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JERSEY'S CONTRACT LAW: A QUESTION OF IDENTITY?

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Introduction

1 On 2nd July, 2004, I was privileged to attend the Jersey Law Review Conference which was held at the Reform Club in London. The event was organised by the Jersey Law Review as part of the 1204-2004 celebrations and featured an array of stimulating topics relating to Jersey law and its constitutional position. Personally, the most interesting part of the conference was to hear the differing arguments presented by three particular advocates as to the future direction of Jersey and Guernsey contract law.[1] In respect of Jersey, Alan Binnington recommended codification favouring an English approach, whilst John Kelleher urged codification based upon Jersey's existing roots in Norman and French law. Finally, Alison Ozanne, a Guernsey advocate, suggested that Guernsey continue with its existing approach, being to follow Pothier and the *Code Civil*.[2] These speeches built upon the various articles that have been featured in past issues of this Review, and upon the recent valuable research and recommendations of the Jersey Law Commission.[3] This article seeks to explore, in further detail, certain areas that were touched upon in these speeches, and in the interesting panel discussions that followed.

Ignorance of the law

"Lawyers are the only persons in whom ignorance of the law is not punished." [4]

2 The Conference considered how English jurisprudence had taken root in Jersey contract law.[5] It was observed that over a period of several decades, from at least the 1970s, advocates had fallen into one of two camps: those who were prepared to "mine the rich lodes" of Norman and French law[6] and those who were content to agree that Jersey law was the same as English law upon the contractual point in question.[7] Commissioner Page QC indicated that advocates who had appeared before him had all too frequently adopted the latter approach. As a consequence, it was suggested that English contract

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[1] Lord Hoffmann PC chaired the panel of speakers upon this particular topic, entitled "*The Law of Contract: Which Way?*"
[2] See also Robilliard, *The Guernsey law of contract –an explanation*, (1998) 2 JL Review 35.
[3] Consultation Paper, October 2002. Final Report, February 2004.
[4] Jeremy Bentham (1748-1832).
[5] See also Binnington, *Frozen in Aspic? The approach of the Jersey Courts to the roots of the Island's Common Law*, (1997) 1 JL Review 21.
[6] A phrase coined by Commissioner Hamon in *La Motte Garages Limited v Morgan* 1989 JLR 312 at 316. See also *Donnelly v Randalls Vautier Ltd*. 1991 JLR 49 at 57.
[7] See Panel Discussion, Session 2 of the Conference. This approach is illustrated, for example, in *United - Dominions Corp. (C.I.) Limited v Pinglaux* 1969 JJ 1123 at 1137 (terms to be implied in respect of a hire - purchase agreement); *Denny v Hodge* 1971 JJ 1915 at 1924 (quantum of damages for breach of contract.)

law had been adopted upon an *ad hoc* basis and that the law of contract in Jersey had become problematic and inconsistent.[8]

3 Although such criticism of the legal profession appears to be justified it should, however, be seen in its proper context. In particular, it should be noted that the adoption of alien, and sometimes erroneous legal principle in Jersey, is a process with a distinguished and acknowledged pedigree. In 1861, for example, the Report of the Civil Law Commissioners commented upon the influence of the *Coutume Reformée* (c.1585), which, despite having been declared not to be of authority on Jersey law, was, in fact, "frequently used as books of reference". As a consequence, this had led -

> "... to the gradual introduction of much foreign matter, so that what is now practically received as the common law of Jersey, may be described of consisting of the ancient Norman law with subsequent accretions, some of which are mere developments of the earlier customs, and others, interpolations of French law*".*

4 Further, in Le Geyt's[9] *Constitution Lois et Usages*, it was accepted that Jersey, having only a little written law, readily made use of neighbouring systems of customary law. This had led to "fashionable innovations" being introduced in error that, by long usage, had become law.[10]

5 Accordingly, in more recent times, we may at least understand the process by which an advocate has found it easier to reach for one set of books (in this instance, *Chitty on Contracts*, or *Halsbury's Laws*) than to examine the works of an author more relevant to Jersey law, such as Domat or Pothier. This is particularly the case, when the costs of more extensive research may now lead to strictures, not only from one's client, but also from the Court.[11]

Links between English & French law & the significance of Pothier

6 Whilst criticism is made as to the use of English law in this area, it is important not to blind oneself to what similarities do exist between English and French law,[12] and, in particular, to the influence wrought upon English law by Pothier,[13] the celebrated French jurist. Because Pothier is often cited as the "surer guide"[14] to Jersey's contract law, it is argued below that English contract law, used cautiously, can frequently prove both a proper and fertile source of guidance for the Jersey courts.

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[8] See also Kelleher, *The sources of Jersey contract law,* (1999) 3 JL Review 1-21.

[9]Le Geyt was Lieutenant Bailiff of Jersey between 1676 and 1695. In *Godfray v Godfray* (1865) III Moo NS 338, the Privy Council described him as "as high an authority as can be produced on the local law of Jersey."

[10]The relevant extract is conveniently to be found at paragraph 11.14 of *The Origin and Development of Jersey Law, an Outline Guide* by Stéphanie C. Nicolle, QC.

[11]The Court now expects an "overriding objective" to be applied to the conduct of litigation, as is more fully discussed in Hanson, *No legal system is an island, entire of it*self, (2004) 8 JL Review 209.

[12]See further Houard's *Traité sur les Coutumes Anglo-Normandes* (1777), where he argued that English and French Law had an identical basis. However, from the 18th century, England was concerned with setting down the letter of its *coutumes*, whist France, its spirit. See Besnier *La Coutume de Normandie*, 1935, pages 207-208.

[13] Born 1699, died 1772.

[14] See, for example, *HM Viscount v Treanor* (1969) JJ 1243 at 1245; *Selby v Romeril* 1996 JLR 210 at 218. Note the flexibility attached to this phrase by Birt, Deputy Bailiff in *In Re Amy* 2000 JLR at 93-94

7 In this context, all three Conference speakers made specific reference to the 1822 House of Lords case of *Cox v Troy*[15] where Pothier, was described as an authority "as high as can be had, next to a decision of [an English] court of justice". Such similarity between English and French law was otherwise left fairly undeveloped in the Conference speeches.

8 The reference to Pothier in *Cox v Troy* was commented upon in 1890 by Sir Mackenzie Chalmers, in his work entitled *The Sale of Goods* -

> "This statement must obviously be taken with the qualification that it only holds good when Pothier is discussing some principle of general application. The law he was particularly dealing with was French law, as modified by the custom of Orléans, before the *Code Napoléon*."

9 Nevertheless, in a further House of Lords decision in 1883, Pothier's importance was again emphasised, but this time by Lord Blackburn -

> "We constantly in the English Courts, upon the question what is the general law, cite Pothier, and we cite Scotch cases where they happen to be in point; and so in a Scotch case you would cite English decisions, and cite Pothier, or any foreign jurist, provided they bore upon the point."[16]

10 The high regard had by Sir Mackenzie Chalmers for Pothier, however, merits particular note because it was Chalmers who was responsible for the drafting of the Sale of Goods Act 1893 ("the 1893 Act"). Further, notwithstanding the subsequent repeal of this Act, significant parts of the 1893 Act were replicated in the Sale of Goods Act 1979 and, therefore, continue to have force in England today.

11 In Chalmers' 1894 book entitled *The Sale of Goods Act, 1893*, he consistently refers to the importance of Pothier and of the civil law generally. In his introduction, he makes the following acknowledgements -

> "I have …made frequent reference to Pothier's *Traité du Contrat de Vente*. Although published more than a century ago it is probably still the best reasoned treatise on the Law of Sale that has seen the light…The references to the Civil Law need little comment. It is the foundation of Scottish law, and it is an inexhaustible store of legal principles. There is hardly a judgment of importance on the Law of Sale in which reference is not made to the Civil Law. "The Roman Law" says Tindal C.J., "forms no rule binding in itself on the subjects of these realms; but in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it prove to be supported by that law – the fruit of the researches of the most learned men, the

[15] (1822) 5B & Ald. 481.
[16] *M'Lean v Clydesdale Bank* (1883) 9 App. Cas. at p. 105.

collective wisdom of ages, and the groundwork of the municipal law of most of the countries of Europe."[17] My task of reference in this edition has been much facilitated by Dr. Moyle's excellent monograph on the *Contract of Sale in the Civil Law*."[18]

12 As can be seen from the above references, Pothier was an authority in England for some considerable period. Further, a more detailed perusal of Chalmers' book (which contains a detailed commentary upon the 1893 Act) reveals the significant debt that the 1893 Act owed to civil law generally and, more particularly to the works of Pothier. [19] However, by the start of the twentieth century, judicial warning bells were to be heard as to the propriety of the Courts applying such jurisprudence, at least without very careful scrutiny. [20]

13 In more recent times, the English courts have had occasion to examine and develop Pothier's works, in much the same way that the Royal Court in Jersey has sometimes been asked to do.[21] Thus in the recent House of Lords case of *Kleinwort Benson Ltd. v Lincoln City Council*[22] [1999] 2 AC 349 at 368-369, Lord Goff refers to Pothier's view that money paid under a mistake of law is not recoverable upon the basis (as argued by Pothier), that *ignorantia juris non excusat*. (Ignorance of the law is no excuse). In overruling *Bilbie v Lumley*,[23] a decision reached 197 years earlier, the House of Lords thereby held that an action for the recovery of money paid upon the basis of a mistake of law, was in fact justiciable. In so doing, the House of Lords finally parted company with Pothier, whose writings upon this point had been consistent with the law in England for some two centuries previously.

14 Should the same point arise in Jersey, the Royal Court could surely not be criticised if it chose to follow the decision reached in this English case, rather than the 18th century writings of Pothier. Such robust development would be consistent with the approach of the Channel Island courts which are frequently called upon to legislate interstitially.[24]

15 It would, similarly, be interesting to see what approach the Jersey courts would adopt in the event of a dispute arising as to the mistaken identity of one of two contracting parties. In England, Pothier's works that bear upon this subject, have been applied by a number of distinguished judges: Fry J in *Smith v Wheatcroft*,[25] Horridge J in *Phillips v*

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[17] *Acton v Blundell* (1843), 12 M & W, at p.324.
[18] Introduction at pages(vi) to (vii).
[19] For example, the commentary to the very first section of the 1893 Act ("formation of the contract of sale"), contains 3 fairly extensive references to Pothier's works and numerous others to the civil law generally. See also *Benest v Pipon* (1829) 1 Knapp 60 as to the depth of influence that the civil law has had upon English jurisprudence more generally.
[20] See the speech of the Earl of Halsbury LC at [1901] AC 244-245 criticising the application of Roman Law by Collins LJ in the Court below, reported at [1900] 1 QB 629 at 647 to 649. The Earl commented that "our law differs in most important respects from the Roman Law, and to quote the latter as an authority we must shew that it has become part of our own jurisprudence." A similar note of caution was expressed by Southwell, JA in the Jersey case of *Colesberg Hotel (1972) Ltd v Alton Hotel Ltd*. 2003 JLR 176 at para.2 when approaching the law of servitudes. Compare with the approach taken earlier in *Haas v Duquemin* 2002 JLR 27 at 38-40 where reliance upon Roman Law supported the apparent availability of judicial regulation in Jersey property disputes.
[21] See *Selby v Romeril* 1996 JLR 210. See further paragraph 28 – 30 below.
[22] Interestingly, Richard Southwell QC (a judge of Jersey's Court of Appeal) appeared for the appellants.
[23] (1802) 2 East 469.
[24] See for example, *Morton v Paint* [1996] 21 GLJ 61.
[25] (1878) 9 Ch D 223 at 230

Brooks,[26] Viscount Haldane in *Lake v Simmons,*[27] and Tucker J in *Sowler v Potter*.[28] More recently, however, Pothier's views came under heavy fire in a judgement of Lord Denning M R in *Lewis v Averay*[29] -

> "This case therefore raises the question: What is the effect of a mistake by one party as to the identity of the other? It has sometimes been said that if a party makes a mistake as to the identity of the person with whom he is contracting there is no contract, or, if there is a contract, it is a nullity and void, so that no property can pass under it. This has been supported by a reference to the French jurist Pothier; but I have said before, and I repeat now, his statement is no part of English law….Pothier's statement has given rise to such refinements that it is time it was dead and buried altogether."

16 The particular refinements referred to by Lord Denning lay in the artificial distinction between a person's identity and his attributes. As Lord Denning states -

> "A mistake as to identity, it is said, avoids a contract; whereas a mistake as to attributes does not. But this is a distinction without a difference. A man's very name is one of his attributes. It is also a key to his identity. If then he gives a false name, is it a mistake as to his identity? Or a mistake as to his attributes? These fine distinctions do no good to the law."

17 The House of Lords recently had cause to revisit these issues in *Shogun Finance Ltd. v Hudson*,[30] where the law on mistake as to identity was described as "a quagmire".[31] Despite Lord Millett's invitation to the House to bury the doctrine "derived from Pothier",[32] the majority instead perpetuated yet further unsatisfactory distinctions.[33]

18 It is submitted that these English authorities would, inevitably, be of some assistance to any Jersey court in deciding how Pothier's writings might now be best developed. In so concluding, one necessarily acknowledges that English authority retains its relevance to Jersey's contract law, notwithstanding the repeated admonition that Pothier's writings represent a "surer guide".

Dissolving Jersey contracts: Hamon v Webster

19 Whatever the reasons for the recent influence of English jurisprudence in Jersey contract law, it is clear that the arguments have, more recently, centred around how a contract may be resolved or rescinded by reason of the other party's breach. This led, for

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[26] [1919] 2 KB 243
[27] [1927] AC 487, at 501
[28] [1940] 1 KB 271
[29] [1972] 1 QB 198 at 206
[30] [2004] 1 AC 919
[31] Per Lord Millett at paragraph 84.
[32] Paragraph 61.
[33] The House of Lords held it to be of crucial importance whether or not the alleged contract was in writing or formed face-to-face. A contract, albeit voidable, resulted only in the latter instance. Lords Nicholls and Millett dissented.

example, to two opposing articles in the 2000 edition of this Review.[34] In the second Conference speech, criticism was made of the decision reached by the Royal Court in *Hamon v Webster*,[35] that was handed down subsequent to the publication of these articles.

20 In *Hamon v Webster*, the Court had held that, save in certain exceptional circumstances, a party may terminate a contract by reason of the serious breach of contract by the other party and, importantly, without first obtaining the sanction of the Court, as had been suggested in previous authority. This decision finally brought some clarity as to the legal position in this area; uncertainty about which had led to expressions of concern as to the possible damage to the Island's reputation.[36] However, the Conference showed that debate about this issue had not quite disappeared.

21 In the second Conference speech, objection was made to *Hamon v Webster* being an impermissible English approach to the termination of a contract and not one based upon the French *ius commune,* as was applied in the case of *Hotel De France (Jersey) Ltd. v The Chartered Institute of Bankers*[37]. The criticism of the approach taken in *Hamon v Webster* is that it followed the previous cases of *New Guarantee Trust*[38] and *Hanby*[39] but those cases failed to examine the applicable legal rules in any detail.

22 Whatever the validity might be of this criticism, it is interesting to note that there was, in fact, some statutory authority for the approach taken by the Court in *Hamon v Webster.* This was not cited to the Court, and was not examined in the Conference speeches. Such authority can be found in article 11 of the Interpretation (Jersey) Law 1954 which until recently repealed, provided a definition as to the meaning of "warranty" -

> "In every enactment, whether passed before or after the commencement of this Law, the expression "warranty" shall, unless the contrary intention appears, mean an agreement with reference to goods which are the subject of an agreement of sale, but collateral to the main purpose of such agreement, the breach of which gives rise to a claim in damages, but not to a right to reject the goods and treat the agreement as repudiated."

23 This definition was clearly taken by the law draftsman from section 62 of the Sale of Goods Act 1893, being the precursor to the current section 61(1) of the Sale of Goods Act 1979. The definition means that a "warranty" is a minor promise within the contract, and for which the promisor answers strictly, but only in damages.[40] For present purposes, the significance of the definition lies in implicitly acknowledging that there is another form of

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[34]See Le Cocq, *Resolving contracts: The Hotel de France case*, (2000) 4 JL Review 151, and the reply in Kelleher, *Résolution and the Jersey law of contract*, (2000) 4 JL Review 266.
[35]2002 JLR Note 30
[36]Hanson, *Justice in our time: the problem of legislative inaction*, (2002) 6 JL Review pages 74-76. Le Cocq, *Resolving contracts: the Hotel de France case, ibid*.
[37]2002 JLR Note 5
[38] 1977 JJ 71
[39]1966 JJ 225
[40]*Chitty on Contracts*, 28th ed. at paragraph 43-042.

breach, which will ground "a right to reject the goods and treat the agreement as repudiated."

24 *Chitty on Contracts*, 28th ed., expands upon the position at paragraph 43-433 -

> "Where the seller repudiates his obligations under the contract, or commits a fundamental breach of contract or a breach of condition, the buyer may choose to treat the contract as terminated, reject the goods, and sue for damages."

25 According to paragraphs 203 and 218 of Pothier's *Traité du Contrat de Vente*, a *vice rédhibitoire* or hidden defect in the goods, would ordinarily allow the buyer the right to an *action rédhibitoire* whereby the seller can be obliged to take back the goods and to return the price. This is, therefore, very similar to the remedy enjoyed by a purchaser under English law, who ordinarily is permitted the right to reject the goods, and terminate the agreement, on account of the goods not being of "merchantable" (now "satisfactory") quality.[41] The comparison is further strengthened by the fact that under both systems, the purchaser has the additional right to choose to keep the goods and, instead, claim damages only.[42] To this extent, there is considerable similarity between the English and French positions.

26 The main difference, however, lies in the manner in which the contract may be dissolved. Absent the agreement of the parties,[43] Pothier emphasises the importance of the Court's sanction for the irrevocable dissolution of a contract of sale.[44] However, as the above extract from Chitty makes clear, under English law, a party may ordinarily terminate a contract extra-judicially and without the other party's consent.[45] The importance of article 11 of the 1954 Law is that it expressly recognises this latter (English) approach.

27 Although confined to contracts of sale, article 11 of the 1954 Law thus contains much of the principle of repudiatory breach consistent with that which was adopted in the subsequent case of *Hamon v Webster*. (This is probably of little surprise, given that it had been copied from Sale of Goods legislation in England.) It is, however, important not to overstate the significance of article 11, which only provides a definition for the purposes of an enactment: *Hamon v Webster* did not involve an enactment and the relevant contract was not a simple contract for the sale of goods. However, such a definition would have provided important and additional authority, if authority were further needed, for the approach that the Court ultimately adopted in that case. It will be noted that since the decision in *Hamon v Webster,* the definition of "warranty" has been removed in the

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[41]Note the modification to this right in non-consumer cases contained in section 15A of the Sale of Goods Act 1979 as amended. Moreover, in consumer cases, additional rights have now been conferred by virtue of sections 48A-F.

[42]In England, under section 11(2) of the Sale of Goods Act 1979. In France, by means of an "*action estmatoire*". See Pothier, at paragraph 233, *Traité du contrat de vente.*

[43]*Ibid*, Chapter II, paragraph 327 *et seq.*

[44]This is so even where a *pacte commissoire* or contractual term providing for its dissolution, has been satisfied. See paragraph 462, *Ibid.*

[45]Note that under section 48E of the Sale of Goods Act 1979 as amended, the Court now has extensive powers in consumer cases to choose an appropriate remedy. Accordingly, the Court may choose to order the repair of the goods rather than to permit the contract to be rescinded.

amendments to the 1954 Law during 2003, presumably, because such definition was, by that stage, considered otiose.[46]

Development towards the Code Civil

28 The definition of "warranty" is, of course, one further piece of evidence recording the movement in Jersey contract law towards English jurisprudence since, at least, the 1950s. It is, however, important to observe that there have been opposing attempts to develop Jersey's contract law in a different direction and, in particular, towards the French Civil Code. *Selby v Romeril*[47] is particularly important in this respect because, in establishing the essential constituents of a valid contract, the Royal Court decided to develop Pothier's writings and follow article 1108 of the *Code Civil.* Any great enthusiasm for this approach, however, appears to have been quickly dampened by the Court of Appeal's note of caution in *Public Services Committee v Maynard.*[48] The Royal Court's decision in *Mendonca v Le Boutillier*[49] to the effect that article 2279 of the French Civil Code ("*en fait de meubles, possession vaut titre*") was not part of Jersey law (and, in fact, never had been) soon appeared to justify the Court of Appeal's concerns as to the use that should be made of the *Code Civil*.

29 Whilst dealing primarily with Guernsey contract law, the third conference speaker argued for greater reliance to be placed upon the *Code Civil.* That argument was further developed by Gordon Dawes in the last issue of this Review.[50] Whilst greater exploration of the *Code Civil* is something that should be encouraged, it is notable that the limited excursions into this area have already posed some difficulties. In *Selby v Romeril*, for instance, the Court had to deal with the position where one of the essential constituents in a contract was absent. Whilst the Court found (properly) that the contract was, therefore, "null" the Court appeared to go on and approve the distinction which exists in French law between defects in a contract that would render the contract an absolute nullity (*nullité absolue*) with those that would render it a relative nullity (*nullité relative*).[51] According to such theory, for example, the lack of one of the essential elements enshrined in article 1108 of the *Code Civil* would lead to the contract being an absolute nullity whereas a *vice du consentement*, namely, mistake (*erreur*), duress (*violence*) or fraud (*dol*) would render the contract a relative nullity. In either event, however, the contract would be *void ab initio*. Otherwise, French law treats each of the types of nullity differently, *inter alia*, by applying separate prescriptive periods to any resulting *action en nullité.* A number of subsidiary rules are of further relevance in this context, notably by protecting the interests of third parties, such as "*en fait de meubles, possession vaut titre*" which, as we have seen, is not part of Jersey law.

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[46] No sale of goods legislation has ever been introduced, although drafting is in progress.
[47] 1996 JLR 210
[48] 1996 JLR 343 at 350-351
[49] 1997 JLR 142
[50] Dawes, *From custom to code – the usefulness of the Code Civil in contemporary Guernsey jurisprudence,* (2004) 8 JL Review 255.
[51] *Ibid*. at pages 219-220.

30 The danger with *Selby v Romeril* is that the distinction between a nullity that is "absolute" or "relative" is something that appears not to have been considered in any other Jersey reported case. Indeed, all other recent Jersey authority defines nullity in terms of contracts that are either void *ab initio* or merely voidable.[52] Given, further, the apparent absence in Jersey law of differing prescriptive periods for an absolute or relative nullity, and the further lack of other relevant rules, Jersey would appear to be ill equipped to adopt such concepts even if it chose to develop the *dicta* in *Selby v Romeril.* The classification of *nullité absolue* and *nullité relative* has, so far, only received further recognition by being included in the syllabus to the current Jersey legal examinations.

The need for reform: the "broken system"

31 The movement of Jersey's contract law towards English law has been noted above. This, however, is now poised to advance dramatically to the extent that the Law Commission's final report is accepted. In February, 2004, *Topic Report No. 10* was published and recommends that Jersey adopts a statute based upon English law, namely, the Indian Contract Act 1872.

32 Whatever criticisms may be made of the English approach taken in *Hamon v Webster* or, indeed will be made of the recommendation of the Law Commission, it is clear that the Jersey law of contract is in urgent need of reform and clarification. Such a conclusion is clear from the Commission's consultation paper and from its final report. It was further apparent from the Conference speeches and, ultimately, was encapsulated in a few comments by Professor Sir James Holt[53] during the course of the Conference:

> "I approach matters very much upon the basis that "if it ain't broke, don't fix it" but having listened to the speeches and comments today on Jersey contract: you're broke alright."

Fears as to identity

33 The recent Law Commission's proposal comes at a significant time, in the midst of Jersey's 800 years' of autonomy celebrations, where notions of "identity" find regular expression. It is inevitable, therefore, that the recommendation that Jersey law ought to be developed towards an English model, will be disconcerting to a number of people. During the Conference, the second and third speakers, certainly appealed to notions of "identity" in arguing for the maintenance of laws that were different to other jurisdictions

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[52]*Vibert v Vibert* (1890) 48 H. 462 (contract void *ab initio* where party deprived of mental faculties); *Valpy, Curator of Warren v Channing* (1946) 50 H. 290 (contract declared "*nul ab initio et non avenu*" upon comparable grounds); *Le Jeune v Le Jeune* (1900) 49 H. 182 (*Table des Decisions* refers to "*la nullité ab initio"*); *Simon v Page* (1905) 49 H. 279 (contract to sell future interest in parents' estate was "*cassable et annullable*"); *Jackson v Jackson* (1965) JJ 463 (time cannot cure a contract that is "*nul*"); *Deacon v Bower* (1978) JJ 39 at 49-50 (contract passed during a *remise des biens* is voidable only: "It is clear …that the Royal Court has distinguished between a case where a contract is void *ab initio* and one which is merely voidable".); *Ferbrache v Bisson* (1981) JJ 103 (contract passed under duress was void *ab initio*: query, however, whether contract ought to have been declared to be voidable only.) ; See also Le Geyt *Constitutions, Lois et Usage*, Tome 1, page 118 *et seq* where a similar distinction is made.

[53]Co-author of "*Jersey 1204*".

and that preserve our Norman French roots.[54] To the extent that locally qualified lawyers may express such fears, they must be alive to the obvious danger that, having invested heavily in the existing order of things, it would be easy to fall into the trap of confusing personal preferences[55] with the perceived public benefits of the *status quo*. It is, for example, immediately noticeable that despite Jersey having followed England for many years in the law of tort,[56] and longer still in relation to criminal law,[57] Jersey has not suddenly lost its sense of "identity" and no public outcry has ensued.

34 In reality, the ordinary person cares little whether or not the purchase of his fish and chips is governed by the French *ius commune,* or whether English jurisprudence has any proper role in such a transaction. These issues are at such an esoteric level, that it is simply fallacious to argue that they have any relevance to the average Channel Islander's sense of "identity". In fact, the average consumer is often misled into believing that s/he shares exactly the same contractual rights as consumers in the UK[58] and is often upset to find out that the position in Jersey is far less advantageous.

35 This was well illustrated by the *désastre* (or bankruptcy) of Five Oaks Garage (Jersey) Limited during December 2003, when various purchasers of vehicles found finance companies claiming title to the vehicles. The finance companies alleged that these vehicles were, unbeknown to the purchasers, owned by them pursuant to certain finance agreements that had earlier been entered into with Five Oaks Garage (Jersey) Limited. The absence of any protective provisions comparable to the English Consumer Credit Act 1974,[59] placed these Channel Islands' consumers at a significant disadvantage.[60] Any notion of "identity" in having a different system to England would have been cold comfort to the aggrieved consumers concerned.

36 It is important, however, to pause so as to ensure that one does not confuse two related but different issues: (i) the need to update Jersey law and (ii) the direction and form that such development should take. There seems to be broad consensus upon the need for the development of Jersey law, but it is the latter issue that is proving to be more controversial. This article is merely arguing that great care is required in saying that, in the 21st century, a Jersey person's sense of "identity" requires the Island either to have

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[54]Reference was, for instance, made by the second speaker to a quotation from Victor Hugo (1802 – 1885): "Jerseymen…are certainly not English without wanting to be, but they are French without knowing it." It is poignant to note, however, that a century later, the Jersey author GR Balleine described Jersey as "intensely un-English, yet even more intensely anti-French." Quoted by R Le Masurier in *Le Droit de L'Ile de Jersey*, 1956, at page 333.

[55]As Eric Hoffer (1902-1983) noted: "In a time of drastic change, it is the learners who inherit the future. The learned usually find themselves equipped to live in a world that no longer exists."

[56]*Picot v Crills* 1995 JLR 33.

[57]See *Report of the Criminal Law Commissioners*, 1847; *Foster v Att. Gen* 1992 JLR 6.

[58]Hanson, *Justice in our time: the problem of legislative inaction* (2002) 6 JL Review 64 at 68. See also Boleat *Review of Consumer Protection in Jersey*, as to the trade between Jersey and the UK and the influence of UK legal requirements upon goods imported into Jersey.

[59]Part III of the Hire Purchase Act 1964, recently incorporated into the Consumer Credit Act 1974 sets out the circumstances where a private purchaser may obtain title to a vehicle notwithstanding the fact that it was sold whilst subject to a hire purchase agreement. Note, however, that the decision in *Kleinwort Benson*, *Ibid*, has diluted protection given by the 1964 Act. See also art. 2279 of the *Code Civil*. Contrast these provisions with *Mendonca v Le Boutillier* 1997 JLR 142.

[60]*Jersey Evening Post*, 20th December, page11; 29th December, 2003, page 29.

laws that are wholly different to England, or laws that are guided by Norman or French law.

37 Whilst the second and third Conference speakers argued against an English framework for the future development of Jersey contract law, and in part, cited Jersey's loss of "identity" as a probable consequence, it is interesting to note the comments of the second speaker in an earlier article featured in this Review -

> "It is a popular misconception amongst the public (not surprisingly) that the law of contract in Jersey derives from English law."[61]

38 As has been suggested above, the public perception is that Jersey contract law is English in nature. To that extent, there can be little force in the argument that the Law Commission's recommendation will suddenly lead to a loss in Jersey's "identity." By the second speaker's own previous comments, which are respectfully endorsed here, the public, in modern times, have never identified with a contract law that is distinctively Jersey, in any event.[62]

Conclusion

39 Our laws should be tested against the yardstick of whether or not they represent the most effective tool that can be used in practice. Just as we expect to receive effective and up to date medical treatment in the event of illness, we should expect our laws to cater for the particular demands and disputes of our modern, dynamic society. Only once we have identified such laws, should other notions, such as "identity", play any role, if at all. Upon this basis, the enactment of laws in the French language - being a foreign language to the majority of the population - or worse still, the retention of the current custom whereby conveyances of land have to be passed in archaic French,[63] would fare poorly against this test, being largely inaccessible to the vast majority of inhabitants in the Island. We should be proud of our Norman roots, but prouder still of a legal system that is effective now in the 21st century.

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[61]Kelleher *The sources of Jersey contract law*, (1999) 3 JL Review 17.

[62]I have not been so presumptuous as to venture an opinion as to the position in Guernsey but it would be interesting to test the third conference speaker's contention that if one were to ask a Guernseyman on the street what it is to be a Guernseyman, the answer would inevitably be "…we have customary laws and our advocates go to Caen." See Panel Discussion 2.

[63]Whilst there is no legal requirement for conveyances to be in French at all, no legal practitioner has yet dared, alternatively, succeeded, in challenging the existing practice. See Falle, *The structure of a pro forma Jersey conveyance* (2004) 8 JL Review page 156 for an excellent introduction to the current system. Note the apparent acceptance in the introduction to this article that only a tiny minority of Islanders (possibly lawyers?) will have any understanding of this important contract. Note further at paragraphs 40, 41-42 the variety of terms utilised that even the *intelligentsia* are either unable to explain or which are simply accepted as being incorrect. See also Kelleher, *The Effect of the Fourniture and Garantie Clause in an hereditary contract* (1997) 1 JL Review page 37 as to the apparent conflict between the "*fourniture et garantie*" clause with the "*vice caché*" clause despite which, no amendment to the standard conveyance has yet been adopted. See also the Jersey Law Commission Report 2002 on this subject; and Crill, *2004 - what better time to change our conveyancing system*, Business Brief, January, 2004 page 33.

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40 Currently, the general public have not involved themselves in the present debate and it is unlikely that they will do so. We perhaps should have some sympathy for this indifference: the current legal confusion is not of the public's making and the average Channel Islander's sense of "identity" would appear to depend little, if at all, upon prevailing principles of old Norman or French law.

41 There is a further, more fundamental problem with the current debate being conducted (as it largely is) by the legal profession: we are considering important issues as to the development of our law with too little regard as to other aspects of Island life. It is true that the debate has taken account of the fact that the Island is now predominantly English speaking, and that its major trade is currently with the UK. However, the legal profession is arguably not well equipped to examine future Island life: this is more a matter for the States of Jersey. For instance, in England, there are currently proposals to abolish GCSE, AS and A2 examinations and replace them with a new 14-19 Curriculum in which French will no longer be a core subject and compulsory to age 16. At the time of writing, it is uncertain, whether such proposals will be adopted in Jersey. If they are, this could have a further deleterious effect upon Islanders' knowledge of the French language and culture and, therefore, be of real significance in the current debate.

42 Similarly, the possible creation of a school of law in Jersey for aspiring advocates or solicitors, could be of significance in the current debate in that it might prove capable of supplying the academic thought and writings necessary to drive an independent and effective legal system. Such academic works could mean that Jersey looks more to itself than to other jurisdictions for its inspiration.

43 We are now engaged in a significant period of Jersey's evolution, where major change looks inevitable. We should not be fearful of such change but see it as a challenge and an opportunity, not as some threat. Whatever decision is ultimately made upon the Law Commission's Report, reform is universally accepted as being required. Any reform ought to be implemented, it is submitted, as swiftly as possible. If not, further uncertainty and confusion will persist to the prejudice of all.

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