounds, all that which the lender receives from the issues, beyond the said money which is rendered in full, is known as usury."

8 According to both Jean Poingdestre and Philippe Le Geyt, writing of Jersey law in the late seventeenth/early eighteenth centuries, usury was a crime punishable by a period of time in the stocks and, as a matter of the law of obligations, interest above the lawful limit was unenforceable.[15] Le Geyt noted however that a mean position was

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[13] *Ibid*, p 865.
[14] Chapter 20 "De Usurariis", *Le Grand Coutumier de Normandie. The Laws and Customs by which the Duchy of Normandy is Ruled Latin*, trans. JA Everard, from *L'Ancienne Coutume de Normandie* edited by WL de Gruchy (Jersey 1881) (Jersey 2009), pp 86–92.
[15] J Poingdestre, *Les Commentaires sur l'Ancienne Coutume de Normandie* (Jersey 1907), p 19. P Le Geyt, *La Constitution, les Lois, et les Usages de Cette*

required between enabling borrowing for those in need and the usurious lender. As he put it, "*Il suffit que le créancier gagne honnestement, suivant le cours du commerce et des affaires*."[16] Thomas Pipon and John-Thomas Durell, King's Procureur and Advocate respectively, writing in 1789 provided some more detail when they set out for the Lords of the Committee of His Majesty's Privy Council what "we conceive to be the criminal law of the island, and the punishments thereby inflicted." For them, in respect of usury, Jersey followed the Norman custom as it had evolved:[17]

> "Rouillé[18] hereupon in chapt. 20. lays down the Custom in the words following, 'we shall in course speak of the chattels of usurers which remain unto the Duke according to the ancient Custom. of Normandy, to restrain those who shall come hereafter from the cupidity of usurers.' By the whole tenor of this chapt. upon usury, it was absolutely unlawful by the Custom of Normandy to take any kind of interest or profit for the use of money or other things lent, without incurring the guilt of usury by which the chattels of the offender were forfeited; it would however seem from what Terrien[19] observes upon this point in his comments upon book I2. chapt. 22d, that in after time it was not held as an offence to take reasonable interest for money; and at this day nothing is reputed usury but what exceeds the lawful and current interest now reduced to five per cent; and usury would now be punished not according to the severity of the law established by the Custom, which forfeited all the offender's chattels, but by cancelling the contract that was judged usurous and by fine according to the circumstances of the case."

9 Half a century or so on, the *First Report of the Commissioners Appointed to Inquire into the State of the Criminal Law in the Channel Islands* confirmed that usury was a crime under Jersey law:[20]

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*Ile* (Jersey 1847) Tome III, p 79; *Privileges, Loix & Coustumes de L'Ile de Jersey avec un Essay pour des Reglemens Politiques* (Jersey 1953), art 7, p 90.

[16] *La Constitution, les Lois, et les Usages de Cette Ile* (Jersey 1847), Tome I, p 114.

[17] *A Statement of the Mode of Proceedings, and of Going to Trial, in the Royal Court of Jersey in all causes, Criminal, Civil and Mixed* (The Jersey Press, 1789), pp 3, 16.

[18] G Rouillé, *Le Grand Coustumier du pays et duché de Normandie* (1534).

[19] G Terrien, *Commentaires du droit civil, tant public que privé, observe au pays et Duché de Normandy* (1574).

[20] *First Report of the Commissioners appointed to inquire into the state pf the criminal law in the Channel Islands—Jersey* (London, 1847, HMSO), at p xxv.

> "Usury was formerly punished by forfeiture of the chattels of the offender to the Sovereign. (Gr. Coust. ch. 20.) This offence, as Messrs. Pipon and Durell point out, consisted in taking any profit for the use of money or other things lent. The penalty, however, was inflicted only, as we understand the chapter referred to, after the death of the usurer, and then not unless he had committed the offence within a year and a day before his death. The writers cite Terrien (xii. 22.) to shew that, afterwards, it was not an offence to take reasonable interest: but we doubt whether Terrien[21] is speaking of the Norman custom. They add that, in their own time, usury would consist in taking more than 5 per cent., and would be punished by cancelling the usurious contract, and by fine according to the circumstances of the case. The code of 1771, confirming a law of 1714, fixes the maximum of legal interest at 5 per cent. In a recent case, the Court annulled the debt. The present law is evidently quite unconnected with what we find in the Coustumier."

10 This conclusion was based on the evidence of Thomas Le Breton, then Procureur Général, and several members of the Jersey bar. It is not at all clear that the one case they mentioned as an example was actually a criminal one concerning usury. On the facts presented, it appears to have been a civil dispute over a debt.[22]

11 The Commissioners appointed in 1859 to Inquire into the Civil, Municipal, and Ecclesiastical Laws of the Island of Jersey also heard some evidence from the Jersey Bar concerning the restriction on interest in the Code of 1771 but the general view was that it was ineffective. As Advocate John Gibaut put it: "Unfortunately this small community swarms with usurers".[23] Certainly, no witness offered a precedent for a prosecution for usury.

12 By the *Loi (1884) sur le prêt sur gages*, the States of Jersey admitted of some exception to the interest cap, reflecting earlier developments in the United Kingdom. The preamble to the *Loi* stated:

> "That, it is useful to regulate the business of pawnbroker. Although this kind of commerce offers advantages to the less well-off class of society, it nevertheless results in very serious abuses, no protection being given to those who find themselves compelled

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[21] G Terrien, *op cit.*
[22] *Ibid*, p 244, paras 3034–3043.
[23] *The Report of the Commissioners Appointed to Inquire into the Civil, Municipal, and Ecclesiastical Laws of the Island of Jersey*, p 341, paras 7560–7563.

> by circumstances to have recourse to lenders . . . Lenders often demand, by way of interest, such exorbitant profits that those who have entrusted them with pledged objects find it impossible to withdraw them, and are forced to sacrifice them."

13 The *Loi* put in place a licensing system whereby pawnbrokers could only operate with the permission of the Constable of the parish in which they intended to practise and were required to keep detailed records of all transactions. Under art 2, a pawnbroker was allowed to charge interest per month, or for part of a month, on the principal sum which was lent on set rates on a sliding scale depending on the quantum of the loan. This ranged from half a penny per month, where the loan did not exceed two shillings and sixpence, to three pennies per month for each £1 if the loan exceeded £2. As if to emphasise the cap on interest in the Code of 1771, art 19 stated:

> "This Law does not extend to persons who do not carry on the regular business of pawnbrokers, but who lend money at interest at the rate of five percent per annum, receiving objects on deposit as collateral."

14 Le Gros, in his *Traité du Droit Coutumier de l'Ile de Jersey* referred to and summarised a number of civil cases brought before the Royal Court between 1839 and 1893 concerning high rates of interest claimed on monies lent.[24] The cases, because of their facts, did not result in any pronouncement as to the law on usurious interest beyond, as the Royal Court later put it, indicating an "underlying assumption" of the court and one of the defendants that had there been "a usurious rate of interest, that would have been a good basis upon which the defendant might have succeeded in resisting the claim."[25]

15 All of which brings us to the repeal of the 5% cap on interest rates in 1962. As will be apparent, although commentators pointed to the Norman custom as the source of Jersey's law on this subject, the percentage chosen for the cap broadly followed English law: 6% in

[24] CS Le Gros, *Traité du Droit Coutumier de l'Ile de Jersey* (Jersey 1943; reprinted with end notes and texts where Le Gros is cited, Jersey & Guernsey Law Review, 2007), pp 310–312. He cites *Young v Barnes* Ex 1861 Avril 6, *Alcock v Lumley* Ex 1893 Juillet 29. He refers two other cases under the heading "*Intérêts usuraires*", though these cases (one from 1819 and the other from 1839) do not appear to be on point. The *Table des Décisions de la Cour Royale*, a series which run from 1885 to 1978 and provides an index by subject matter, has no obvious heading to draw the reader to cases on usurious interest.

[25] *Doorstop Ltd v Gillman* 2012 (2) JLR 311, para 32.

1688 (reduced from an unstated higher figure), then 5% in 1714.[26] Jersey did not however follow England in repealing the cap in 1854. The existence of a cap does not indeed appear to have arisen as an issue until the early 1960s when a number of problems of a financial nature confronted the States of Jersey.

16 First amongst these was the use of loans made by UK domiciled persons to Jersey property owners to avoid UK death duties. The tax loophole identified was the exemption from that duty of foreign-sited immovable property owned by the deceased and the fact that a sum of money lent and secured against Jersey immovable property by way of simple conventional hypothec (HCS) was, under Jersey law, deemed to be immovable property.[27] A veritable industry had developed whereby UK-based private lenders made available loans to Jersey property owners, often placed shortly before the death of the anticipated lender, typically at an artificially low interest (presumably reflecting that the lender's estate had much to gain from the arrangement) and subject to repayment on six months' notice, with the understanding that this would not be activated for five years.[28] In a report presented to the States in March 1962, the Finance Committee claimed that the HCS had been used for these purposes from at least as early as the 1950s, when the total lent was estimated to be £175,000. By 1960 this had increased to some £4m. By early 1962, the Committee estimated that the amount so advanced was "not less than £12,000,000 and that a considerable sum has been on loan for more than five years."[29] In today's money, the latter sum would be nearly £220m. The late Sir Peter Crill, former Bailiff of Jersey and, between 1960 and 1962, a States Senator, recalls in his autobiography the popularity of the practice in this period. Indeed, he recounts how he received a telephone call from a London firm one Friday who had a client on his deathbed and wanted to transfer

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[26] This interpretation is supported by Le Geyt, as we have seen above. He added that the interest cap was reduced in 1688 to 6% "*comme on avoit fait en Angleterre, par un Acte du Parlement de l'an 12e du règne du Roy Charles II*." *La Constitution, les Lois, et les Usages de Cette Ile* (Jersey 1847) Tome I, p 114.

[27] *Per* art 27 of the *Loi (1880) sur la Propriété Foncière*.

[28] (1) Report of the Finance Committee on repeal of provision of the Code dealing with the rate of interest on loans; (2) Bill to repeal the provision of the Code of 1771 with regard to the rate of interest on loans and to empower the States, for a limited period, to prescribe maximum rates of interest; and (3) Bill to authorise the raising of loans of a total amount not exceeding £2m. 250–38/3(8), 165(1) P–29. ("March 1962 Report") Jersey Archive Reference S/ALL/Y2/B/68.

[29] *Ibid.*

£250,000 to Jersey for it to be lent and secured via an HCS "at once", an instruction he and his assistants managed to complete a day later before the Samedi Court. The business was so buoyant, he states, that companies like the Royal Trust Company of Canada "appeared to do very little else". For locals it was a boon: cheap money which enabled homes to be purchased, hotels to be expanded and, for those with an eye to investment deployed elsewhere, such as in Treasury Bonds, for a good return of 4% to 5% to be achieved.[30]

17 The Finance Committee did not share the enthusiasm of the local market for this practice. It was concerned at the inflationary effect of so much cheap money pouring into the Island. It was also concerned that the amount of tax thereby lost to the UK Treasury would result in friction with the British Government[31] and breach a tacit understanding, in place since the 1930s, that Jersey would not actively assist UK tax avoidance.[32] As the law stood, it could not control the process. Under the Borrowing (Control) (Jersey) Law 1947,[33] one of several laws promulgated at the time to enable the States to control the economy as it sought to reboot following liberation from the German Occupation, the Finance Committee was empowered to make orders to regulate—

> "(a) the borrowing of money in the Island where the aggregate of the amount of money borrowed under the transaction and of any other amounts so borrowed by the same person in the previous twelve months . . . exceeds ten thousand pounds sterling."[34]

Article 1 of the Schedule made it a criminal offence to contravene any provision of any order made under the Law. A 1947 Order clarified that prior consent of the Finance Committee was only required for a person to borrow a sum over £50,000 (in a 12-month period).[35] This had left something of an open field for those wishing to avail themselves of the

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[30] P Crill, *A Little Brief Authority* (Great Malvern 2005), pp 186–187.

[31] The March 1962 Report claimed that the UK Government's intentions were not known but it observed that the Labour Party's declared policy at its Annual party Conference in October 1961 to close tax avoidance using "tax havens abroad".

[32] *The Evening Post* 5 April 1960. The Senator was reported as saying that so pervasive was the loophole that it was advertised in the UK financial press.

[33] The preamble described it as—

> "A Law to provide for the regulation of the borrowing and raising of money, the issue of securities, and the circulation of offers of securities for subscription, sale or exchange."

[34] Article 2(1).

[35] Control of Borrowing (Jersey) Order 1947. This was replaced by the Control of Borrowing (Jersey) Order 1958.

HCS tax loophole, since the Order restricted borrowers rather than lenders and enabled multiple loans of £50,000 or less to be made without the consent of the Finance Committee. One UK domiciled lender in 1960 was reported to have made 55 separate loans of £316,000 secured by HCS.[36]

18 The second problem of a financial nature which confronted the States of Jersey in the early 1960s was its inability to borrow money to fund much-needed capital projects because banks were unwilling to lend at 5% interest. As the Finance Committee explained in its March 1962 Report, communications from various other States of Jersey Committees indicated large additional sums would be required in the near future to fund intended capital projects: the Housing Committee for the construction of dwellings and advancing of loans to assist home buyers; the Island Development Committee to commence projects indicated in the recent Barrett Report on Island planning; the Agriculture Committee for grants to growers to enable the purchase or extension of their holdings. Furthermore, the States were already over extended to the tune of £1,100,000 in the sense that capital had been committed without drawing down on agreed loans. [37]

19 The third issue was the perception of the Finance Committee that the 5% restriction was impeding the growth of Jersey as an international finance centre, particularly in persuading merchant banks to establish themselves there. This issue is not ventilated in the Committee's reports or *The Evening Post*, the only newspaper of the day. However, the late Colin Powell recalled that the Finance Committee was, by at least early 1961, in discussions with Lord Bearsted, the Chairman of the UK merchant bank M Samuel & Co (in 1965 renamed as Hill Samuel), who was looking to establish a presence in Jersey to tap into the large sums of money flowing into Jersey from UK expatriates around the world and thus place their funds in a politically stable and tax friendly jurisdiction. According to Powell, both Jersey and Guernsey were in the running, with Bearsted weighing up Jersey's better transport links to the UK and its lower tax on business profits against the absence of a statutory interest cap in Guernsey. Bearsted was reassured by Senator Cyril le Marquand that repeal of the cap was already on the political agenda and would be secured within a short time.

20 The extent to which this story is correct and not simply apocryphal is impossible to say. However, on 16 December 1961, *The Evening Post*

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[36] *The Evening Post* 14 February 1961. The minutes of the Finance Committee for the relevant time period provide little insight into the Committee's thinking on any of the issues discussed in this article.

[37] The March 1962 Report.

announced the establishment of M Samuel & Co (Jersey) Ltd endowed with a prestigious board including the recently retired Bailiff of Jersey, Lord Coutanche. As we shall see, it was soon followed by a number of other merchant banks.

21 The repeal of the HCS tax loophole and the statutory cap were not however the plain sailing for which Senator Le Marquand may have hoped. On 14 February 1961, the States debated the proposition to amend the Borrowing Control Law to introduce a specific restriction on borrowing secured by the creation of an HCS. It became very clear during the debate that there was a lot of local opposition to the proposal from lawyers, bankers, estate agents, builders and others. Senator Crill led the opposition, arguing that the Island needed low interest loans for its economy to grow. It was important to allow the HCS loophole to remain until alternative modes of lending could be arranged. If the cap were removed, interest rates, he predicted, would soar and the economy would stagnate. He presented an amendment which (as a matter of Jersey law at least) would leave the loophole in place, but give the Committee greater control over lending, save where a loan was required to purchase a house, a farm or buildings for public use.[38] On 15 February his amendment was defeated 25:19 and the Bill was adopted, but the opposition had been such that it was agreed (following a proposal of Senator Wilfred Krichefski) that its activation would be suspended pending discussions between a States' delegation (of Senators Cyril le Marquand, Rumfitt[39], and Crill; Deputies Venables and Tanguy) and representatives of HM Treasury to ascertain the degree of UK concern about the HCS loophole and report back to the States.[40]

22 An inkling as to the degree of the UK Government's concern might be surmised from the fact that in June 1961 the BBC's *Tonight* programme featured a less than favourable piece on Jersey entitled "Cheap Money Controversy".[41] Senator Le Marquand, perhaps wisely, refused to provide an interview for the programme.[42]

23 On 18 August 1961, however, an allegation was made in a States' sitting that Senators Le Marquand and Rumfitt, rather than undertaking

[38] *The Evening Post* 14 February 1961. It is worthwhile informing readers that Jersey at this time had no *Hansard*-type recording of its sittings and *The Evening Post* offers the only detailed record of debates.
[39] Vice President of the Finance Committee.
[40] *The Evening Post* 15 February 1961.
[41] *The Evening Post* 5 June 1961. The presenter was Alan Whicker, later a long-term resident of Jersey.
[42] *The Evening Post* 25 May 1961.

discussions via the delegation as mandated, had unilaterally been discussing the HCS issue with HM Treasury officials, it being suggested that they had done so because they were in favour of closing the loophole, unlike many States members.[43] The two accepted that there had been discussions, but claimed that this had only arisen because the relevant parties were meeting anyway and that there was no reason to doubt their good faith. States members were not placated.[44]

24 This controversy provided an unhelpful setting for the States consideration on 21 September of the Finance Committee's proposal to remove the interest cap in the Code of 1771.[45] Senator Le Marquand opened with an expression of disbelief at what he considered to be the general lack of understanding of what was best for the Jersey economy, as evidenced by recent States debates and coverage in *The Evening Post*. There was plenty of capital in Jersey available to borrowers, without the need to allow the exploitation of a UK tax loophole, but it was first necessary to unlock that money by removing the interest cap. Banks would not lend because of the cap. They preferred to lend abroad. Furthermore, they used the cap as an excuse not to pay market rate interest on deposits.[46] Even the States sent public funds to the UK to be placed on deposit at the higher rates of interest available there. The States could not secure the large loans required to fund capital projects at 5% interest and nor could they afford to lend money at that rate to prospective local home owners.

25 Deputy Vernon Tomes (a future Deputy Bailiff of Jersey) led the opposition. It was a populist presentation dressed up in a highly technical argument about alternatives to removing the cap. He argued that removal would cause untold suffering to householders with mortgages, to farmers with bank overdrafts which they paid off in a good potato season, to agricultural merchants who extended credit to farmers, to local businessmen who required credit to operate, and to consumers generally who would face a resulting increase in the price of

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[43] *The Evening Post* 18 August 1961. Crill, *op cit*.
[44] *The Evening Post* 1 September 1961. The only reference to the issue in the Minutes of the Finance Committee is on 4 September 1961 where it is recorded that the two Senators had met with officials of the Home Office and the Treasury Department in an effort to persuade them to expedite a high-level meeting with the States' delegation.
[45] The Bill had in fact been lodged *au Greffe* on 13 September 1960.
[46] The banks present in Jersey appeared curiously reluctant to venture any opinion on the question of the interest cap, despite attempts by the Finance Committee to ascertain their views. See Minutes of the Finance Committee for 10 August 1960 and 7 February 1962.

goods. If the real concern of the Finance Committee was the funding of public projects and the making of loans to homeowners, then there were a number of technical ways in which an exemption from the cap could be carved out just for States borrowing and lending. Senator Crill added that it was imperative that Jersey controlled interest rates locally.[47] The proposition was defeated and the Finance Committee sent back to review the alternatives that had been put forward. Notwithstanding that it was lost only 21:19, *The Evening Post* called for the Finance Committee to resign: its members had lost the confidence of the States and the commercial community by their dictatorial and intransigent attitude to everything.[48]

26 But the Committee stood firm. It did so by repeating its warnings about the dire need for capital to fund States' projects. In its report on the budget to the States in late November 1961, it contrasted a booming economy (an increase of 9% in revenue) with the ordinary, capital requirements of the States Committees (up by 20%). Cuts were required to be made and those capital projects it considered essential (a new sewage treatment works and housing) would need to be funded by a substantial loan or an increase in income tax.[49] Later that month it warned of a budget deficit of £1.6m. Furthermore, it did as it was bidden by the States and explored in some detail the alternatives that had been put forward as obviating the need for the repeal of the cap in the Code of 1771, only to conclude that none of them was viable.

27 The results of its investigation were set out in a report to the States presented in March 1962, together with a tactfully amended bill.[50] The report took each alternative put forward by Deputy Tomes in turn.

28 Alternative 1: The issue of a States loan at 5% free of income tax to those wishing to build a home, notwithstanding the provisions of the Code of 1771. HM Acting Attorney General's advice was that this would be lawful provided the lender did not receive more than 5% interest but was ineffective for the issue of a loan under the Housing Construction Loans (Jersey) Law 1960, to which the proposal related,

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[47] He asserted this notwithstanding that the majority of the banks in the Island were branches of UK ones and Jersey was in monetary union with the UK.
[48] *The Evening Post* 22 September 1961. See also editorials on 15, 29 November and 30 December 1961. Another aspect of the attitude towards the Committee was its resolute opposition to the conduct of an economic survey of Jersey.
[49] *The Evening Post* 29 October 2011.
[50] The March 1962 Report. *The Evening Post* 23 March 1962.

since there was no express power thereunder to issue a loan free of tax.[51] The Finance Committee was not minded to change the law to give it power to issue a loan at 5% free of income tax. It concluded that it was not prudent to assume that that the large sums likely to be needed by the States for onward lending could, under existing market conditions, be obtained at less than 6.5% gross.

29 Alternative II: That while generally maintaining the interest ceiling of 5% on money borrowed, legislation should be enacted providing exemption for States' loans. The Committee rejected this on the basis of public policy:

> "it would be ludicrous to create a situation in which private loans are limited to 5% while the States of Jersey, with the backing of the security offered by the General Revenues of the Island, would pay higher rates."

30 Alternative III: The issue of a loan at a discount with interest at 5% on the nominal value. This was rejected because mathematically the lender would in fact receive more than 5% on the actual sum lent.

31 Alternative IV: Investment of insular insurance funds in the House Construction Loan at 5%. This was met by the obvious point that it was the duty of the Committee to invest monies from those funds in such a way as would be most advantageous for its beneficiaries, which required a broader enquiry as to what the market had to offer from time to time. Given that interest rates outside Jersey were higher than 5%, it was hard to see how it would be in their best interests to cap their return.

32 Alternative V: That the possibility should be explored of making available for re-investment in States of Jersey loans at low rates of interest of monies derived from the deposits in the Jersey Savings Bank. This however was not possible because of restrictions in the Trustee Savings Bank Act of 1954 as to permissible investments for depositors' monies.

33 The States were therefore, so it was argued by Senator Le Marquand, in something of a fix: remove the cap, increase income tax or face restrictions on much needed capital projects. They could no longer rely on cheap money from the UK exploiting a loophole that it was understood would soon be closed, not only blocking a fresh flow of funds but likely also causing the calling-in of existing loans, and in any event a lending process which the Committee intended to regulate via its new powers under the Borrowing Control Law. The Committee

[51] In contrast to the loan of £300,000 approved in 1927 as Jersey's final contribution to the UK Government's First World War debt.

concluded that it was "now more necessary than ever to put an end to a situation which isolates the Island from the normal flow of money available for borrowing". Nonetheless, with prescience as to the needs for compromise, it recommended that whilst the interest cap must be removed, the States for a period of two years should be empowered to make Regulations to fix the maximum rate of interest "so as to effect an easy transition from the old conditions to the new" and, simultaneously, presented a Bill authorising the raising of loans to a total of £2m for intended States' capital projects.

34 On 25 April 1962, the States approved the Code of 1771 (Amendment) (Jersey) Law 1962 repealing the interest cap and empowering the States for a period of two years to prescribe the maximum rate of interest owed on transactions giving rise to a debt. It also authorised the raising of loans to a total of £2m.

35 *The Evening Post*, which prior to the debate had firmly opposed repeal of the cap because it considered it had served Jersey so well and would severely hit the local economy,[52] viewed as the turning point in the debate the reported announcement of the UK Chancellor that the HCS loophole would be closed.[53] Indeed, the loophole was closed soon thereafter. On 23 May 1962, the Finance Committee issued the Control of Borrowing (Amendment No 2) (Jersey) Order 1962 which removed the restriction it had placed on the borrowing of money secured by HCS which it had fought so hard to obtain. There was now no control over borrowing a sum less than £50,000 in a twelve month period.[54]

36 Colin Powell's *Economic Survey of Jersey* observes how, prior to the repeal of the interest cap in the Code of 1771, the main deposit collecting institutions in Jersey were branches of the London clearing banks and the Jersey Savings Bank, but thereafter there had been a significant increase in the number of banks, particularly merchant banks. Following the introduction of the Depositors and Investors

[52] *The Evening Post* 9 April 1962.
[53] *The Evening Post* 25 April 1962. It gave no further detail on the Chancellor's announcement, though it did note that the tax loophole which applied to foreign-sited realty was also exploited by UK residents in other jurisdictions, notably the Bahamas. According to WJ Heyting, a frequent letter writer to *The Evening Post* on the subject and later author of *The Constitutional Relationship between Jersey and the United Kingdom* (Jersey 1977), Jersey had not been the worst offender by far and it had not pressed the point with the UK Treasury, the Chancellor would not have felt compelled to act. *The Evening Post* 27 April 1962. The Minutes of the Finance Committee dated 18 April 1962 recorded that the UK had taken steps to close the loophole.
[54] *The Evening Post* 25 May 1962.

(Prevention of Fraud) (Jersey) Law 1967, banks operating in Jersey had to be licenced by the Finance Committee. As of 1971, Powell listed 22 banks registered under the Law, 19 of which were incorporated between 1962 and 1969. Together, at the end of 1969, they held deposits of some £296m, 70% of which was held for non-residents.[55]

37 As to usurious interest, it is noteworthy that the subject did not feature in the debates over the repeal of the HCS tax loophole or the removal of the interest cap. Inevitably, perhaps, it did come to the attention of the Royal Court. In 2012, the Royal Court had cause to visit the subject in *Doorstop Ltd v Gillman*.[56] The case concerned two loans between two businessmen which had not been repaid on time. The loans carried interest at 12% during their terms with penal interest for a failure to redeem on time (on one of them the interest claimed was the equivalent of a return of 51.16% for the use of money for one year). The key issues before the court were whether it could intervene to reduce the interest claimed to be lawfully due and, if so, on what basis.

38 Of the 1962 repeal of the interest cap in the Code of 1771, the court correctly observed that this had nothing to say about the existing law against usury and therefore the court was left to draw what it could from the customary law. To the observations of Poingdestre and Le Geyt cited above, it added:[57]

> "34 . . . our own experience is that, during the last 40 years or so, the Royal Court has occasionally intervened to restrict the interest which it would allow in any judgment. Usually those restrictions arose on the return date of the issue of proceedings where the defendant was unrepresented, and judgment in a lesser sum than was claimed by the plaintiff was allowed by the court, without any reasoned decision. Although this may not have happened very frequently 20 years ago, in our experience, that was the practice. In the last 15 years or so, the court has made it clear it would not give judgment for interest until repayment of the judgment debt at full contractual rates—at times it has allowed interest at 15% on the judgment debt until repayment but more recently has only permitted interest at 8% even where the claim was pursuant to contract.

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[55] C Powell, *Economic Survey of Jersey* (Jersey 1971), pp 147–148, 179. Of the 30% held by the local population, he notes that the majority was held by wealthy residents who had been attracted to Jersey because of its low tax regime.
[56] 2012 (2) JLR 311.
[57] Paragraphs 34–37.

> 35 More recently, the court has, in practice directions, given indications of the maximum rate of interest which it would allow on judgments under first of all the 1971 Law[58] and secondly the 1996 Law,[59] which is at an even lower rate. We recognize of course that those represented judicial directions in relation to a statutory jurisdiction to award interest, rather than an interference in an agreed bargain, but they show the court's willingness to restrict interest rates to what is reasonable.
>
> 36 In our judgment, although the 1961 Law removed the cap on interest rates of 5%, it did not affect the laws on usury generally, and the position therefore remains broadly that the charging of interest at customary law must be moderate or reasonable.
>
> 37 It seems probable that the customary law rule arose out of judicial policy. In that respect, therefore, the Royal Court of Jersey has not, for a very long time, been subject to the constraints to which Lord Scarman referred in the Privy Council decision of *Pao On* v. *Lau Yiu Long*[60] . . . The policy may well have arisen at a time when the law did not distinguish quite so clearly between that which was illegal and that which was immoral. Whatever the original rationale, it is clear in our judgment that this was the customary law."

39 The court concluded, drawing on the approach adopted in contemporary France and the United Kingdom, which offers a degree of protection against extortionate interest rates by statute, that as a matter of Jersey customary law, interest charged during the period of a loan must be moderate or reasonable. To the extent that it was not reasonable, the court would not enforce its recovery. When determining whether a rate of interest was moderate or reasonable, first and proper regard would be made to the principle of Jersey law that *la convention fait la loi des parties.* Whilst the fact that parties acting at arm's length had agreed a bargain would be of significant weight in the analysis, it was necessary to view that in the larger context of the agreement. Such factors as the level of risk for the lender, what the borrower gained from the arrangement, prevailing interest rates in the market place and the

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[58] Interest on Debts and Damages (Jersey) Law 1971.

[59] Interest on Debts and Damages (Jersey) Law 1996.

[60] [1980] AC 614 The principle that, absent duress, the Privy Council would not as a matter of public policy otherwise intervene to undo a contract where there had been unfair use of a dominant bargaining position since those who negotiated at arms' length and reached a contract were not amenable to the court's intervention on the well-established grounds that they should be held to their bargain.

relative strength of the bargaining positions of those involved might bear on the question.

40 So, to end where we began, was the repeal of the interest cap in 1962 a watershed moment for Jersey's finance industry? The answer is yes. As Powell put it in 1971, the growth of offshore centres was based on the internationalisation of finance, and banks were at the centre of that process—

> "The existence of fiscal and monetary restrictions throughout the world creates a demand, from a variety of sources and for a variety of reasons, for an area which can act as a financial intermediary, and which has a simple and attractive fiscal system and an absence of controls over the movement of funds. Jersey is increasingly playing that role."[61]

It is an interpretation shared by other authors.[62] Banks were the key financial intermediaries in enabling the international movement of funds. Coupled with other factors such a political and fiscal stability and proximity to the City of London, the releasing of a centuries-old restriction on interest rates made Jersey a very attractive base for such institutions to engage in international finance.

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[61] Powell *op cit*, p 145.

[62] RA Johns, *Tax Havens and Offshore Finance. A Study of Transnational Economic Development* (London 1983), p 9; RA Johns & CM Le Marchant, *Finance Centres. British Isle Offshore Development since 1979* (London & New York 1993), pp 1–3; MP Hampton, "Offshore finance centres and small island economies. Can and should Jersey be copied?" (University of East Anglia PhD Thesis 1993), pp 102, 242–243, 269.