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SHORTER ARTICLES AND NOTES

TREASURE TROVE (2)

Paul Matthews

In England and Wales, the law of treasure trove survived in its medieval form until September 24th, 1997, when the Treasure Act 1996 was brought into force. The old law defined treasure trove as -

"when any gold or silver, in coin, plate or bullion hath been of ancient time hidden, wheresoever it be found, whereof no person can prove any property, it doth belong to the King, or to some Lord or other by the King's grant, or prescription"[1]

This rule, whatever its merits as a means of maximising royal revenue in the feudal period,[2] had a considerable number of defects as a way of protecting archaeological and cultural artefacts in the twentieth century. First of all, the definition, by concentrating on gold and silver, excluded many objects worth preserving. Secondly, the definition depended on the *intention* of the original possessor. Was the object deliberately hidden with a view to later retrieval, or was it lost or even abandoned? But in most cases such facts were barely knowable from the very limited evidence available. And why, centuries later, in the absence of any other claimant, should such distinctions have been relevant anyway? Third, there was the involvement of the coroner's inquest, inquiring into the finding of the object. This was (and is) unnecessary in many jurisdictions, including Scotland and, of course, Jersey. What was worse was that, although the coroner's inquest in sitting to inquire into sudden and unnatural death had not needed to convene a jury in most cases since 1926[3], nevertheless, when inquiring into *treasure*, a jury still needed to be called, with all the extra delay and expense thereby entailed. And fourth, the decision of the inquest was not final or binding on the parties. Indeed, it was not binding on anyone,[4] and the question whether a given artefact did or did not constitute treasure trove could be (and was) litigated again in the ordinary courts, even straightaway.[5] There were other defects too, such as the obscurity of the rules themselves, the paucity of the authorities,[6] and difficulty of ascertaining the legal requirements in some cases.

The Treasure Act 1996 was the first attempt at statutory reform in this area in modern times. It applies to England and Wales only, and has no application to Jersey. As has been stated above, coroners are intimately concerned with the administration of the treasure system in England and Wales. Governmental responsibility for coroners is shared between local authorities (who appoint and pay them), the Home Office (which oversees them) and the Lord Chancellor's Department (which makes procedural rules for, and can dismiss, them). But this Act was produced by the Department of National Heritage (now The Department for Culture, Media and Sport). Unsurprisingly, this is not a recipe for happy lawmaking, and, as we shall see, the new Act has given rise to a number of difficulties.

The changes made to the former English law by the Treasure Act are, in broad terms, the following.

The first change is that the notion of what constitutes treasure has been considerably widened. In so widening it, the legislation's definition has become much more complex. There are now four categories of treasure, one of which (despite one of the professed objectives of the Act being "to abolish treasure trove") actually preserves the old law of treasure trove, because it comprises "any object which would have been treasure trove if found before the commencement of section 4"[7]. The other three (new) categories in section 1(1) comprise:

"(a) any object at least three hundred years old when found which -

(i) is not a coin but has metallic content of which at least 10% by weight is precious metal;

(ii) when found, is one of at least two coins in the same find which are at least three hundred years old at that time and have that percentage of precious metal; or

(iii) when found, is one of at least ten coins in the same find which are at least three hundred years old at that time;

(b) any object at least two hundred years old when found which belongs to a class designated under section 2(1);[8]

(c) [above]

(d) any object which, when found, is part of the same find as -

(i) an object within paragraph (a), (b) or (c) found at the same time or earlier; or

(ii) an object found earlier which would be within paragraph (a) or (b) if it had been found at the same time."

But "unworked natural objects" and "minerals as extracted from a natural deposit" are excluded, as are objects in a class designated by the Secretary of State[9]. The phrase "precious metal" is defined[10] to mean gold or silver.

The basic definition of treasure is by no means the only complexity involved in the drafting in the Act. For example, section 3(4) importantly expands the notion used in that definition of an object being "in the same find" as another object by providing that an object is part of the same find as another if

"(a) they are found together,

(b) the other object was found earlier in the same place where they had been left together, and

(c) the other object was found earlier in a different place, but they had been left together and had become separated before being found".

It will be noted that this expansion itself refers to another new notion, namely that of items having "been left together". This in turn is expanded by section 3(5):

"If the circumstances in which objects are found can reasonably be taken to indicate that they were together at some time before being found, the objects are to be presumed to have been left together, unless shown not to have been."

When one considers that this legislation is intended to operate in the first instance, not by skilled lawyers, but by metal detectorists, amateur archaeologists, coin collectors and so on, and that elsewhere in the new Act a serious criminal offence is created for failing to notify the coroner of a find which the finder "believes or has reasonable grounds for believing is treasure"[11], it can easily be seen how far short of the ideal this legislation falls. In addition, the fact of retaining, within the so called "new" definition of treasure all the medieval law of treasure trove, with its difficulties over proving the deliberate hiding of an object with the intention to recover it at a later date, merely demonstrates how ill-thought out this all was.

Again, the coroner is by section 9(2) put under an obligation, where he proposes to hold an inquest into treasure, to notify the British Museum or the National Museum of Wales (as the case may be). This is all fine and good, but the Act also provides by section 4(1) that when treasure is found, then, subject to any prior rights and interests, it vests in the treasure franchisee (if there is one) and only subject to that in the Crown. There is no provision made in the Act for the coroner to notify the franchisee. Presumably this was simply overlooked. It is hardly to be supposed that the framers of the Act deliberately intended the person entitled to the object if it were treasure to be kept in ignorance of the fact that an inquest was to be held.

The Act by section 6(3) introduces for the first time a power for the Secretary of State to disclaim the Crown's title to any treasure. This was no doubt considered to be a valuable power to deal with cases where for one reason or another it was simply not sensible for the Crown to assert that a particular item was treasure. But although it appears to have been assumed that the disclaimer by the Secretary of State of the Crown's title would do away with the need for an inquest, this is in fact not so. For one thing, there may be a franchisee involved, and the power to disclaim is only to disclaim *the Crown's* title. If the Crown has none, the disclaimer will have no effect. Secondly, even where the Crown is the only other person interested, it is clear that the coroner's duty to inquire into the finding is not taken away by the fact that the Crown no longer claims it as treasure (consultations are currently being carried out on this and other points arising under the Act, with a view to recommending amending legislation in due course).

A further feature of this legislation is the requirement in section 11 that a Code of Practice should be issued, as indeed it has been,[12] to give guidance to persons such as metal detectorists, coin collectors and so on in relation to possible treasure finds.[13] This contains a great deal of very useful information, including information on reporting finds and on the rewards system[14] which operates as an incentive for finds to be reported. At the same time there is a danger with any Code of Practice, and that is that it is treated as the letter of the law (which it is not). Moreover, it becomes out of date quite easily, as in fact this one has done, so far as concerns the contact details for coroners.

Nonetheless, the system still suffers from a number of the defects of the old treasure trove law. For one thing, the coroner is still involved, despite the fact that he is an expert in one

form of inquiry only[15] - that into unnatural death - and there is no good reason to expect him to be good at dealing with archaeological artefacts as well. Moreover, the decision of the inquest will still not bind anyone, and can be followed immediately by litigation. For another, even the new expanded definition of treasure still concentrates largely on gold and silver, and thereby fails to cover a great many objects which as cultural heritage are deserving of care and attention by the State. If it is right that any items at all should be forfeit to the State as its property on archaeological or socio-cultural grounds, there is no basis for restricting it to items that either have some precious metal in them or which enclosed or contained such precious metal. What about a pre-historic boat that is found buried under the mud? What about parchment or other documents containing important early literary or historical documents?

So the English experience in reforming the treasure law cannot be said to be an unqualified success. It is not to be uncritically recommended as a model to be followed in Jersey. But, as Jersey considers the scope of possible reform to its treasure law, it is a useful comparison, nevertheless.

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TAKING OFFENCES INTO CONSIDERATION

William Bailhache QC

On December 21st, 2000 the Superior Number of the Royal Court, in exercise of its powers under the Royal Court (Jersey) Law, 1948 and the Magistrate's Court (Miscellaneous Provisions) (Jersey) Law, 1949 made the Criminal Procedure (Taking Offences into Consideration) (Jersey) Rules, 2000 (the "Rules".)[16] These are to come into force on March 1st, 2001.

Once the Rules are in force, the Royal Court, the Magistrate's Court and the Youth Court will be entitled, when sentencing any person in respect of an offence, and of course subject to the Rules, to take one or more other offences committed by that person into consideration. This power has long been available to the courts of England and Wales and it is to be hoped that the use of this power will assist greatly in achieving a more efficient administration of justice.

Absent the Rules, the Court can naturally sentence the offender only for the offence with which he is charged. In practice this has meant that the Crown reviews carefully all potential charges which might be brought, having in mind *inter alia* the need to ensure that the offender receives the right overall sentence, and in order to do justice as far as may be to the victims of the different offences which have been committed. Where the evidence is equally

good, there is no obvious basis upon which one should select some offences and not others particularly in those cases where the existence of the criminal conviction may be an important ingredient in establishing civil liability for which the accused, his insurer, or possibly the Criminal Injuries Compensation Board may be required to make recompense.

Conditions precedent

The Court can only take into consideration other offences committed by the accused where the accused has admitted at least one charge and requests that the other charges be taken into consideration; where the offences which are to be taken into consideration are of a similar nature to the offence for which the sentence is being imposed and are otherwise within the jurisdiction of the Court; and where the Attorney General does not object, or in the case of the Magistrate's Court or Youth Court, the prosecution does not object.

The Rules make it plain that there is a residual discretion in the Court not to take into consideration an offence where the Court considers in the public interest that the offence ought to be charged and tried separately.

The effect of taking offences into consideration

Where the Court is to take one or more other offences into consideration, it may impose in respect of the offence charged a sentence which is more severe than it would have imposed had it not taken the other offences into consideration. Clearly the maximum sentence cannot exceed the maximum sentence fixed by law, and equally clearly the Court cannot exceed the maximum of its sentencing jurisdiction. However the effect of the Rule is likely in practice to lead to the Court having a more informed view of the accused and the nature, pattern or extent of his offending.

An offence which has been taken into consideration does not become an offence in respect of which a person may subsequently make a plea of *autrefois convict*, but no proceedings for an offence which has been taken into consideration can be instituted without the leave of the Attorney General. This provision will obviously be of greater impact in the Magistrate's Court than the Royal Court where proceedings are commenced by the Attorney General anyway.

Practice directions and rules of court

The Rules make provision for the Greffier, in consultation with the Bailiff, to issue Practice Directions to ensure that sufficient notice is given of the particulars of the offences to be taken into consideration and to ensure that the defendant understands what is being done and freely admits them.

It is of interest that in England and Wales, the taking of offences into consideration was a common law development. In *R v Walsh*[17], the appellant had pleaded guilty to six counts of burglary and other offences and he asked for 259 other offences to be taken into consideration. He was sentenced to six years imprisonment. He subsequently denied responsibility for many of the 259 offences, some of which had occurred while he was serving a term of imprisonment. As Lord Justice Scarman, as he then was, said: "I would emphasize that the practice of taking other offences into consideration when imposing a sentence is a conventional practice, not founded on statute or any rule of law. A conventional

practice is merely a lengthy way of describing something that is done by agreement. The agreement is between the Court and the accused man. It is essential that if this practice is to continue, both the Court and the accused man should understand perfectly clearly what it is that they are agreeing to do. The practice is beneficial to the administration of justice and beneficial to the accused man personally. It is beneficial to the administration of justice in that it enables a number of matters which might otherwise have to come to trial to be taken into consideration in a proper case when a man is being sentenced. In fact it removes a workload from the overburdened system of the administration of criminal justice. It is of great benefit to the accused man, because it means as a matter of agreement that after the sentence he will be able to face life freed of the threat of punishment for the offences that have been taken into consideration at his request ...".

The difficulty which appeared in the *Walsh* case in 1973 naturally gave rise to further comment by the Court of Appeal. It is important that the Court, at the trial stage, should ensure that the accused man understands what is being done, admits the offences and wishes to have each and every one of them taken into consideration. The Court suggested that the police should prepare a schedule which should be served upon the accused person. If it is known that he intends to plead guilty, the schedule can be served before indictment, perhaps even some days before the day of the trial. If the accused is intending to plead not guilty, it may be more appropriate that the list should not be served until after he has been found guilty. The Court made it plain that the standards to be observed by the police in the preparation and service of the schedule should be high. The police must exercise meticulous care in the preparation of the list and should ensure that when the list is given to the accused, his signature is obtained, and in so far as it is within the power of the police, they should ensure that he gets an opportunity of studying the list before it is signed and obviously before it is dealt with in Court.

The fact that the Royal Court Rules in respect of this matter provide for the making of Practice Directions should ensure that appropriate instructions will be laid down for preventing the kind of difficulties which arose in the case of *Walsh*, or indeed which arose in the case of *Urbas*[18], which came to the English Court of Appeal on June 24th, 1963. There, counsel for the Crown informed the Court that there were 61 other cases to be taken into consideration, which after debate was reduced to a final total of 56. The Court then asked the prisoner whether he admitted those other cases and wanted them taken into account, to which the prisoner replied "Not all of them". When asked how many of them, the prisoner said "I should say around 50". Although the Court advised the prosecution that at sometime or other the prisoner ought to agree which 50 were to be taken into account, sentence was subsequently imposed without identification of which precise offences had been taken into account and which had not. This was clearly unsatisfactory because the Court, in sentencing the prisoner, should only take into account such offences which the prisoner clearly admits.

In the case of *Mortimer*[19], heard in the English Court of Appeal on March 10th, 1970, the Court indicated that the proper practice was for the accused to be told what the offences are, asked if he admits them and if he wishes them to be taken into consideration. The details of the offence need not in every case be put to him, but he should be asked if he has received and signed a list of offences so that he should have an opportunity of correcting himself by saying he does not admit any of them. The judge should ask the accused personally if he admits the offences and not rely upon statements from counsel on instructions.

In England and Wales therefore the taking offences into consideration procedure arose without any statutory basis, although its prolonged use (indeed since at least *R v Syres*[20]), has resulted in reference to it in statutes - by way of example, Section 35(1) of the Powers of Criminal Courts Act, 1973, relating to compensation orders. This has its counterpart in Jersey in Article 2(1) of the Criminal Justice (Compensation) (Jersey) Law, 1994 which may be the subject of amendment in the future.

The gestation period for the present Rules has been very long. In the early 1970's, the then Attorney General favoured the view that taking offences into consideration could be introduced in Jersey by means of a "Full Court Directive". A subsequent Attorney General took the view that the English procedure was good enough, and there was no need for Rules of Court. At all events, it can hardly be said that if it is permissible judicially to develop the customary law in any particular decision, it is inappropriate to lay a proper framework by Rules of Court and Practice Directions made thereunder.

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RECTIFICATION OF WILLS: RECENT DEVELOPMENTS IN JERSEY

Michael O'Connell

The Royal Court in Jersey recently handed down a judgment in a probate case which developed the common law of the Island and showed the law of Jersey evolving in a healthy way.

The case was *re Vautier*[21]. It involved a mistake made when Mr & Mrs Vautier signed their wills of moveable property in 1977. They had given instructions for mirror-image wills to be prepared by which the husband bequeathed all his moveable property to his wife in the event that he should predecease his wife, and vice versa. Without realising it at the time, the wife signed the husband's will; and the husband signed his wife's will. These incorrectly signed wills were duly attested and locked away safely until Mrs Vautier died in 1999 and her will was brought out for an application to be made for probate. At that moment the unfortunate error was discovered.

The husband, who had been nominated as executor of his wife's will, brought an application for directions to the Royal Court by way of representation. The Court appointed the Attorney-General as *amicus curiae*. It was clear that the facts of the case presented a number of difficult issues of principle and the Court delivered a judgment which will be of great help to the legal profession in Jersey in the future.

The first question for the Court was whether or not it would be possible to admit to probate the wife's will which had in fact been signed by the husband. It was clear that the wife had never signed her own will. There being no decided case on the point the Court looked to the commentators on Jersey Law to see if such a matter had ever been considered. Le Geyt[22] wrote that Terrien had argued that a will is valid if made verbally in the presence of two witnesses. Le Geyt went on to analyse the development of this area of law under the *Nouvelle Coutume de Nomandie* which provided that all wills must be made in writing. According to Le Geyt the jurisprudence of the Island followed the *Nouvelle Coutume* and all wills must be signed by the testator or marked by him in some identifiable way, and such signature or identifiable mark must be attested by two witnesses.

In Le Geyt's *Privileges, Loix et Coustumes de L'Isle de Jersey*[23] he writes -

Tout Testament doit estre redigé par éscrit, & signé pour le moins de deux tesmoins, non légataires, ni reprochables, avec le seing ou marque du Testateur.

The Court also looked at the 1861 Report of the Commissioners into the Civil, Ecclesiastical and Municipal Laws of Jersey which stated[24] that a will of moveable estate, to be valid, had to be signed by the testator.

The only comments which appeared to dilute that principle were found in Basnage in his *Commentaires sur la Coutume de Normandie*[25] which indicated that an unsigned will could be valid provided it was read to the testator or read by him. But the Court declined to follow Basnage on the basis that Le Geyt was a more weighty authority in relation to the law of succession on this point. The Court accordingly held that, in order to be valid under Jersey law, a will of moveable property must be signed by the testator.

That finding is of course very important. It rules out the possibility, it seems, of basing a future argument on strong evidence of an intention on the part of the testator to sign his will of moveable property. Suppose a terminally ill man gives instructions for a new will of moveable property to be drawn but by the time it is ready for signature he is too physically weak to sign it, even though his intellect is sufficient to form the necessary testamentary intention and he can communicate such intention lucidly. It seems that he will die intestate if for any reason he cannot sign or otherwise make his mark on the will. We will have to wait and see if such extreme facts ever present themselves to the Court and how the Court will receive the Basnage – type arguments.

Having made that finding the Court then turned its attention to the possibility of admitting to probate the husband's will which had been signed by the wife. As a document bearing her signature and witnessed in due form, it was a document which complied with the requirements of Jersey law. But it was, on its face, absurd since it purported to leave everything to the deceased wife and named her as executrix. The Court was asked to consider therefore whether it had a jurisdiction to rectify wills under Jersey law.

Surprisingly there was no Jersey authority directly in point. In *re Vibert*[26] the name of a particular legatee had been omitted from a will. Extrinsic evidence was admitted to enable identification of the legatee. Although the headnote and report of the case suggest that the applicant sought rectification of the will, the reality is that, on a proper analysis, the case is more about interpretation of wills rather than rectification. Although the distinction between interpretation and rectification can sometimes become blurred, it is nevertheless a real and

important distinction and the Vibert case should properly have been categorised as an instance of the former rather than the latter. To that extent the report is a little misleading.

There was however some reported case law from other jurisdictions which provided considerable assistance to the Court. Looking firstly at the English common law position it was clear that, prior to statutory intervention, the English courts had had no jurisdiction to rectify a will. There was a limited power to delete words from a will provided that the testator's intentions were otherwise clear and it was proved that the words had been included through fraud or mistake. This led to judicial frustration because judges in England were unable, despite clear examples of the rule leading to absurd results, to rectify wills by introducing new words into them. In *re Reynette – James*[27] Templeman J said -

"Any document other than a will could be rectified by inserting the words which the secretary omitted, but in this respect the Court is enslaved by the Wills Act 1834. Words may be struck out but no fresh words may be inserted".

Eventually Parliament intervened and by the Administration of Justice Act 1982, section 20 (1), the courts of England and Wales were given statutory power to insert words in wills in certain circumstances.

The Royal Court also considered a number of cases decided in New Zealand and Canada. Perhaps the most significant case was *McGonagle v Starkey*[28] in which the facts were virtually identical to the facts in *Vautier*. The New Zealand court in *McGonagle* was prepared to develop the common law of that jurisdiction to allow rectification of a will by inserting words to give effect to the testator's intentions.

The Royal Court held that it had jurisdiction to order the rectification of wills of moveable property not only by omitting words, but also by introducing words. "If the Court can make one kind of change (a deletion) so as to correct a manifest error and make the will accord with the testator's clear intentions, why should it not be able to make another type of change (e.g. a substitution or addition) to achieve exactly the same result?".

The Court however concluded by issuing a firm warning as to its reluctance to use this new found jurisdiction. It is clear that it will only be used sparingly and in the clearest possible cases when the exercise of the Court's discretion is necessary to give effect to the intentions of the testator. The Court accordingly ordered the rectification of the husband's will albeit signed by the wife with certain words deleted and other words introduced, so that thereafter it could be admitted to probate.

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JUDICIAL REVIEW, JERSEY AND THE FIRST QUEEN ELIZABETH

Paul Matthews

It is well known, amongst Jersey lawyers and local historians at least, that the Charter of Queen Elizabeth I of June 27th, 1562 granted to the people of Jersey various privileges, including immunity from legal process issued out of England. As the Charter says,[29]

"None of them for the future should be cited apprehended or drawn into any lawsuit by any writs or process issued from any of our Courts or other Courts within our kingdom of England or any of them...concerning or touching any thing suit matter or causewhatsoever arising within the aforesaid Island..."

So there has been, as the Royal Commissioners of 1860 into the Civil Laws of Jersey reported, "an unfortunate jealousy as to the service in the Island of writs of summons, and other analogous process from the English Courts,"[30] and it has happened that the Royal Court has refused to enforce orders of English courts purporting to have direct effect.[31] But the scope of the Charter immunity is cut down by these words of exception at the end of the relevant clause -

"Except only such cases as by the laws and customs of the Island and aforesaid places may be reserved to our royal cognisance and examination *or by our royal right or privilege ought to be reserved*."[32]

This exception for cases reserved (under Jersey law) to "royal cognisance and examination" or (under English law) to "royal right or privilege" (ie the Royal Prerogative) has been traditionally considered to extend only to the writ of *habeas corpus*, as a prerogative writ by which the Queen may inquire into the causes for which any of her subjects are deprived of their liberty.[33] As is well known, there are a number of reported cases concerning Jersey where that writ has issued.[34] The rather quaint explanation sometimes formerly given in Jersey for this singular exception was the fear that perhaps the Bailiff of the day (as sole judge of law in the Island) might in a moment of insanity lock everyone up, and without his co-operation there would be no redress from the Royal Court[35].

But this explanation ignored the position elsewhere in the British colonies, where the judiciary might be more numerous, and no one judge exercised such complete control. It also gave no weight to the existence of the other "prerogative writs" (now prerogative orders) of *certiorari*, *mandamus* and *prohibition*, also originally part of the Royal Prerogative.[36] And so, very recently, a decision of the Divisional Court of the Queen's Bench Division of the English High Court has suggested that the true position may be rather broader than the "Jersey" view, at any rate in English law. In *R v Secretary of State for the Foreign and Commonwealth Office, ex parte Bancoult*[37], the Divisional Court (Laws LJ and Gibbs J) had to rule on the legality of the British Indian Ocean Territory Ordinance No 1 of 1971, which had purported to banish from that territory certain British dependent territory citizens resident there, and to prevent them from returning. Ultimately, the court held that the

Ordinance was unlawful, and an order of *certiorari* was issued to quash a particular provision of that Ordinance.

For present purposes, the details of the case, although interesting in themselves, raising important points on *Magna Carta*, and on that part of the law relating to the enactment and validity of colonial laws, do not matter. What concerns us directly is that the British Government argued at the very outset of the case that the High Court in England had no jurisdiction to review any local acts of an administrative or legislative nature where (as in that case) in the territory concerned there was a municipal court of competent jurisdiction. The Court therefore had to decide whether the existence of a competent municipal court went to the question of the *jurisdiction* of the English court in judicial review proceedings, or only to the *discretion* that the English court had as to whether to exercise its jurisdiction.

In his judgment Laws LJ referred to Lord Mansfield's famous dictum in *R v Cowle*[38] -

"Writs, not ministerially directed (sometimes called prerogative writs, because they are supposed to issue on the part of the King), such as writs of *mandamus*, prohibition, *habeas corpus*, *certiorari*, are restrained by no clause in the constitution given to Berwick; [39] upon a proper case, they may issue to every dominion of the Crown of England. There is no doubt as to the power of this court, where the place is under the subjection of the Crown of England; the only question is, as to the propriety.

To foreign dominions, which belong to a prince who succeeds to the throne of England, this court has no power to send any writ of any kind.[40] We cannot send a *habeas corpus* to Scotland [41], or to the Electorate [ie of Hanover]; but to Ireland[42], the Isle of Man[43], the plantations[44], and, as since the loss the Duchy of Normandy, they have been considered as annexed to the Crown, in some respects, to Guernsey and Jersey, we may; and formerly, it lay to Calais, which was a conquest, and yielded to the Crown of England by the treaty of Bretigny[45]."

In addition to the Jersey cases of *habeas corpus*, and those relating to Ireland and the Isle of Man referred to in the quotation above, there are other cases where it has been held that *habeas corpus* could issue from the English court to Canada[46], to Bechuanaland protectorate[47], and to Northern Rhodesia[48].

In fact, the (UK) Habeas Corpus Act 1862, enacted following the decision in *Ex p Anderson*[49] that *habeas corpus* could issue to Canada, put an end to much of the extra-territorial *habeas corpus* jurisdiction of the English courts, by enacting that -

"No writ of *habeas corpus* shall issue out of England, by authority of any judge or court of justice therein, into any colony or foreign dominion of the Crown where Her Majesty has a lawfully established court or courts of justice..."

Indeed, there may be a question mark over whether *habeas corpus* can now issue to Jersey at all: it depends whether Jersey is a "colony or foreign dominion of the Crown" within the meaning of the Act[50]. But that need not detain us now, as we are concerned with the *other* prerogative orders.

On this question, Laws LJ in the present case said -

"Here, of course, we are not concerned with *habeas corpus* but with an application for a *certiorari*. I can see no basis for distinguishing between one prerogative writ and other upon the question, what is the reach of this Court's jurisdiction."

Also pertinent on this issue was a dictum of the Court of King's Bench in *Calvin's* case[51], cited with approval by Lord Evershed MR in *Ex p Mwenya*[52], to the effect that -

"The other kind of writs [i.e. prerogative writs] that are mandatory and not remedial, are not tied to any place, but do follow subjection and legiance in what country or nation soever the subject is ..."

R v Cowle[53] itself was a case of *certiorari*, not *habeas corpus*. And in *Ex p Lees*[54], the Court refused a writ of *certiorari* directed to the Supreme Court of St. Helena on the basis, not of lack of jurisdiction, but because it was sought to obtain the writ only in order to obtain a writ of *error*, which could not be obtained without the fiat of the Attorney-General.

There was only one case put to suggest that *certiorari* could not be issued in relation to matters which occurred outside England, and that was *Re Mansergh*.[55] But although some of the judges in that case stated that the Court had no jurisdiction, as it did not appear that the Court had ever sent a *certiorari* beyond the seas, the judges also stated that in any event they would not exercise their discretion in favour of it being sent in that case. In *R v Secretary of State for War*[56], the Divisional Court was asked to grant *certiorari* in respect of a British court martial sitting in Italy. The Court refused to do so on the merits of the case, but Lord Goddard CJ specifically added[57] that he did not regard *Re Mansergh* as deciding that there was no *jurisdiction* to grant *certiorari* in such a case. Curiously enough, that decision does not appear to have been cited in the present case. Of *Re Mansergh*, however, Laws LJ said this -

"The judgments in *Mansergh*, whatever with respect they in fact decide, draw no distinction between *habeas corpus* and the other prerogative writs in relation to jurisdiction."

He concluded:

"No such distinction could in my judgment survive the glare of reason: *habeas corpus* is a high constitutional writ because it protects the individual from unlawful detention; but an order of *certiorari*, whilst not necessarily concerned to secure the freedom of the person, is just as surely provided as a remedy against arbitrary, capricious and oppressive conduct".

The Court in the present case accordingly decided that the court *did* have jurisdiction to issue an order of *certiorari* in respect of overseas administrative or legislative acts. The existence of local courts of competent jurisdiction, able to deal with the matter, merely went to the exercise of *discretion* by the English court in deciding whether or not to exercise its undoubted jurisdiction. As Laws LJ put it -

"There is no authority at all - none in *Mansergh* - for the proposition that the existence of effective local courts negatives the jurisdiction of the Queen's Bench to issue *certiorari* extra territorially. It may be that the reasoning in *Mansergh*, though undoubtedly deploying the language of jurisdiction, is in truth directed to this powerful principle of discretion; at all events one has in mind that in that case their Lordships found very strong reasons why the power to order *certiorari*, if on the facts they possessed it, should not be exercised".

Accordingly, it appears that, under English law, there *is* jurisdiction in the Queen's Bench Division of the High Court to issue any of the prerogative orders of administrative law (except *habeas corpus,* where the 1862 Act applies), in respect of acts and omissions taking place outside England and Wales, in territories which are dominions of the Crown of the United Kingdom, and of course this includes Jersey, Guernsey, the Isle of Man and so on. Of course, the existence of a long established, efficient and independent court system in Jersey[58] and elsewhere means that the chances of the English court exercising this jurisdiction there in this way must be remote in the extreme[59]. And, given a situation in which the Bailiff is no longer the only professional judge of law in the Island, and also the relatively recent institution of the Court of Appeal of Jersey (which means that decisions of the Royal Court can be tested locally before having to be taken to the Privy Council in London), the danger resulting from the nineteenth century concentration of power in the hands of one person has receded, if it has not completely disappeared. Nevertheless, according to English law at least, the jurisdiction remains, and extends to *all* the prerogative orders. The implication for Jersey is that the exception to the Charter of Queen Elizabeth I for "royal right or privilege" may extend rather wider than has hitherto been thought.

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[1] 3 Co Inst 132

[2] See *Jervis on Coroners*, 11th ed 1993, para 1-02

[3] Coroners (Amendment) Act 1926

[4] *Jervis on Coroners*, 11th ed 1993, para 20-02

[5] Eg *AG for the Duchy of Lancaster v G E Overton (Farms) Ltd* [1982] Ch 277

[6] A number of important points were settled only by the decision in *AG for the Duchy of Lancaster v G E Overton (Farms) Ltd* [1982] Ch 277

[7] Section 1(1)(c)

[8] ie designated by the Secretary of State

[9] Section 1(2)

[10] Section 3(3)

[11] Section 8(1)

[12] Approved by the House of Commons on March 18th, 1997, and by the House of Lords on March 20th, 1997

[13] The text is available on the internet at www.britarch.ac.uk/cba/potant10.html

[14] Section 10

[15] There are very few treasure inquests every year, and indeed many - if not most - coroners will go through their whole career without holding one. So they have no opportunity to build up experience, let alone expertise

[16] R & O 156/2000

[17] Current Sentencing Practice, paragraph L3 - 3A01 page 110306

[18] *Ibid*, paragraph L3 - 3B01 page 110307

[19] *Ibid*, paragraph L3 - 3C01 page 110308

[20] [1908] 1Cr.App.R. 172

[21] October 12th, 2000 unreported

[22] *Manuscrits sur la constitution, les lois et les usages de cette Isle, Des Testamens,* Jersey 1846, Tome I,at page 132

[23] Jersey 1953; *Titre VII: Des Testamens* Article 1 at page 56

[24] Page xx, paragraph 20

[25] 4th edition, 1778, Tome I *Des Testamens*

[26] 1987-88 JLR 96

[27] [1975] 3 All ER 1037

[28] [1997] 3 NZLR 635

[29] English translation of the Latin original, taken from the preamble to the Service of Process and Taking of Evidence (Jersey) Law 1960; see also Le Geyt, *Privilèges de l'Isle de Jersey*, para 28, 1953 ed, 8; Le Quesne, *Constitutional History of Jersey*, 1855, Ch VI

[30] *Report of the Commissioners,* xl.

[31] See eg *Re Belson* (1850) 7 Moo PC 114 at 117; Bois, *A Constitutional History of Jersey*, 1972, paras 9/48 - 9/56. See also *Re Gould* (1838) 2 Moo 188 (Privy Council refusal to exercise original jurisdiction)

[32] Emphasis supplied. See also the Charter's special reservation of the Royal Prerogative, set out in English translation in Bois, *op.cit.*, para 8/17, and *Renouf v AG for Jersey* [1936] AC 445 at 462-463

[33] *Crowley's* case (1818) 2 Swan 1 at 48; see also *R v Cowle* (1759) 2 Burr 834 at 856.

[34] See *R v Overton* (1668) 1 Sid 386; *R v Salmon* (1669)2 Keb 450; *Carus Wilson's* case (1845) 7 QB 984; *Re Belson* (1850) 7 Moo PC 114; *Dodd's* case (1858) 2 De G & J 510. The Habeas Corpus Act 1679 and the Habeas Corpus Act 1816 were both clearly intended to apply to Jersey (amongst other places): see s 10 of the former Act, and s 5 of the latter, Le Hérissier, *The Development of the Government of Jersey, 1771-1972*, at 67-68, and Heyting, *The Constitutional Relationship between Jersey and the United Kingdom*, 1977, at 77

[35] Although in *Re Belson*, above, it is clear that the Royal Court was of the view that even *habeas corpus*, being a common law writ, did not run to Jersey (the "royal cognisance" exception to the Charter of Elizabeth not being mentioned): see Bois, *op cit*, para 9/56. On the other hand, the Royal Commissioners into the Civil Laws of Jersey were clear, in 1860, that *habeas corpus* did run to Jersey; indeed, it did so *seven times* in 1858-59: *Report*, xlv. See also the Crown Memorandum in the *Jersey Prison Board* case, paras 58,170

[36] Bac Abr, *Prerogative*, D1; Crown Memorandum in the *Jersey Prison Board* case, para 170: "Prerogative writs run in the Island". See also the *Daniel* case, where the Privy Council concluded that "A pardon by the Sovereign is an exercise of the Royal Prerogative which operates immediately, and requires no further act to make it effectual". Accordingly there could be no privilage of the people of Jersey (eg requiring prior registration of a Royal Warrant by the Royal Court) which could hinder or delay the execution of such exercise: Order in Council, January 12th, 1891

[37] *The Times*,10 November 2000

[38] (1759) 2 Burr 834 at 855 - 856

[39] [The case concerned the jurisdiction of the Court of King's Bench in relation to Berwick-upon-Tweed.]

[40] [Cf *Re Ning Yi-Ching* (1939) 56 TLR 3.]

[41] [See *Re Keenan* [1972] QB 533 at 539.]

[42] [*Anon* (1681) Vent 357; 3 Bl Comm, 17th ed 1830, 44; see now *Re Keenan* [1972] QB 533, CA.]

[43] [*Re Crawford* (1849) 13 QB 613; *Ex p Brown* (1864) 5B&S 280.]

[44] [Jersey has been said not to be "a plantation": *Renouf v AG for Jersey* [1936] AC 445 at 460]

[45] [On which see [1999] 3 JLReview 177 at 183 – 184]

[46] *Ex p Anderson* (1861) 3 E & E 487 (though see per Crompton J in *Re Mansergh* (1861) 1 B & S 400 at 409)

[47] *Ex parte Sekgome* [1910] 2 KB 576, CA

[48] *Ex parte Mwenya* [1960] 1 QB 241, CA

[49] (1861) 3 E & E 487

[50] Jersey is not a "colony" (*Renouf v AG for Jersey* [1936] AC 445 at 460), and is usually described as a *Crown dependency*: see eg the *Report of the Royal Commission on the Constitution*, 1969-1973 (the "Kilbrandon Report"), Vol 1, part XI, para 1347, and the *Review of Financial Regulation in The Crown Dependencies*, Cmnd 4109 (the "Edwards Report"), para 1.1.2; as to "dependency" see *Halsbury's Laws of England*, 4th ed., vol 6, para 802. In *Ex p Brown* (1864) 5 B & S the Isle of Man was held not to be a "colony or foreign dominion" within the Act, and it may be doubted that Jersey would be held to be in a different position. Bois, *op cit*, para 9/64, took the view that Jersey *was* caught by the 1862 Act, but did not refer to *Ex p Brown* or to *Renouf*. See further *R v Home Secretary, ex p O'Brien* [1923] 3 KB 361 at 376 (Irish Free State held "colony" for this purpose)

[51] (1609) 7 Co. Rep. 1 at 20a

[52] [1960] 1 QB 241 at 293

[53] (1759) 2 Burr 834

[54] (1858) EB&E 828

[55] (1861) 1 B&S 400

[56] [1949] 1 KB 1

[57] [1949] 1 KB 1 at 6

[58] Note also the recent introduction, in April 2000, of rules for judicial review proceedings (Royal Court (Amendment No 15) Rules 2000 (R&O 10/2000); Court of Appeal (Civil) (Judicial Review) (Jersey) Rules 2000 (R&O 11/2000), discussed by Le Marquand [2000] 4 JLReview 278

[59] See also *R v Secretary of State for War, ex p Price* [1949] 1 KB 1 at 6, per Lord Goddard CJ; *Re Keenan* [1972] QB 533 at 544