

Jersey & Guernsey Law Review – June 2010

THE CUSTOMARY LAW IN RELATION TO THE FORESHORE (2)

Richard Falle and John Kelleher

The second part of an extended article on the customary law in relation to the foreshore. The first part of the article (June 2008 edition) focussed on the connection between continental Normandy and the Islands, through their shared custom, in relation to the law as to the foreshore. It argued that according to the custom the foreshore was presumed to be parcel of the adjacent terra firma and accordingly parcel of a maritime fief. It concluded that the Duke of Normandy had no general claim to the foreshore and, barring certain limited ducal privileges, it formed part of the seigneurial regime and its ownership lay in private hands. The second article focuses on custom and practice in Jersey from 1204 to the present day to illustrate the law and use of the foreshore. The article reviews a range of evidence from the records of individual fiefs, 13th century enquiries undertaken in Jersey on behalf of the Crown, disputes over the foreshore, the views of customary writers and use of the foreshore ranging from varech, vraic, essiage, pescheries and the collection of salt. It also examines the changing attitude of the Crown to ownership of foreshore in Jersey and the genesis of the Crown's claim to it. It concludes with the case of Les Pas Holdings Ltd and its claim to a private title in a significant part of the St. Helier seafront.

Introduction

1 In the first part of this article we demonstrated a close connection between continental Normandy and the Islands through their shared custom.¹ According to that custom the foreshore was presumed to be parcel of the adjacent *terra firma* and accordingly parcel of the maritime fief. We examined the origins of the Norman Duchy and reached the conclusion, supported by historians such as Delisle,² du Pont³ and Bottin⁴ and the evidence of many contemporary records, that save in the matter of his overriding feudal jurisdiction and certain limited ducal privileges e.g. in the matter of wreck, the Duke had no general claim to the foreshore. We, for our part, found no evidence either of an original title by the French Crown to the foreshores of Normandy. Indeed, it appeared that the French king prior to 1204 held no land in the Duchy. He had been suzerain not sovereign. Moreover, although novel claims were in the event made by Francis I onwards to the foreshores of Normandy, it is clear that the post medieval decrees of a foreign king could have had no effect on feudal titles in the Islands.

2 It is our thesis that English kings after 1204 could likewise claim no greater title in the Islands than their predecessor dukes had enjoyed and we further contend that this

¹(2008) 12 *J&G L Rev* 158, at para 4 *et seq.*

²Delisle, *Etudes sur la Condition de la Classe Agricole et l'état de l'agriculture en Normandie au Moyen Age* (Paris, 1903).

³du Pont, *Histoire du Cotentin et de ses Iles* (Caen, 1870).

⁴Bottin, *Domaine Maritime au XI^e, XII^e, XIII^e et XIV^e Siècles sur le Littoral Normand etc* (St Lo, 1868).

proposition would hold true into modern times despite the Islands' long association with England and the English Crown. To support our case we shall, so far as may be relevant, review the changing attitudes of successive English kings towards the Islands in the 13th and 14th centuries and later as they sought to identify the extent of their ducal inheritance. We shall consider a long series of cases before the Jersey Court and the Privy Council which recognise and confirm the force of Norman Custom.⁵ We shall also consider, albeit in barest outline, the divergent path taken by the courts in England and in other parts of the British Isles in relation to foreshore law. It is our case that such development occurred in a jurisprudential milieu increasingly alien to that of the Islands and consequently that English Law concerning the foreshore now differs from that of the Islands and, in particular, of Jersey.

3 Inevitably, because our knowledge of the historical records in other Channel Islands is weak, we concentrate on those concerning Jersey. These show that despite the English connection, custom and practice in Jersey in relation to the foreshore remained remarkably unchanged into the modern era.

After 1204, a new relationship with the English Crown

4 Although 1204 is generally considered to be the critical date for King John's loss of Normandy, the fate of the Islands was not settled in that year. John had lost possession of the Duchy. His legal title was in issue and the nature of that title, whether based on inheritance or conquest in 1204, would be relevant to those who held their own land from John and his successor kings. But the struggle for the Islands was not over. Everard and Holt tell us⁶—

“In proceedings before royal justices in Jersey in 1309, sworn evidence was given that:

A certain king of France disinherited the Lord John, formerly King of England, of the Duchy of Normandy and then the King of France on two occasions ejected the said Lord John the King from these islands and occupied them as annexed to the said duchy. And the said Lord John the King with armed force on two occasions reconquered these islands from the said King of France. And from that his said second conquest he and his posterity kings of England have held these islands up to the present.”

5 Everard and Holt agree that other evidence supports this narrative—

“King John's representatives were ‘ejected’ from the Channel Islands by the rival Capetian forces twice, first in 1204 and a second time in 1216. On both occasions,

⁵For a modern reflection of the Privy Council's recognition and confirmation of the force of custom see *Snell v Beadle* [2001] JLR 118 PC, a case in which the authors appeared for the respondent.

⁶Everard & Holt, *Jersey 1204: The Forging of an Island Community* (Thames & Hudson, 2004), at 11–12.

the Plantagenets successfully counter attacked and re-conquered the Islands within a matter of months.”

6 In the Assise Rolls of 1309 the representatives of the king would claim that John’s title to the Islands was rooted in conquest, a claim which, if true, would have put the men of the Isles and their titles on the same footing as those in England after the Conquest in 1066.⁷ But John had not conquered the Islands, just as seven centuries later, the Islanders were not “conquered” by the allied forces in 1945. Some would say rather that in each case they were liberated from an alien oppressor. The men of the Isles certainly never thought of themselves as a conquered people. Indeed, it was not on that basis that John and his son Henry III treated the Islanders in the decades that immediately followed the loss of Normandy. Loyalty was rewarded and secured not by conquest, but by the grant of privileges and the confirmation of customary rights.⁸ Perception of those events would, however, later change. We see in the Assise of 1309, an early attempt by English common lawyers to argue that John’s “conquest” had interrupted the continuity of custom and thereby, the Islanders’ title to their land.

7 We find our contention supported by two important documents which form part of a series of Royal Letters in the early 13th century giving directions to the Warden of the Isles—

(a) In 1226, a “Letter” from Henry III of England⁹ directs the Warden Richard de Grey—

“... according to the same franchises and free customs [he] deal with the good subjects of the Lord King in Jersey, Guernsey and the other Islands to which the Lord the King has confided the guardianship; customs which have governed them from the time of the King Henry grandfather of the Lord the King, of King Richard his uncle and of King John his father until the declaration of war *etc* ...”;

(b) On the same day Henry issued a further order¹⁰ to Richard de Grey—

“That according to the Customs of the Isle of Jersey full justice [jurisdiction] be rendered to Enguerand de Furnet on the subject of the wreck of the sea which he is entitled to have on his manor of Rosel (“*apud manerium*”) of which according to his complaint, Geoffroy de Lucy has dispossessed him ...”

This is clear and unambiguous both as to custom and title. Here is a royal direction that the men of the Islands should be allowed to continue to enjoy their ancestral custom and this notwithstanding the transfer of the seat of authority from the

⁷Vide Part 1, paras 8–10.

⁸The foundation of their autonomy was the “Constitutions of King John” granted in c1248. The “Constitutions” remain a vexed subject for historians. See Everard & Holt, *op cit*, at 109.

⁹*Letters Closes Henri III*, Public Record Office, London.

¹⁰*Idem*.

Norman Exchequer to the King's Council in England. The Islands would not live according to English Law.¹¹ John's recovery of the Islands from Philip Augustus would therefore not disturb the basis of Custom and, in particular, title to land. Significantly, we find here no hint of a claim to an original Crown title by conquest. In relation to the particular matter of wreck, the key words in Henry's second letter are "*quod secundum consuetudines insule de Geresei plenam justiciam* [which according to the Custom of the Island of Jersey, full jurisdiction] *quod habere debet apud manerium suum* [which he is entitled to have on his manor]". This showed—

(i) that de Furnet was entitled to wreck with jurisdiction ("*plenum justiciam*") to adjudicate it. The right existed not in virtue of a royal grant, but by Custom; and

(ii) that he would take possession of the wreck "*apud manerium*" [on the manor] of Rosel; varech was an incident of the fief and exercisable only within the strictly territorial jurisdiction of a Seigneurial court.

8 The direction to the Warden in 1226 was consistent with Custom. In the words of Philippe Le Geyt—

"La Coustume de Normandie en fait un Droit Féodal".¹²

That is to say, it was according to Norman custom a right arising from and attaching to ownership of land.

9 It is significant that Henry III had so early confirmed that Norman Custom would continue to govern the Islands. Everard and Holt state¹³—

"... throughout the 12th century the Law of England was developing its own uniform set of principles, the 'common law' of the Royal Courts. After 1204, it would have been possible for the common law of England to have been extended to apply to the Channel Islands. This did not occur, being neither practical nor desirable. To have replaced the well-known customary law of Normandy with the embryonic common law of England would have caused disruption and uncertainty amongst the Islanders ... Convergence in law with England was not desirable because King John and Henry III after him anticipated that one day Normandy would be restored to Plantagenet rule, in which case the Channel Islands would have resumed their historical status as part of the Duchy of Normandy. It was therefore preferable for their legal system to remain harmonious with that of Normandy. The 'Coûtume de Normandie' remained the law of Jersey ..."

¹¹The notion of a uniform system of law was, in any event, alien to the Plantagenets. The Angevins had ruled over an Empire which contained a great number of discrete systems of law and custom. Henry III, who still retained Gascony, was no exception.

¹²Le Geyt, *Manuscrits sur la Constitution, les Lois, et les Usages de cette Ile*, Volume I, *du Varech*, at 340.

¹³*Op cit*, at 156.

Enquestes & extentes¹⁴

10 Despite such confirmation to the men of the Islands of their custom and judicial institutions, various enquiries in the Islands (1230, 1233, 1247/1248) were made by the Crown to identify and establish Royal revenues and other rights. The king had considerable land holdings in the Islands all right of the Norman Duchy. In 1274 Edward I appointed commissioners to make “*extentes*” (surveys and inventories) of his estate. The *Extentes* followed a form widely used in England and elsewhere in the king’s dominions.

11 The articles of appointment in 1274 charge the Commissioners, Messrs Wyger and de Broghton, with the preparation of a full and exact list of the king’s properties in the Islands including his “*droits et ... franchises tant par terre que par mer*” [rights and franchises both on land and on sea].¹⁵ The resulting *Extente* of 1274 and the related Inquisitions provide insight into various customs including, in relation to foreshore, varech and *esperquerie*. Given the particularity of the articles of appointment and the authority of the resulting record, it is of the highest importance to our argument to note that neither in this nor in any of the later *Extentes* is there any evidence of a general Crown claim to the foreshore of the Islands. Indeed the texts all invite the conclusion that no such claim existed.

12 First, the Commissioners took a statement of the king’s feudal rights in the Island from the Grand Jury (*Grande Enquête*) which included (in translation)—

“... of franchises they say that the Lord the King has the wreck of the sea on his own lands and the visitation of wrecks which come on the shores on the lands of others ... before any of the Seigneurs ... because in the case of every wreck wherever it may come to shore the things underwritten belong to the Crown that is to say gold *etc.*”¹⁶

This record of the *Grande Enquête* clearly distinguishes the land of the king (“*ses propres terres*”) from the land belonging to others (“*les terres d’autrui*”). In each case the land concerned is self-evidently foreshore. It is the land on which the varechs “*arrivent*”.¹⁷ The king had, however, an overlapping royal jurisdiction which extended over the lands of others and to which he was entitled in right of the Norman ducal title. The inference is clear: the king claimed the foreshore only on his own fiefs; the king recognised the title of other seigneurs in the foreshore on theirs.

Esperquerie

¹⁴For a description of these enquiries see Le Patourel, *Medieval Administration of the Channel Islands* (OUP 1937), at 12–15.

¹⁵This formula was often used to indicate rights over the foreshore.

¹⁶“*Item, des franchises disent que le sire le Roi a Varech de mer sur ses propres terres, et la visite des Varechs qui arrivent sur les terres d’autrui avant qu’aucun des Seigneurs n’y mette la main parceque de chaque Varech partout où il peut arriver, les choses sous-écrites appartiennent au Roi, savoir l’or, etc.*”

¹⁷We explored the significant etymology of the verb “*arriver*” in Part I, para 44 and fn 42.

13 *Esperquerie* was a feudal monopoly enjoyed by a Seigneur over the fish (congers) caught in the sea and landed by his men on the fief. The monopoly consisted of a pre-emptive right over the catch which enabled the Seigneur to acquire the fish against payment of a fair market price.

14 The Jurors in the *Grande Enquête* of 1274 deposed (in translation)—

“That the king has *esperqueries* over all his land and all the franchises which are due to the king.”

The king thus had this monopoly but only in respect of his own lands.

15 Other Inquisitions in 1274 were held in the parishes. The sworn evidence of twelve of the principal men of the parish records not only the properties and revenues of the king, but also the privileges claimed by individuals and challenged as potentially encroaching upon the Royal domain. One Regnault, for example, was called “... à répondre par quel droit il a prélevé l'*esperquerie* dans le port de l'*estac*” [by what right he has taken the *esperquerie* within the port of l'*Estacq*]. It is significant that the right is described as being exercised “within the port of L'*Estacq*”. The Jurors are recorded as saying (in translation)—

“... several persons had erected *esperqueries* on their lands without the licence of the king, that is to say the Abbot of Belosanne in the port of Waletremble, the heirs of William de Chesney in the port of Bonenuit, John de Cartret in the port of Lek, Guillaume de Maugres in the port Rocell, Geoffroy de Cheney in the port of Boley and because it had seemed uncertain to the deponents whether it be permitted to have *esperqueries* of this kind and farm it without the licence and authority of the king, the issue should not be addressed until the will of the king and his Council be known.”

16 The location of each *esperquerie* mentioned above was within a port, a protected bay and the natural landing place on the fief for the fishermen tenants of the Seigneur. Significantly, the Jurors questioned only the monopoly. The ownership of the land or foreshore on which the *esperquerie* was in each case levied, was not in issue. Indeed, the Jurors admit that the rights of *esperquerie* claimed by the landowners were exercised on their own land viz the foreshore.

17 These matters were considered by Brenda Bolton in a thesis entitled “*The Esperqueries of the Channel Islands and their Analogues*”.¹⁸ Bolton concluded that *esperquerie* meant two things—

(i) a *banalité* or monopoly enjoyed by a Seigneur over his tenants' catch of fish; and

¹⁸Bolton, *The Esperqueries of the Channel Islands and their Analogues*, unpublished MA Thesis, Leeds, 1962, published in *Report and Transactions of La Société Guernesaise*, 1969. Bolton's research was done under the celebrated medieval historian, Professor John Le Patourel, himself a Guernseyman.

(ii) the facility itself, that is to say the area set aside by the Seigneur on his land together with the tressels or poles erected on it for drying the fish and for levying the feudal custom.

18 Bolton does not herself address the issue of foreshore ownership. The clear inference to be drawn from her text, however, is that *esperquerie* was a Seigneurial right incidental to the ownership of the foreshore. On the question of location, Bolton states—

“In only a few cases can the exact or even approximate location of an *esperquerie* be given or identified ... The *esperqueries* along the rocky western coast [of Guernsey] were less profitable than those in the north of the Island where there were considerable areas of sand along the shore and where the erection of a structure would be easier.”

We have noted earlier that Poingdestre was also in no doubt as to the intimate connection between the ownership of the foreshore and the feudal monopoly of *esperquerie*.¹⁹

19 The precise location of the *esperquerie* may not have been crucial, provided it fell within the jurisdiction of the fief and was proximate to the place where the Seigneur’s tenants landed their catches. The evidence seems to point to a place on the foreshore near or at high tide level where the Seigneur would have been entitled to place his “*perques*” (poles or tressels), by fixing or driving them into the sand, gravel, grave, or gravage of the fief above high tide level.

20 We have discussed in Part I how Seigneurial possession and territorial jurisdiction were intimately connected in feudal law. Thus *choses gaives* were included with varech in art 194 of the *Coûtume Reformée* because the *chose gaive*, like varech, was within the Seigneur’s possession on his fief. In the same way the right to varech crystallised when the object came onto the foreshore.

21 The evidence suggests that the *esperqueries* were of considerable value. The feudal monopoly in some cases, particularly on Crown fiefs, was farmed to Gascon merchants who traded in dried and salted fish. The Quo Warranto Rolls of 1299 and 1309 show that the Seigneurs continued to claim *esperqueries* on their maritime fiefs, as also other rights such as varech and *choses gaives* on the foreshore, all of which they claimed to have enjoyed from time immemorial.

The lands of the monastic houses

22 As we have previously noted the Norman monastic houses continued to hold and enjoy their fiefs in the Islands after the separation of 1204 and were only dispossessed in

¹⁹Part 1, para 89 (in translation) “... it is not yet three hundred years since all the principal fiefs possessing foreshore had the right of *esperquerie* ... etc”.

the grand seizure of the Alien Priories in the 15th century.²⁰ In the years between, the relationship between the English kings and the Norman monks was not always easy. Because theirs was not a military tenure, the question for the monks was less acute than for other Seigneurs with estates both in the Islands and continental Normandy. The warring Kings of France and England could not, in theory, demand temporal help from spiritual land owners. Relations between the English Kings and the Norman monks were however not always easy.

23 Initially all was sweetness and light. For example, in 1218 the Warden of the Isles, Philip D'Aubigny, restored by charter²¹ to the monks of Mont St Michel—

“... omnia jura sua in insula Jersoi in terra et in mari, videlicet wereckum suum per totam terram suam ...”

[... all his rights in the Island of Jersey on land and sea, that is to say, wreck over all his land ...]

This document not only tells us about relations between the King and Abbot, it also tells us something important as to the extent of about the latter's property. The words quoted admit in our opinion of one construction only: that the Abbot's rights "*in terra et in mari*" were rights based upon foreshore ownership and control; they included wreck to be enjoyed on the Abbot's foreshore.

The priory of St Clement

24 In 1254 we find Henry III writing a letter²² to the Guardian of the Isles asking for an enquiry to be made into the right of varech enjoyed by the monks. The enquiry would extend to all their land in Jersey including the land of Noirmont in the west and the fief of the Prior of St Clement in the south-east. The enquiry would also reveal the relevant customs. The Jurors reported that the abbot in the time of King John and of Henry the King's son was entitled "to take wreck over the whole of the land which he had in the Island of Jersey except those things which pertained to the prince ...". Shortly after, in 1260, we find significant record, a letter from Edward (later Edward I), Lord of the Isles.²³ It is addressed to all the dignitaries of the Isles confirming the monks of Mont St Michel in the enjoyment *inter alia* of "varech" (in translation) "on all their land in Jersey except that on their land in St Clement." This would be reserved to the king. The language is significant. It presupposes the ownership of the foreshore in the monks and separates the franchise of wreck from ownership of land.

²⁰Part 1, para 89. The security of the Abbot of Mont St Michel's estate in Jersey would nonetheless weaken in the two centuries following the loss of Normandy as relations with the English kings deteriorated.

²¹*Cartulaire des Iles Normandes Recueil de Documents etc Conservés aux Archives du Département de la Manche et du Calvados, de la Bibliothèque Nationale, du Bureau des Rôles, du Château de Warwick, etc. Société Jersiaise, Jersey 1924 No 14, at 25 (Jersey 1924).*

²²*Cartulaire* (No 15).

²³*Vide Cartulaire* (No 16).

25 In 1307 there is a further declaration by Edward confirming the right of the abbot to farm out his *esperquerie*, perhaps to those Gascon merchants mentioned above. The point to be made here as before, is that this particular franchise (as we saw in the case of wreck above) could also be separated from the property in the underlying soil. The inference here further supports our central contention that the property enjoyed by the Seigneur was not merely a bundle of franchises but *ius in solo*, the soil itself.

26 Notwithstanding the earlier Charter of Philip d'Aubigny and the letter of Edward in 1260 mentioned above, the Abbot of Mont St Michel would in 1331, by Writ of Quo Warranto be summoned before the King's Justices sitting in Jersey to show his title, *inter alia*, to wreck at Noirmont. And subsequently, in 1415, early in his campaign for the Crown of France, Henry V, King of England, confiscated all the lands of the alien Priors in the Islands. Noirmont and its appurtenances, including the right to wreck, would thenceforth be in the possession of the king.

The Writ of Quo Warranto

27 In addition to the *Extentes* there were other commissions from the king to enquire into the rights, liberties and franchises claimed by the Islanders. The principal enquiry was instituted by the Writ of Quo Warranto. This writ was not exclusively directed to the Channel Islands. Indeed, such enquiries were made throughout the king's dominions during the reigns of Edwards I, II and III. As Maurice Powicke explains²⁴—

“The Writ Quo Warranto itself gave an opportunity to the tenant of a franchise: he could prove his claim and reply to the challenge which the Royal Writ contained. Indeed it came to be regarded as a Writ of Right. In course of time it was held that a judgment in favour of a defendant foreclosed the Crown forever.”

28 In the Quo Warrantos, as we shall see, the King's Attorney ignored customary title. He demanded the production of a Royal Grant. Here was an attempt to restore privileges and franchises over and in the lands of others which were said to have been unlawfully taken from the king. Had the Attorney quite forgotten customary rights which only a few years earlier (*supra*) had been recognised and enforced by the king?

29 The problems of proof and title were never clearly resolved in the Islands. We have found no final judgments in the Quo Warranto Rolls in relation to those whose rights were challenged in the Islands, only a stout defence based on possession enjoyed from time immemorial. All the proceedings were repeatedly adjourned and eventually seem to have petered out. But as we shall seek to show, the Quo Warranto Rolls would come to be regarded as a record of title. Thus, for example, Royal Letters Patent granted to Debora Dumaresq, Dame de Samarès in 1695 confirmed and declared her title based on 14th-century claims made by her predecessors in answer to the Quo Warrantos.

²⁴Powicke, *The Thirteenth Century 1216–1307* (OUP, 1962).

30 Whatever the outcome of the process, the record of the Quo Warranto Pleas is helpful in the present context. This is because in framing the summons of Quo Warranto, the King's Attorney conceded that the franchises in question were exercised over the subject's own land ("*per totam terram suam*") which in the case of varech could only mean the foreshore.

31 It is certainly significant that the King's Attorney made no claim to the foreshore. Had he claimed it for the king he would surely have been in a stronger position to challenge private franchises over that foreshore. The Attorney's silence accordingly warrants our conclusion that title to the foreshore was simply not in issue. In effect, he was bound by the record of the *Grande Enquete* in the *Extente* of 1274.²⁵

The assise of 1299 and Peter de Samareys

32 This Roll records the King's Attorney challenging Peter, Seigneur of Samarès and La Fosse, to show title *inter alia* to varech and *esperquerie* on those fiefs and asserting that the king had himself possessed (in translation)—

"These privileges from time immemorial *on the manor* [of Peter] as elsewhere on the Isle." [Emphasis added.]

Peter's answer followed the line adopted by the other Seigneurs of maritime fiefs also summoned to answer the writ. Their unanimity suggests that the Seigneurs, in claiming to have exercised rights time out of mind, were relying upon their ancestral customs. Indeed, they would expressly do so some years later at the Assise of 1309, when the men of Jersey declared themselves subject to the Custom as it had been recently set down in writing in the "Some de Mancael".²⁶

33 It is particularly significant here that the King's Attorney puts in issue for the first time the peculiar circumstance that the foreshore of La Fosse extends further west than its dry land boundary towards the neighbouring Fief du Prieur. Pierre de Saumareis was summoned to answer "*Quo Warranto clamat habere in manerio suo ... veriscum*" [by what right he claims to have wreck within his manor]. In reply, Pierre claims to have the varech not only "*in manerio suo*" [within his manor] but also "*ultra metas manerii predicti*" [beyond the confines of the said manor].

34 The fief, here, is La Fosse. The underlying proposition of the King's Attorney is that if, as he claimed, Pierre was entitled to wreck, it could only have been enjoyed within the boundaries of the fief, not beyond them. Significantly, the Crown and the subject were at one in accepting that the foreshore was part of the manor or fief; it might have been part of

²⁵*Vide* para 12, *supra*.

²⁶The Some de Mancael is recognised by all authorities to be a reference to *Le Grand Coûtumier de Normandie*, written c.1260 which in the two printed editions of Le Rouillé (1534 and 1529), has for centuries been an authoritative text in the Islands.

the neighbouring fief; but it was certainly not the property of the king.²⁷ The Attorney's concern is, as always, with the franchises, not the foreshore.

35 There were other Seignorial rights challenged relating to the foreshore e.g. *esperquerie* and *choses gaives*. To a man the Seigneurs answered (in translation)—

“And as to such chattels they claim as of old. And they say that they and all their ancestors from time immemorial had them as they now claim them. And this they offer to establish as the Court shall determine.

And William des Mareys, who sues for the Lord the King says ... no one can have that ... unless he have a special warrant of the Lord the King ... especially as all the natives here have their status on the island from the time of the Lord King John from his last conquest which time is contained within the time of memory. Also he says likewise as to the rights of having eperkeria and taking wreck which are wholly royal dignities ... and he claims that they should show when and how such royal rights were allowed to their ancestors in a court of the Lord the King which had power to take cognisance thereof:

To which none of them gave answer except only that they and their ancestors from time immemorial always used to have such rights ...”

36 The Quo Warranto was an invention of English Common Law. It presupposed that all Seignorial liberties and titles must have their origin in a Royal grant. The Writ pretended that the franchises being challenged had been unlawfully taken. It may be that the English monarchs saw the Quo Warranto as a means to claw back royal powers, privileges and franchises which allegedly had been surrendered to the nobility by John and Henry III, both weak kings. The process certainly dragged on and its effects were uncertain.²⁸

37 It is noteworthy that the Quo Warranto Act 1290 provided in England—

“... that those which claimed to have quiet possession of any franchise before the time of King Richard without interruption can show the same by a lawful Enquest, shall well enjoy their Possession and in case that such possession be demanded for cause Reasonable, our Lord the King shall confirm it by Title and those that have all charters of franchise, shall have the same Charters adjudged according to the Tenor and Form of them ...”²⁹

²⁷See in this connection Susan Reynolds' work *Fiefs and Vassals* (OUP, 1994) at 361.

²⁸See Le Patourel, *op cit*, at 54–60.

²⁹In this connection see Baker, *English Legal History* (London, 1990), at 166–167; Prestwich, *Edward I* (1988), at 92–80 and 258–264; and Reynolds, *Fiefs & Vassals* (OUP, 1994), at 361.

This new law thus provided for the acquisition of a prescriptive title to the franchises. It was a statute expressly made for England and, strangely, given the response of the Islanders to the Quo Warrantos, it was not extended to the Islands.

38 In retrospect, it seems likely that the reference to John's "conquest" of the Islands was nothing more than a device to undermine claims to prescriptive title. If time could run only from John's conquest there could be no prescription. For the same reason, there could be no claim to a lost ancient grant. In the event, the English Justices attempted to have the proceedings moved to the courts in England. There is however, no evidence that the English courts ever adjudicated Jersey titles.

The 1309 Quo Warrantos

39 In the Assise Roll of 1309³⁰ Peter de Saumareys (the same Pierre) was summoned to show "By what warrant without the license and will of the Lord the King and his progenitors kings of England he claims to have wreck of the sea throughout all his land in the Parishes of St Clement and St Helier ... and also by what warrant he claims to take and have free esperkeria in the parish aforesaid of the fish caught by his men in the waters of the king, which belonged to the Crown and dignity of the Lord the King ... and also by what warrant he claims to have beasts of waif, which belong to the Lord the King." All the other lords are similarly summoned: "And they say that ... they and all their ancestors from time immemorial had the same as they now claim them. And this they offer to establish that the Court shall judge."

40 It is again noteworthy that the summons challenges only the franchise and not the land which, in the case of wreck and esperquerie, could only imply the foreshore. The Rolls of Assise of 1309 also record general challenges by way of Quo Warranto. Peter de Saumareis is only one of the seigneurs with maritime fiefs summoned to answer for such fiefs. One of them, Drogo de Barentin, remarks in respect of his fief (Rosel) that his right is identical to that of all the other seigneurs. This must, of course, be a claim to customary rights.

41 In fact all holders of the principal fiefs who had been challenged offered to prove their titles. The Assise of 1309 was cited by the Crown in 1953 in the important Ecréhos and Minquiers case discussed below. That case concerned the Fief of Noirmont which lies only some four miles from the Fiefs of Peter de Saumareis across St Aubin's Bay.

The 1309 Assise—Peter and the salvaged barrels of wine and another case of wreck

42 The thirst of Englishmen for the wines of Bordeaux is at least as old as Plantagenet rule in Gascony. It is not surprising therefore that over the centuries a number of recorded

³⁰*Nota:* the juxtaposition of land over which varech is taken and esperquerie with "the waters of the King" in which the fish are caught. The foreshore represents Seigneurial territory; the waters of the King—equally here a locative—does not. In our view, on any construction the passage quoted above would exclude any inference of a general Crown claim to the foreshore at this time.

judgments feature barrels of wine found either floating at sea or washed up on the shore. The Assise Roll of 1309 records one such dispute. The parties included the Crown (as Lord High Admiral of the Seas) the sailors (salvors) who found and rescued the barrels in the open sea and three Seigneurs who claimed the wine as having landed on their fiefs and thus come into their possession. The case is important because all the parties recognise as fundamental to the outcome that foreshore was parcel to each of the fiefs. We accordingly feel justified in quoting the Roll (in translation) almost in its entirety—

“Peter ... says that whereas certain foreign sailors found the said casks floating about in the sea *etc.* and took them into their boat and the said sailors taking those casks into their boat first came to a port of safety on the land of the said Peter who has and claims to have and was wont of old to have wreck occurring there, and remained *on the seashore within the boundaries of the land of the said Peter* for the space of one ebb tide and more, with the said casks then being in their boat and so those casks are and ought to be the wreck of the said Peter,—the said Prior ... fraudulently got those sailors to withdraw with their said boat and the wines being in the same from the land of the said Peter without the knowledge and will of the said Peter & to take themselves to the land of the said Abbot where the said Prior is as it were his Bailiff, so appropriating to himself the aforesaid wines which are and ought to be the wreck of the said Peter ... and the Abbot and Prior ... say that inasmuch as Peter acknowledges that the aforesaid sailors remained with their boat, the said wines being therein, *on his land for long during the ebb of the tide*, that he or his Bailiff might well have arrested their boat and other things in the same which he wished to claim & that he did not seize them nor did he claim anything from them while they were on his land, they pray judgment whether it was not lawful for the said sailors to withdraw and go where they wished especially as it cannot be denied that they took those casks into their boat on the high seas. And they say the aforesaid sailors with their said boat and the wines but took themselves to the land of the said Abbot being in the custody of the said Prior where they and all their predecessors of the said Abbot ... have and were wont to have wreck occurring from time immemorial ... and they claim ... delivery ... and William who sues for the Lord the King says that none of them can claim the said wines as wreck because he says that those things *only are wreck* which the *flow of the tide brings to land or in harbour*, or so near the land that by those standing on the land they may be laid hold of, and are thus guided or brought to port, but those things which are found on the high seas whereof no certainty exists as to where the flow of the tide may cast them, if they are raised from the sea by the labour of the sailors and put into the ship or boat and are so conveyed ... to the land, *and do not touch the land of anyone by conveyance or any other way* cannot be called wreck but are only the ventures of the sea of which no one can claim anything except the salvors and the Lord the King *or he to whom the Lord the King shall have granted the right of taking such ventures*. And he claims judgment ...” [Emphasis added.]

43 The King's Attorney is correct in his analysis of the applicable custom: this is not a case of wreck. The wines were salvaged on the high seas. According to him, the boats were clearly and expressly said to be on Peter's land but the wines themselves were not landed. Remaining in the boat they did not touch the soil of the foreshore and, accordingly, did not trigger a right which Peter could otherwise have claimed to a share in the salvaged goods. Judgment was given in favour of the Crown; but fundamental to that decision was specifically Seignorial, not Crown ownership of the foreshore. The attorney may seem to have been splitting hairs: the wines had surely and in substance been brought on shore in the salvors' boat; but, as discussed elsewhere in this article, Seignorial possession and jurisdiction would only flow from an actual touching of the Seignorial shore.

44 The Rolls of the same Assise also report a case of wreck which casts further light on foreshore ownership.³¹ This concerns a review of the Rolls of Philip L'Evesque, Bailiff, by the Justices—

“... It is found also by the Rolls of the same Bailiff that John Patier at another time acknowledged that he took away a certain boat of wreck *out of the fee* of the king at Lecq *into the fee* of John de Cartret, Knight, and was remanded on bail to these Assises” [Emphasis added.]

This is not mere narrative. The wreck was moved from one fief to another, that is to say from one beach to another. The complaint of the Crown was based on purely feudal considerations. It was the king's beach only because it was part of his fief.

Edward III's Charter 1341

45 Edward III's Great Charter of 1341 given to the Islanders at the outset of the Hundred Years War confirmed them in their liberties and rights. There would be no more Quo Warrantos and assises held by Itinerant Justices. It was perhaps politic on Edward's part to secure the loyalty of Islanders grown restless in the face of repeated challenges to their immemorial titles. The Charter was confirmed in the centuries that followed by successive sovereigns. In the course of time, the Quo Warrantos and the record of the response of the Jersey Seigneurs became evidence of a root of title. As we have already observed, an example of this is in the Letters Patent granted to Debora Dumaresq, Seigneur of Samarès, by William III in 1695. The preamble to the Patent cites the repeated claims of Debora's predecessors, made “in old Quo Warrantos” as evidence of the validity of such claims.

Fleta: the feudal position as to the foreshore in England

46 The relevant feudal position in England in the 13th and 14th centuries appears to have been very similar to that in the Islands. Fleta, a treatise on English law written about 1290,

³¹Rolls of the Assises, 1309, *op cit*, at 316.

deals *inter alia* with wreck.³² It describes a process similar to that set out in the *Grand Coutumier de Normandie*. Commenting on Fleta, Stuart Moore says³³—

“... it appears that it was well understood that wreck coming ashore on a man’s fee belonged to him if he had a grant of wreck ‘infra feodum’, and there is no suggestion that the foreshore of the fee on which it is taken is not parcel of it; nor is there ... a single word from which it can be argued that the Crown at this period laid any general claims to the foreshore of the realm.”

The Quo Warrantos in England

47 Moore goes on to consider the Quo Warranto Rolls in England. He quotes from a Writ of 1293—

“... the king commands to his justices in Eyrie ... that in all writs as well of Quo Warranto as of right which shall henceforth happen to be brought before them or before the king or before any of his justices, limitation shall be made and the declaration of the same from the time of King Richard and the subsequent time.”

48 This writ appears to have been sent to all the “Justices in Eyrie” but not it seems to the Justices Itinerant in the Islands. Given what we have seen, and in particular attempts by the Crown to create a discontinuity arising out of John’s “conquest of the Islands”, it is evident that the Islanders were not intended to profit from the Writ of 1293. Indeed, in England it seems:

“the king granted for the favour of his people, and on account of the then existing war in Gascony, that all his writs as well of Quo Warranto, pleas of land, should remain until the king or his heirs should wish to prosecute them. This practically amounted to a discharge of all the Quo Warrantos then undetermined; the subjects remained in the possession of their liberties and lands, and in almost every case where we find a Quo Warranto against the lord of a manor for wreck we find the lord of that manor at the present day in possession of the franchise ...

Looking back at this long list of proceedings and presentments by the Crown, its continual assertion of its rights against the subject, these minute and careful examinations and enquiries into purprestures upon the Crown’s property and upon the Crown’s dignity, made persistently throughout the long reign of the king and his Justices and attorneys, it is surprising that we find not one instance of a claim, or a pretensive claim on the part of the king to any one piece of the foreshore adjacent to the manor of a subject in any one place. It is especially to be noticed, also, that we do find presentments of purprestures upon the soil of the foreshore adjacent to the manors in the hands of the Crown, and that in those

³²Fleta c. 1290, Book I, chap 44 – “Of Wreck”.

³³Moore, *A History of the Foreshore and the Law relating thereto* (London 1888, at 69–70). This celebrated work has been and is still cited as an authority in cases before the English courts and in the literature on this subject.

cases the claim is made, not, as it would be made in these days, by reason of the prima facie title of the Crown to the whole of the foreshore of the kingdom, but by reason of the foreshore being parcel of the king's manor in his own hand."

49 Moore's review of the Rolls of the Assises held in the Channel Islands in 1309 led him to comment—

"From these entries it is clear that the Crown only claims the foreshore opposite to its own land in the Channel Islands."

CS Le Gros writing in 1943 at the end of his chapter "*du Varech*" also quotes these lines with evident approval.³⁴ At the end of a long recitation of Jersey and Privy Council cases, Le Gros could not better Moore's conclusion. With that local imprimatur, Moore's review of the comparative English jurisprudence down to the mid-16th century is compelling—

"Thus far, from the earliest times down to the end of the reign of Philip and Mary, we find no trace of any claim by the Crown to the foreshores of the kingdom as part of the rights of the prerogative; on the contrary, all the records which are forthcoming show that the idea of such a claim did not exist. The Crown itself claimed the foreshore only when it was parcel of its own manor and when it challenged the right of the subject to wreck of the sea taken upon his lands, that is, upon his foreshore, it tacitly admitted his right to the foreshore, and in no case traversed his claim that the wreck was his by virtue of a grant of prescription to take wreck upon his lands. We have seen that commissions were continually issued from the time of Henry III downwards to make enquiry concerning purprestures (anything occupied against the Sovereign unjustly *etc*), encroachments, and usurpations of the rights of the Crown, but no case is forthcoming to show that any dealing by the subject with the foreshore opposite his land was ever returned as a purpresture or encroachment upon the rights of the Crown to any interests of property in the foreshore."

50 We shall now consider a sample of cases of wreck and salvage concerning Jersey dating from the 14th century onwards. We have already considered above two such cases reported in the Assise Rolls of 1309. Those to which we now turn are mostly decisions of the Royal Court, but also include important decisions of the Privy Council on appeal from Jersey.

³⁴Le Gros, *Traité du Droit Coutumier de l'Isle de Jersey*, republished (a facsimile edition but with added notes and index) by the *Jersey and Guernsey Law Review*, 2007.

51 In the Samarès archive is the manuscript copy of an adjudication of wreck following an inquest in 1356 on a barrel of wine. It seems certain that this is copy of a judgment of the Royal Court. The record (from the French) is in these terms³⁵—

“Letter dated 1356 the 18th day of October, there came under the fief of Crapedoit a barrel of wine and a pine table. It is declared by several persons sworn for the purpose and found to belong to the Seigneur of Samarès by his right of *gravage* from Le Hocq in the east to the Douet of Hauteville in the West.”

52 This is a case of varech. The wine came to the shore by itself. It was adjudicated to the Seigneur of Samarès whose fiefs extended from Le Hoc in the east to the stream of Hauteville on the west. In this record, “*gravage*” might perhaps be construed as referring rather to the right than to the shore itself.³⁶ While the word “varech” is invariably employed in the texts of the Custom and the Commentators, it is not much used in reported Jersey cases. Instead, we find “*gravage*” or “*estrandes*” in common use to mean both the foreshore and its accidents. The etymology here suggests an emphasis on the land itself rather than the accidents: an illustration of the strictly feudal character of Jersey Custom. In this light, a better translation of the words “p. *gravage* depuis l’est du Hoc *etc*” might be “to the foreshore from Le Hocq in the east *etc*”.

53 Space does not permit a full analysis of each case of interest but a summary of a few from the early 17th century to the 20th century demonstrates a consistent and unchanging custom: the feudal rights to salvage and wreck accrued at the moment when the object touched the foreshore; feudal because it derived from ownership of the foreshore. Thus—

1638 *Procureur du Roi v Bisson (Seigneur of Luce de Carteret)* (“*ancree et cable trouvés au fond de la mer et apportés sur ledit fief*” [anchor and cable found on the sea bed and brought onto the said fief]);

1690 *Crown v Le Rossignol* (party fined for having removed a barrel “*trouvée à gravage sur le fief Morville*” [found on the shore on the Fief of Morville]—and failing to inform the Court);

1692 *Tutrice de la Dame de Samarès*, the salvors and Crown (ordered that various wreckage found at Les Minquiers Reef and “*apportés sur le fief de Samares*” [brought onto the Fief of Samarès]—be shared);

1696 *Re De Carteret* (goods found in the sea and “*apportés dans cette ile sur le fief Chesnel*” [brought into this Island on the Fief Chesnel]);

³⁵“*Lettre datte de l’an 1356 le 18 jo d’Octobre comme un tonnel de vin & table de sap vinret soubs le feu de crapdoyt. Il est declaré b. pleussieurs personnes sermente à cet effait & est trouve appartenir sr.de Samarès p. gravage; depuis l’Est du Hoc jusque au Douet de Hauteville.*”

³⁶This report may be compared with the language used by the Royal Court of Jersey in 1602 noted in Part 1, para 90 where a similar Inquest is considered.

1704 *Requete of Lemprière (Seigneur of des Craquevilles)* (Viscount ordered to go to the fief and make register of wreckage of a ship “*venus sur ledit fief*” [come onto the said fief]);

1781 *De Carteret (Seigneur of Morville) v De Caen* (De Caen took a boat which “*étoit venu à gravage sur le Fief de Morville*” [had come to shore on the Fief of Morville]);

1800/1803 *Pipon (Seigneur of Noirmont) v Hamon* (goods found at sea and taken onto Hamon’s ship in the Havre de la Tour, alleged by Pipon to be on the fief de Noirmont);

1812 *Poingdestre (Seigneur of Anneville, Evrat & Lemprière) v Machon* (“*une pipe de vin d’Oporto, laquelle ils ont mise à terre sur un desdit fief*” [a pipe of port wine which they put on land on one of the said fiefs]);

1932 (casks of wine “*fut apporté à gravage à la Rocque*” [was brought to shore at La Rocque]).

54 The series *Ile de Jersey, Ordres du Conseil*, report two Privy Council cases in 1621.³⁷ The headnote, prepared when Volume I was published in 1897, justifies our quotation not only for its distillation of the judgment but also because it clearly invites the inference that this statement of custom continued to be valid at the end of the 19th century—

“*Par la Coûtume de Jersey le Seigneur a droit à un tiers d’un objet trouvé au flot de la mer et amené à terre sur son fief; le trouver a un tiers, l’autre tiers revient à la couronne.*”³⁸

The apportionment of entitlement is clear: the right of the Seigneur is feudal and derives from the foreshore which is part of his fief while in contrast the right of the Crown derives from the king’s prerogative. These cases again concerned salvaged barrels of wine.

55 The fiefs here were Samarès, Rozel, Saval and Diélement. The Seigneurs claimed one half of the value while the Crown claimed the whole save the right of the salvors to one third. The judgment of the Privy Council for Hugh Lemprière of the Fief de Diélement is of particular interest and merits close analysis—

“Whereas his Majesty’s officers of that Isle have apelead unto this board in a case depending betweene them and Hugh Lemprier Seignor. of the fee Diélament concerninge c’tan wynes found flotinge in the sea and brought one shoare upon that tee by divers mariners and there detained³⁹ by the said Lempriere as due to him for

³⁷*Le Procureur Général v. Lemprière*, Jersey OC, 1621 Vol 1, at 109–112.

³⁸“According to the Custom of Jersey the Seigneur has right to a third of any object found on the high sea and brought to land on his fief, the finder to a third, the other third comes to the Crown.”

³⁹“Detained”, according to the OED, means “To keep, retain (in a place or position, in a state or condition, or in one’s possession)”.

one moytye, but claimed by the king's procureur as belonging whole to his Majesty in right of his prerogatyve, salvage excepted, and although upon hearing of the parties with there learned counseill, and due examincion of every circonstance of the case, it is found that no maner of deede or graunt could be produced to maintayne and prove Lempriere's pretences but some usage or prescription wheare unto also materyall exceptions wheare takenby the counseill for his Majesty's Officers It for as much as it apeareth by good probabilitie that both there and in Normandie the practice hath beene very ancient to devide things flotinge at sea and brouth by the ffinders to Lannde into these parts the first to the finder or saver the second to the Lord of the fee where the same shall be Landed and the third to the king or Lord Admirall We conceive this course of division to be most Justifiable and fittest to be observed for the wyne presently controverted and landed upon Lemprier's ffee ..."

56 This important case established—

(i) that varech and salvage are governed by Jersey and Norman Custom not by English law. The absence of a "deede or graunte" was accordingly not material to proof of title;

(ii) that Lemprière's claim was feudal, based on the wines landing on his own foreshore. They were detained by him, in his possession. The possession was Seignorial because within his territorial jurisdiction, a jurisdiction which existed substantially to secure the Seigneur's rights; and

(iii) that the Crown rights were based on the king's prerogative, not on any claim to the foreshore.

57 At the end of the 17th century our greatest commentators, Philippe Le Geyt and Jean Poingdestre, both repeatedly confirm that the Seigneur's rights to the foreshore and its accident in Jersey arise not from grant but from Custom.

58 In his Code,⁴⁰ Le Geyt declares the right to varech to be feudal and enjoyed by a Seigneur whose fief includes the foreshore within its boundaries—

"Tout seigneur féodal a droit de Varech, tant que son fief s'estend sur la Rive de la Mer, s'il n'y a titre au contraire".

[Every feudal lord has the right of varech as far as his fief extends over the foreshore of the sea, save contrary title.]

59 Poingdestre in his poem "*sur la Coustume de Jersey*" is equally clear that the *droit de varech* is a customary right.⁴¹ These lines support our analysis that the Seigneurs possessory right to objects accrues as soon as they touch the Seignorial foreshore.

⁴⁰*Privileges Loix et Coustumes de l'Isle de Jersey*, printed edition with index (Jersey, 1953) Titre III.

“On l’apele Varech ... soit qu’il touche le fonds ... lors que quelque Varech sur quelque fief prends terre ... si le Varech jetté par la mer au rivage ... Dans les mains du Seigneur à qui est le gravage ... au seigneur de ce fief ou le Varech vient ... ou il est arrivé appartient au seigneur auquel est le gravage.”

[It is called Varechwhen it touches the ground ... when some varech on some fief takes the land ... if the varech thrown by the sea on to the shore ... In the hands of the Seigneur who owns the foreshore ... to the Seigneur of this fief where the varech comes ... where it comes to shore (arrive) it belongs to the Seigneur who has the varech/beach.]

Varech, Gravage—the Rolls of Samarès and La Fosse

60 These rolls from the 17th and 18th centuries provide an abundance of evidence of Seigneurial activity on the foreshore. Thus,

(i) In 1613, Jean de Vallenton having found certain wreckage on the beach “*en a dessaissey le fieu*” has dispossessed the fief of it. The record clearly implies that on coming to land the wreck was *ipso facto* in the possession of the fief and its removal without authority of the feudal court accordingly did a violence to that possession. It is notable that the compiler of the record refers not to the rights of the Seigneur but to the fief (La Fosse) itself: a crude but eloquent expression of the principle that the right of wreck was impersonal and arose directly as an accessory of the fief.

(ii) Another entry for 1613 records the finding of a small mast “*sur le gravage près le Fort d’Auvergne*”. The meaning is plain: the wreck landed on the *gravage* or foreshore of the fief near the Fort d’Auvergne in the Havre de Pas. A similar record in 1619 tells us that a certain piece of wood had been taken into possession which had “*venue au gravage de ce fieu*” [come to the shore of this fief] (La Fosse).

(iii) In 1620 and 1621 there are four cases of wreck recorded. The last in 1621 notes that the Prévôt of the fief had reported finding a plank in the open sea “*soubs le cymetyère de St Helier venue à gravage*” [under the cemetery of St.Helier come/coming to shore]. It was ordered that the plank be seized for the benefit of the Seigneur.

(iv) In 1636 the Rolls record the coming ashore of a fish “*venue à vrecq Sur le fief*” [come as varech on the fief]. The language suggests the compiler may have consulted the text of the Coûtumier. This seems to have been a “fish” falling within the Seigneurial privilege—perhaps a porpoise.⁴²

61 All these cases are demonstrations of the exercise of territorial jurisdiction. The third example is also of interest in providing evidence of the landward extent of the La Fosse

⁴¹ Printed at (2000) 4 *JL Rev* 217.

⁴² See Part 1, para 82.

foreshore before reclamation in the 18th and 19th centuries would leave the cemetery far inland. From the description, the plank would seem to have come ashore somewhere between what is now Bond Street and Wharf Street.

The Bas Fiefs

62 These fiefs held by the Crown since seizure from the Norman monasteries in the 15th century have always been separately administered from those of the Ancient Domain.⁴³ We have seen a manuscript survey of these Rolls which reveals that the foreshores of these fiefs were carefully administered by the Crown over the period of review during the 17th and 18th centuries.⁴⁴ The Rolls recording wreck landing on these fiefs repeatedly use the phrases “*venue à varec sur le fief*” [came as varech on the fief] or “*venu/trouvé au gravage de/sur le fief*” [came/found to/on the shore of/on the fief]. It is clear that those who kept such records for the Crown saw the foreshore as parcel of the Bas Fiefs.

Jurisdiction

63 When discussing the nature of Jersey feudalism in the first part of this article, we emphasised the importance of territorial jurisdiction in the determination of the extent and boundaries of the fief.⁴⁵ Here, we have thus far considered the evidence of historical texts largely to find in the rolls, *enquêtes*, commissions *etc.* vocabulary and assumptions tending to the conclusion that the Seigneur’s rights to varech, salvage, *esperquerie etc* must arise from his possession of the foreshore. Our analysis of varech in part 1 of this article further explored the central rôle of territorial jurisdiction.⁴⁶ We shall now consider aspects of jurisdiction in relation to other Seigneurial activities concerning foreshore in Jersey.

The Court of the Fief sitting on the beach

64 Given the fundamental maxim that no man can exercise justice beyond the confines of his fief, the corollary is that the feudal court must sit within the same limits.⁴⁷ There are indeed records of the fief courts sitting on the foreshore. The Rolls of Noirmont record several such cases according to GFB de Gruchy. We have ourselves seen one in 1701. In addition, Vinchelez de Haut Rolls have the court sitting on the foreshore in 1713 to adjudicate the boundary of a *saline*. Again in the same year the court was “*tenus sur [le] fief sous la maison de Jean Bailhache filz Jean fils George sur la mielle & place a seicher du vraicq & le Galley*” to consider the case of a whale “*venue à gravage . sur le fief*”. Clearly the court considered, in each case, that it was sitting on the fief. It was a matter of principle. The Seigneurial Court sitting outside the fief would have been without

⁴³See Part 1, para 20.

⁴⁴Court Rolls of the Bas Fiefs of the Crown in Jersey, ms work c. 1993 by CN Aubin.

⁴⁵Part 1, paras 22–24.

⁴⁶Paras 48–50.

⁴⁷See Part 1, paras 22–24, “[P]ersonne ne peut faire justice hors de son fief”.

jurisdiction. The Vinchelez de Haut Rolls in 1716 indeed record a challenge to the jurisdiction of the Court which had allegedly been held outside the confines of the fief.

The harvest of Vraic

65 Vraic, seaweed either cut from the rocks or thrown onto the shore by the tide, figured large in Island life from the earliest period. As a fertiliser on the fields and a fuel for the domestic fire, vraic was an important element in the rural economy. It is relevant to our argument because the regulation of the vraic harvest, quintessentially a foreshore activity, for centuries fell within the jurisdiction of the Seignorial Court.⁴⁸

66 Vraic occurs abundantly about the coasts in quantity greater than was required to meet the needs of the Seigneur and his tenants.⁴⁹ Over time the pressure for a share of this resource grew in areas inland from the coastal fiefs and eventually undermined the feudal régime itself. The municipal regulation of vraic however, which substantially replaced the jurisdiction of the fief, is not our present concern.

67 The earliest reference we have discovered to the gathering of vraic is in Delisle's classic work on life in medieval Normandy.⁵⁰ Dealing with the use of sandy deposits ("tange") to lighten heavy soil, Delisle noted that the extraction of such sand from the foreshore naturally fell within the confines of the fief and hence within the jurisdiction and control of the Seigneur. Delisle's view was that at this time (13th and 14th centuries) the harvesting of vraic on the foreshores of the Cotentin was also subject to a Seignorial régime.

68 Another Norman historian, Dupont, reports litigation over vraic in Normandy in 1549.⁵¹ Supporting his claim to the *gravage* and opposed, not by the Crown, but by another Seigneur, the Lord of La Hougue stated that when the season for harvesting vraic arrived, it was the custom (in translation)—

"... to announce at the pleas of the Barony of St Wast ... the time when it is permitted for their men to cut ... in order to fertilise their lands and also to give notice and make proclamations before the ... officers of the Barony of La Hougue ... for the reason that their *gravages* are indistinguishable ..."

The conclusion is clear. The boundary between neighbouring fiefs on the foreshore was material. The exercise of territorial jurisdiction necessarily implied that the foreshore on which the vraic grew was part of the fief.

⁴⁸As we noted in Part 1, para 30.

⁴⁹Bérault, a leading commentator on the *Coûtume Reformée de Normandie*, recognised the importance of vraic for the Islands "*Vraich ... signifie algne marine ... de laquelle usent les habitants des Isles de Gersey et Guenesey au lieu de bois et pour se chauffer. Car cette herbe croist en telle quantité à l'entour de leurs rochers qu'il semble de forests touffrués, de sorte qu'ils la coupent et la font secher au soleil pour brusler, et de la cendre ils en sement leurs terres ... pour les engraisser ...*"

⁵⁰*Op cit*, at 270.

⁵¹Dupont, *op cit*, at 448–449.

69 The earliest record we have found in Jersey concerning Seigneurial control over the vrac harvest, appears in a document of 1421.⁵² This same matter is also discussed by Le Geyt in his chapter *du Vrac*. The document records an inquisition into the rights of the Seigneur of St Ouen, a large fief on the west coast of Jersey. The Jurors declared (in translation) “that *persons having land outside the Fief of St Ouen* used in earlier times to ask the Seigneur’s permission to take vrac from the foreshore of that fief” [emphasis added]. The petitioners were clearly not tenants of the Seigneur of St Ouen. Implicit in the Inquisition is the understanding that the foreshore of St Ouen was within the jurisdiction of the Seigneur and accordingly within the confines of his fief. The vrac was the bounty of the fief for his own use and that of his tenants. Any excess was at the disposal of the Seigneur. For a stranger of the fief to have come onto the foreshore without license and taken vrac, would, accordingly, have been a breach of the Seigneur’s proprietary rights.

70 Some two centuries later this strictly feudal regime in relation to vrac was becoming municipalised. Le Geyt writes disapprovingly of Seigneurial privilege, but is forced to recognise the continued existence of certain privileges in relation to vrac on the principal fiefs, St Ouen, Rosel and Samarès and that of the Prior of St Clement which continued to be enjoyed and enforced in Le Geyt’s day and, in the case of St Clement, which had recently been upheld by the Royal Court.⁵³

71 This ancient feudal custom was not only discriminatory; it flouted ordinances made by the Royal Commissioners (Hussey and Gardiner) in 1607, who, heeding the complaint of the inhabitants of St John:⁵⁴

“... dwelling far from the coast of the sea where the wraick growth ... putt from the benefit thereof and not permitted to gather the same, by such as pretend to have licences to gather the same ... For as much as this complaint concerneth all the inhabitants of this Island as well as the parish of St John ... and much concerns the common good of the Country ... [ordered] that the Bailliff and Justices only ... shall henceforth ... make and sett down all orders whatsoever they find to be most convenient, both for the place where, the times and seasons when, the said wraick shall be gathered ... and that it shall not be lawfull for *any other person upon his fee or fees to grant any licence* or sett down any course ... to the impeaching of this our Order ...” [Emphasis added.]

72 It is clear from this passage that while the Commissioners were concerned to allow a general right of access to the vrac harvest they did not dispute that the vrac was itself gathered “on the fee or fees” of “other persons”—viz the Seigneurs.

73 Le Geyt looks approvingly to France where a general right of access to the foreshore for gathering vrac had been given to the people of the Parishes bordering the sea, a right

⁵²See BSJ 1976 and Royal Court H Livre 14 Folio 110.

⁵³*Manuscripts etc, Du Vrac*, vol 2, 259 et seq.

⁵⁴Hussey and Gardiner, *Prison Board Case*, Treasury Appendix II.

embodied by Louis XIV in his Ordonnance sur la Marine of 1681. It is, we believe, with modern (17th Century) French law in mind that Le Geyt wrote (in translation)⁵⁵—

“Indeed I declare that I do not understand how the sergeant of the Fief of the Prior of St Clement, however furnished he might be with ancient possession and a modern judgment in his favour, nor generally how any feudal Seigneur could with equity and charity claim any privilege on the vraic to the prejudice of the common weal. It is the resource of the labourer and the fiefs do not extend beyond the *Plein de Mars*.”

74 This passage has a political rather than a juridical flavour. The concluding statement touches a matter on which Le Geyt clearly held strong views. It should not however, in our opinion, be read as a declaration of foreshore ownership. To do so would not only be inconsistent with Le Geyt’s views expressed elsewhere but would run counter, as we have shown, to Norman/Jersey Custom. We recall in particular, Le Geyt’s dispassionate discussion on the subject of varech and the *grave* or *grèves* of the Fief discussed elsewhere in this article. Significantly, Le Geyt never suggests that the Crown, except as Seigneur of its own maritime fiefs, had any general title to the foreshore. His remarks are limited to the issue of public access to a vital economic resource. Taking his writings as a whole therefore, it cannot be in doubt that Le Geyt considered the foreshore to be part of the fief. In fact, as Lieutenant Bailiff, he will have been well aware that the courts of all the fiefs bordering on the sea continued to regulate the vraic harvest albeit now in accordance with regulations promulgated in the King’s Court.

75 Jean Poingdestre’s analysis of vraic and its harvest is more dispassionate than that of his contemporary Le Geyt. He demonstrates a close procedural connection between Vraic and the related Custom concerning *banon*. Thus, (in translation)⁵⁶—

“As Banon concerns the use of that which the Earth itself produces without cultivation, so the Ban or Banon of vraic (which is no more than a herb or marine plant) concerns only the order to be observed in the collection and division of vraic, which is of two kinds ‘Le vraic flotte’ [floating vraic], which is thrown on the shore by the waves; and the ‘vraic taillé’ [the cut vraic] which is cut where it is growing on terms settled by the Court of the place, beyond which (fief) it is not permitted for anyone to touch it ...”

Banon, before its administration, like that of vraic, was municipalised, consisted in the right of feudal tenants to graze their cattle at the appointed time on the stubble of the unenclosed land of the fief. The policing of *banon* was by the Seigneurial Court. The procedure for harvesting vraic on unenclosed land was subject to the same territorial

⁵⁵*Op cit*, Tome 2, Livre Premier, *De Sentences de la Cour Royale de L’Isle de Jersey, avec diverses questions touchant les loix et coutumes du pays*, at 76.

⁵⁶*Les Loix et Coutumes de L’Isle de Jersey, Des Choses Communes à plusieurs*, Jersey Law Society, 1928, at 125.

jurisdiction. At the appointed time the foreshore was said to be “*abandoné*” to the tenants by the “*ban*” or proclamation of the Court.

76 In this passage Poingdestre emphasises the jurisdiction of the Seigneur over all his land including foreshore. He was conscious however, that there must be a clear limit to feudal privilege. Public interest must take precedence over the Seigneur in relation to access to this important commodity⁵⁷ (in translation)—

“Indeed, it ought in theory to belong to the Seigneur of the Fief on which it is to be found particularly that which is floating. In this nonetheless, Custom ... has derogated from the right of the Seigneurs in favour of the public interest to which all private interest must always give way. This is a good of which no private person could take advantage alone given the great quantity [of *vraic*] which is to be found ...”

77 Here again Poingdestre makes his meaning clear: the feudal position is not in doubt. Were it not for tenants’ rights or the wider public interest, *vraic* would belong to the Seigneur. It would be his because it either landed on his foreshore or was cut while growing on his rocks.

Vraic: the Samarès and La Fosse Rolls

78 Because matters concerning *vraic* have to do with the internal economy of the maritime fiefs, the subject scarcely figures in the Assise Rolls. The king was concerned with the franchises, not the rural economy. To see the Custom in practice we have accordingly consulted the surviving Rolls of the Fief of Samarès which cover the 17th and 18th centuries. These records make clear the exercise of an ancient territorial jurisdiction.

79 In 1611 the Rolls of Samarès record a penalty imposed on Jean Gobbes for *vraicing* at night, a perilous enterprise one would think. In 1613 the same Rolls record the fining of Thomas Mollet, a non-tenant of the Fief who was forbidden to return on pain of a greater fine. This surely records a trespass. The offence and its penalty could only have been based upon a breach of the Seigneur’s right to possession of the foreshore.

80 In 1636 one Fiott was fined for being in breach of the *vraicing* regulations. He was one of ten others fined at about that time for the same offence. Indeed, in these Rolls we see repeated entries of this kind. Enforcement by the Court required officials to be sworn in to police the regulations. Such persons were known as “*Assermentés des Vraics*”. The Samarès Court Rolls show the appointment of such officials up until the 1860s.

81 In 1850, a prosecution was brought in the Royal Court against Edward Maurant, Seigneur of the Fief of Samarès and his Sergeant, one Gibaut. They had, it seems, both been *vraicing* one full tide before the law allowed general access to the harvest. The

⁵⁷*Op cit*, at 125–126.

Seigneur's defence was that he and his ancestors before him since time immemorial had, as of right, harvested vrac for his domainal lands one tide before the rest. The Court found Mourant's defence good. Gibaut however, was fined. As a mere officer of the Seigneur's Court, he was not entitled to the privileges to which the landowner could lay claim. Mourant's privilege of course, was the same as that which had provoked Le Geyt's indignation some two hundred years before.⁵⁸

82 The central position of the vrac harvest in the social and economic life of the Island meant that once municipalised, its regulation would increasingly be the concern of the Royal Court and the Constable of the parish. This led in the 19th century to an interesting clash between the States on the one hand and Seigneurial claims on the other.

83 In 1808 the States enacted new regulations which wholly ignored feudal title and tacitly assumed that the foreshores were public and publicly owned. That was a mistake on the part of the States. No Order in Council issued to make the regulation law and it was not until 1829 that a new law "Sur les Vraics" was enacted. The new law, in contrast to the failed enactment *inter alia*, expressly contained this (in translation)—

"This law is not in any way intended to derogate from the rights which may exist in relation to certain private fisheries [*pecheries*] nor to the rights of particular Seigneurs".⁵⁹

84 It is significant that in each of the successive laws concerning vrac enacted in the 19th century there is a careful reserve of Crown and Seigneurial privileges. The law of 1894 still stands.

Essiage

85 While it seems, according to Brenda Bolton, that all fishing dues in Guernsey may have died with *esperquerie*, in Jersey, its successor was *essiage*. De Gruchy tells us that the rights of *esperquerie* were commuted at the beginning of the 16th century into a fixed annual sum of *eissiage* payable to their lords by those who fished for conger which were either landed or caught on the foreshore.⁶⁰ De Gruchy thought the word might denote "drying". "The Seigneur", he tells us, "had the option at the beginning of each season either to fetch the conger from alongside the boat ... or to claim *essiages* ... from everyone who used a trot line". The Code Le Geyt suggests, not a trot line, but "*Le gros fillet à fonds*", a set net with its bottom grounding.⁶¹ In each case, the nature of the

⁵⁸*Vide* para 73 *supra*.

⁵⁹"*Cette Loi n'est point entendu déroger aux droits qui peuvent exister à l'égard de quelques percheries particuliers, aux droits des Seigneurs particuliers.*"

⁶⁰De Gruchy, *op cit*, at 123.

⁶¹*Op cit*, at 45.

Seigneur's right is clear: it arises from the ownership of the foreshore. *Essiage* was evidently a form of payment for a license to fish on the seignorial foreshore.⁶²

Pescheries

86 In the first part of this article we referred to the many *pescheries* on the foreshores of continental Normandy which were an important component of the coastal economy.⁶³ *Pescheries* played a less significant rôle in Jersey. Their existence is, nonetheless, significant from our perspective because their owners enjoyed proprietary rights in them. We have found evidence of others in Jersey but we have space here to consider only one: “*une pechérie à vraic et à poisson*” situated near the rock called L’Avarison in the Bay of Grouville.⁶⁴ The existence of this *pescherie* was noted by Le Geyt in his chapter “*Des Pescheries*”. It is further recognised in a judgment of the Royal Court dated 28 April 1747. This confirmed rights traditionally enjoyed by the owner of the Manoir des Prés (or des Maltières) in Grouville, subject to a perpetual annual *rente* of three capons payable to the Crown. The judgment in 1747 also provided for the restoration of the boundaries of the *pescherie*. They can still be seen: a number of rocks on which are carved the letter “P” to denote ‘Payn’, the name of a prominent family which for long held the fief and manor of Les Maltières. Thus the right associated with this fishery is that of exclusive fishing and enjoyment of the *vraic*.

87 In this example the owner is charged with payment of a *rente* due to the Crown and that this particular foreshore is parcel of the Crown Fief. It all points to the existence of an alienable feudal title in the foreshore.

88 It should be recalled, as we have seen (*supra*), that title to *pescheries* is expressly recognised and reserved in the *vraicing* laws by both the Crown and the States.

Salines or salt pans

89 Bottin, whose work we discussed in Part 1 of this article, quotes from an official report made on the *salines* on the Norman littoral in 1809 (in translation)—

⁶²The Extent of 1607 (Hussey and Gardiner), Prison Board Case, Treasury Appendix II: “The *essiaiges* or fines for fishing is a duty owing by the fishermen and payable always at the Feast of the exhaltation crosse in September ... 7½ sous of every person that fisheth Congers, dwelling as well upon the Kinges Fee as in any other basse Fees apperteyning to the King ... which duty is yearly levied to His Majesty’s use, sometymes more sometymes lesse, according to the number of the fishermen that shall be employed in fishing ...”

⁶³Dupont *op cit*, at 140 *et seq* cites numerous *pecheries* on the Norman litoral. Bottin’s location of *pecheries* is even nearer. At 85 and 86 *op cit* he says (in translation)—“The maritime fisheries were established at differenet points of the coast. It was alienable like any other immoveable. All the bays (in Normandy) were divided into ... salt pans privately possessed by Seigneurs, grantees or tenants: the Port of Jorfleet (Barneville) [the nearest pont on the coast to Jersey—a bare 14 miles distant] belonged to the Vernon family [which also owned land in the Islands]”.

⁶⁴See McGugan, 1989 BSJ, at 179.

“The second object with which we are concerned ... the white beaches exploited for the production of salt ... we have had represented to us the titles of each property bordering the beach and we are convinced⁶⁵ that each point of the coast was or had been the site of a salt pan and that time beyond memory these salt pans were the subject of sales, partages and of all kinds of transactions ...”

90 The *salines* of Jersey are less well documented than those in Normandy. Their former existence is however, well evidenced in place names. On at least two points on the coast of Jersey we find bays called “La Saline”. One of the most important *salines* was exploited on the semi-tidal marshes which once ran down to the sea from Samarès Manor. Hence the name “Samarès” which derives from “*sals marais*”, a salt marsh. Indeed, early records show Guillaume de Saumarais to have been also known as “de Salinelles” [from the salt pans].⁶⁶ What is significant to our argument is that all the *salines* both in Jersey and in Normandy had a seigneurial origin.

“Bornement” of the foreshore

91 We have earlier noted Philippe Le Geyt remarking that the foreshores of neighbouring fiefs could on occasion be difficult to define, for example, in the case where a number of fiefs terminate in a deep bay on the coast: “... *on demande de quelle manière il faut distinguer leurs grèves* ...” [one questions in what way their beaches must be defined].

92 Le Geyt’s comment regarding boundaries and their definition of *bornement* was not then academic. The issue could be material. A number of records have survived of judicial proceedings concerning undefined foreshore boundaries dating from periods both before and after the 17th century. A few examples will suffice for our purpose.

93 A 14th-century petition by the Abbot and monks of Mont St Michel requests that a clear boundary on the beach be established to distinguish the land of the king from the land of the Abbot⁶⁷—“*Quod terminetur de finibus sui metis terre domini Regis*” (“*terre de Nigromonte*”). The fief of Noirmont, as we have seen, then belonged to the Abbot.⁶⁸ The king’s land was part of his ancient domain. There had evidently been differences over wreck, the king’s men having taken wreck landing on the foreshore of Noirmont and claimed by the Abbot. There is no question from the language of the petition but that each fief had its own foreshore and was capable of being bounded in the same way as *terra firma*. The source of the difficulty is clear to this day. The stream which divides the fiefs runs out over the beach in St Aubin’s Harbour. Its course on an exposed shore might change with the action of a single tide.

⁶⁵“*nous sommes convaincus ...*”

⁶⁶See 1931 BSJ 376 and 1987 BSJ 339.

⁶⁷This is the same fief whose foreshore on the Minquiers reef was in issue between the UK and France before the International Court of Justice in 1953.

⁶⁸*Cartulaire des Iles Normandes (Société Jersiaise 1924)* No. 20.

94 An ancient manuscript copy of an Act of the Royal Court dated 25 January 1575 is inscribed in the margin: “The bounds of the fee of St Owen”.⁶⁹ The Act records a “*Grande Vue de Justice*” concluded before the Bailiff at St Ouen. The recital shows—

“Honourable man Helier de Carteret esquire Seigneur of St Owen, which Seigneur showed unto us as lately certain wrecks had arrived and been cast *by the sea in the port de la mare being upon the fee Haubert of St Owen* belonging unto him viz the boat of a ship and a beam of oak and for as much as *certain fees be joining on either side of the said fee Haubert of St Owen* by reason whereof and for want of knowing perfectly the *separation and division of the said fees* some debate or contention might arise in time to come therefore the said Seigneur of St Owen for preventing and avoiding all such occasions and inconveniences did justly require us that by the authority of office it should please us to administer the oath unto twenty four ancient and credible men next neighbours of the said fee ... to the end they should report unto us ... upon oath ...” [Emphasis added.]

The Act goes on to record in minute detail, “The separations of the fees between Lestack & the Corbière bordering on the seashore ...”.

95 There is no mention of the Crown being in any way interested in these proceedings and yet it is the king’s court which is dealing with the central issue of titles and competing claims over the foreshores of private fiefs where the boundaries were uncertain.

96 An Act of the Royal Court dated 5 January 1604 records a *Vue de Justice* and the sworn testimony of fourteen men concerning a difference between the Dame du Fief de La Fosse, on the one hand, and the Attorney General representing the Fief du Prieur de l’Islet (then, as now, in the hands of the Crown), on the other. The *Vue de Justice* settled the boundary between the Fiefs over the foreshore. There is no mention of any general Crown interest in the foreshore. It seems the Jurors in this case were charged to consider the boundary only in relation to the taking of wreck and although they found for La Fosse and that its rights had existed “... *de toute ancieneté*”, their conclusions, which could have been of fact only, went no further. The record closes with the note, “*quant à la propriété desdites limites*” [as to the property in the said limits]; an issue of law, this matter would be adjourned to the pleas of Catel (a division of the Royal Court). Unfortunately, we have been unable to trace any record of further proceedings whether in Catel or elsewhere. It seems the practical question of *varech* having been settled the (for us interesting) issue as to *propriété* no longer concerned the parties.

97 The issue in 1604 only arose because of the unusual extension of the La Fosse foreshore which, as we have seen in the 1299 Quo Warranto,⁷⁰ extended west under the *terra firma* of the adjacent Fief du Prieur. That circumstance had raised a boundary issue

⁶⁹Jersey Archive, Rep J.A/7 MS.

⁷⁰*Vide* paras 33 and 34 *supra*.

prompted by the landing of varech near the line. It is of interest that our immediate source for this case is a 17th-century book of precedents in our possession. The entry is headed “*Ex 1604 Jan 5 bornement du gravage du Fief de la Fosse et les limités du Douet de Hauteville, la grande planque et le ouest du Rocher Estur.*” We have there a clear line across the beach.

98 In 1854 this same boundary between the Fiefs of La Fosse and Le Prieur was yet again debated and fixed after a long drawn out Inquest. It is not clear whether the earlier decisions of the Court in 1356 and 1604 which deal with precisely the same boundary, were put before the Jurors. Had these precedents been pleaded it is hard to believe that the Crown, in right of the Prior, would not have been estopped from disputing this ancient boundary.

99 It is clear from these proceedings that at no time was there any suggestion of a Crown interest in any of the foreshores in issue. The Crown made no claim save in relation to its own fiefs.

Alienation and partage of the foreshore

100 We report here three cases of division where a maritime fief was involved. In each case the division concerns the Seigneurial foreshore.

101 The first is a contract of partage in 1382 (in translation)—

“On the Wednesday next before the Feast of St Michael William Payn and Drouet Lemprière heir of the aforesaid Raoul appeared before Court to record the division between them of the Fiefs and other properties they had acquired in 1367 the whole subject to the dower rights during her life of the Lady of St Ouen widow of the said Jourdain de Barentin who was entitled to take le tiers au vreic dudit Rossel pour douaire. Lemprière would take l’assiette du vreic de Sausmares during the life of the said Lady and after her death the said William and Drouet or their heirs will divide all that she held by way of dower of the said Lady of St Ouen formerly wife of Jourdain.”

We need not burden our text with further detail of this interesting transaction. It is sufficient to note the division of the wreck landing on Rosel and the reference to the *assiette* of the wreck at Samarès. The *assiette du vraic* can only, in our opinion, refer to the foreshore.

102 The second, a contract dated 1413 follows the ancient traditional form.⁷¹ Translated from the French it reads—

“Douet and Richard de St Martin acknowledge having ceded to their brother Janequin out of the inheritance of their father ... the entire Fief de Craqueville also

⁷¹The original is in the archive of the Société Jersiaise.

called Layc or Lecq in the Parish of St Mary [the other half of the Fief of Lecq being in the Parish of St Ouen on the west side of the Grève de Lecq] including cash and rentes ... a pound for stray animals, services, warren and all the things which are part of the fief *including a third part of the beach in the port called Lecq towards the east of the bay* with the mill stream which comes to shore on the said beach ...”

[Emphasis added.]

103 The third example is a partage concerning the Fief Haubert de St Ouen. This, unusually, fell to be divided in 1789 amongst seven female heirs each of the heirs taking a portion of foreshore or gravage co-extensive with her share of *terra firma*.

104 As we showed in the first part of this article the alienation of parts of the foreshore was a common feature of the régime on the Normandy coast immediately facing the Islands. Transfers of fisheries, salt pans and plots for digging tangué or marl are there commonly recorded. We have found fewer examples in Jersey but this probably only reflects the fact that few fief rolls dating from before the 17th century have survived. We have, nonetheless, located evidence of one early sale of foreshore. Between the Fiefs of Samarès and La Fosse which are respectively in the Parishes of St Clement and St Helier, lies a narrow tongue of the Fief of Grainville coterminous with the seafront boundary of the Parish of St Saviour. This small strip of land (not more than one hundred yards wide) was the subject of a transaction in the 14th century indicating that Grainville had also once claimed the foreshore. This transaction is mentioned in a document entitled “*Patronages des Eglises*” which dates from the early 14th century.⁷² This inventory of Seigneurial rights and privileges tells us that Peter de Chaeney had “*wreccum per totam terram suam in parrochia Sancti Salvatoris*” [wreck over all his land in the Parish of St Saviour] and later that William de Chaeney (father of Peter) had previously bought “*wreccum de Sancto Salvatoris*” from Eustace de Grainville. We conclude from this document that in buying the wreck, de Chaeney had purchased the soil (*terram*) on which that right was enjoyed leaving to de Grainville possession of the rest of his fief in St Saviour’s Parish landward of the foreshore.

105 We shall shortly conclude this study with an examination of the genesis of a Crown claim to the foreshore in Jersey. Notwithstanding, as we have shown, that from the 13th to the 18th centuries there is no evidence to suggest that the Crown ever claimed more than the historic ducal rights over those parts of the Jersey foreshore in the hands of third parties, thenceforward the Crown’s attitude would change. This appears to have been particularly so following Hall’s Essay in 1830 (see *infra*) and in our view the Crown’s position in Jersey reflected its more aggressive stance towards foreshore in England. Notwithstanding Stuart Moore’s forceful demolition of Hall’s thesis, the latter clearly had some continuing influence on Crown policy. For comparative purposes, it is however of interest to take a quick look at the English law of the foreshore as it has evolved into the 20th century.

⁷²*Cartulaire des Iles Normandes*, No 318.

The position in English Law⁷³

English law on the foreshore

106 In England, there is no Custom; there are no Commentators. The property in the solum of the foreshore in England is therefore, *prima facie*, vested by virtue of the prerogative of the Crown.⁷⁴ It may however belong to the subject by express grant, by charter from the Crown or most commonly by user or prescription. The ownership of the solum by the Crown (and thus by its grantees) is subject to limited public rights of navigation and fishery as have been immemorially enjoyed by the subjects of the Crown.

107 Where an express grant of the foreshore is alleged by the grantee, the existence and the extent of the grant falls to be constructed along established legal principles. Lemmon, *Public Rights in the Seashore*,⁷⁵ expresses the law to be thus—

“Grants from the Crown are always supposed to be construed very strictly, whereas grants from one subject to another are read in favour of the grantee. It should however be observed as an exception to this rule that Elizabethan grants are to be ‘expounded, construed, deemed, and adjudged most beneficially for the Patentees and Grantees of the same’. This is provided by 18 Eliz. c.2, s.3, so far as regards then existing grants and those made within seven years of the passing of the statute, and 43 Eliz. cl, a.2, contains words very similar in effect. The authorities seem to treat the rule that Crown grants are to be construed as *stricto jure*, as an invariable one, but this view is obviously not correct, although the Elizabethan exceptions given above have been almost invariably overlooked. There is also one other exception usually acknowledged, viz that the grant is made not at the request of the subject, but by the initial motion (so to speak) of the Crown. Otherwise, it is generally true to say that all doubts arising out of Crown grants are resolved in favour of the Crown.”

It is pertinent to refer to what is known as the rule in *Iveagh* which arises from the judgment in *Earl of Iveagh v Martin*,⁷⁶ a case concerning manorial mooring rights in Sussex. The principle is this: the document declaratory of rights cannot be used to limit or extinguish broader pre-existing rights, where such earlier rights are to be found recorded in documents or otherwise.⁷⁷

108 In the absence of express grant, the question arises as to how title to the foreshore as against the Crown can be acquired by a subject by user and prescription, thereby

⁷³We have drawn, largely verbatim, in this section, upon the Opinion of Michael Fysh, QC prepared for *Les Pas Holdings Ltd* in 1993. *Vide paras 193 et seq infra*.

⁷⁴The historical development of the exercise of Crown rights in the seabed is examined in detailed in Marston, *The Marginal Seabed of the United Kingdom* (Oxford 1981), Chapter 1.

⁷⁵(London 1934), at 31–32.

⁷⁶[1960] 1 QB 232.

⁷⁷See in particular the judgment of Peaull J, at 263.

giving rise to the presumption of a grant. The amount of evidence of use required is a question of fact and degree, as explained by Phear in *Rights of Water*⁷⁸—

“Where, as in the case of the seashore, the incidents of enjoyment are very few, it is not easy to say whether the user of one or two of them is to be referred to the greater or lesser right. No general rule of guidance can be laid down, but perhaps it may be assumed that, to make acts of possession evidence of ownership, they must appear, under circumstances which surround them, to have been done animo habendi possidendi et appropriandi.”

109 In more practical terms, the position has been well put in *Lord Advocate v Wemyss*⁷⁹—

“For a definition of what will constitute sufficient evidence of such possession, I may refer to the remarks made by Lord Blackburn in *Lord Advocate v Blandyre* (1879) 4 App Cas 770 at 791: ‘Every act shown to have been done on any part of that tract by the barons or their agents which was not lawful unless the barons were owners of that spot on which it was done is evidence that they were in possession as owners of that spot on which it was done. No one such act is conclusive, and the weight of each act as evidence depends on the circumstances; one very important circumstance as to the weight being, where the act was such and so done, that those who were interested in disputing the ownership would be aware of it’.”

This is not the place to review the English case law which has considered the various acts upon a foreshore by owners of adjacent property—be they Royal, baronial, manorial or seigneurial—which the Courts have come to regard as being sufficient to raise a *prima facie* title thereto on the part of an individual claimant.⁸⁰ Coulson and Forbes cite the following as the chief acts on the part of a Lord which afford good evidence of his ownership of the foreshore adjacent to a maritime grant of land:

taking wreck;
taking Royal fish;
the various incidents of a port;
paying for the burial of dead bodies washed ashore;⁸¹

⁷⁸(London 1857).

⁷⁹[1900] AC 48.

⁸⁰Numerous historical extracts in judicial authorities are cited in the following sources: Hale, *De Jure Maris*; Hall on the Seashore, 2nd Edition (1875); Stuart Moore; *History of the Foreshore*, 3rd Edition (London 1888); Phear, *Rights of Water* (London 1857); Stuart Moore and Hubert Stuart Moore; *The History in Law of Fisheries* (1903); Lemmon, *Public Rights in the Seashore* (London 1934); Coulson and Forbes; *The Law of Waters* (6th Edition 1952); Halsbury Volume 8, 4th Edition; Marston, *The Marginal Seabed of the United Kingdom* (Oxford 1981).

⁸¹This is not a relevant foreshore activity in Jersey; inquests and the disposal of bodies were always entrusted to the Royal Court. However see *Code Le Geyt*, at 46, art 47, for evidence of a residual jurisdiction based on the ownership of the foreshore.

a several fishery;⁸²
hunting over the foreshore;
mining, digging and taking sand, shingle and seaweed;
levying anchorage and groundage dues;
building or embanking and enclosing foreshore;
suing trespassers;⁸³
licensing persons to do various acts upon the foreshore.

110 When disputes have arisen, the Courts have far more often than not held, on evidence of user, that the solum of the foreshore is within the boundary of the manor in question. Indeed the cases go further; it seems upon examination that, far more often than not, the foreshore is not with the Crown but in the hands of its subject. Indeed this is the underlying theme of Stuart Moore's textbook. The point is well made by Earle CJ in *Lestrangle v Rowe*,⁸⁴ a case where an allegation was made of unlicensed taking of shellfish from the foreshore adjacent to a maritime manor in Norfolk—

“There are some manors which remain in the Crown—that are the property of the Crown—as in Cornwall; but I take it that, in the great majority of cases, the right to the foreshore between high and low water mark is in the Lord of the Manor.”⁸⁵

We leave the last word on the subject to Hale in *de Jure Maris*⁸⁶—

“Foreshore may not only be parcel of the manor but de facto it many times is so, and perchance it is a parcel of almost all such manors as by prescription have the Royal fish or wrecks of the sea within their manor.”

111 In English law, wreck of the sea may be defined as property which is a ship or her cargo or has formed a portion thereof and has been cast ashore (*i.e.* it is not still floating) and for which the owner cannot be found: *Sir Henry Constable's case*.⁸⁷ The right merely to take wreck has been regarded in English law primarily as a franchise and not as an incident inherent to the possession of foreshore. Because of the position under customary law, English, Irish, Jersey and Guernsey law fundamentally differ in this respect. However since *Dickens v Shaw* (1822), if not before, the Courts have consistently regarded the taking of wreck as strong evidence of ownership of the soil of the foreshore.⁸⁸ Though a grant of the foreshore and a grant of wreck are not necessarily concomitant, if the grant of the wreck was “*infra manerium*” (or words equivalent) a presumption will arise that the

⁸²Le Geyt considers the right to hunt over the shore to be common *vide Traité de la Chasse*.

⁸³In most of the English, Scottish and Irish foreshore cases, the cause of action has been in trespass.

⁸⁴[1866] 4 S & F 1048.

⁸⁵*Prima facie* the foreshore in the Duchy of Cornwall is within the Parliamentary grant to the Black Prince and is inalienable: but there have been exceptions even to this.

⁸⁶*Op cit*, at 27.

⁸⁷(1601) 5 Co. Rep 106.

⁸⁸This case appears not to have been reported. It is however considered in Moore, *op cit*, at 451–454. The case was also considered by the judges in *Calmary v Rowe*.

foreshore was part of the manor before the grant of wreck was made. Separate titles are involved. When the grant of wreck is thus made the presumption which arises is: that the manor was granted together with the foreshore; that the wreck was granted to be taken in and upon that manor and, therefore, that the foreshore must have been parcel of that manor, because the wreck to be taken can only be taken upon the foreshore. But if the two rights become severed, vested in different persons, it is impossible to say that because a man has wreck he must have the foreshore also.⁸⁹ This distinction is well made in *Dickens v Shaw* (1882) where Holroyd J said

“It is true that Lord Hale instances wreck as one species of right which tends to show a right to the soil. In one place in his treatise *De Jure Maris* he intimates that if it were otherwise the party could not get down to taking the wreck. I think it may be evidence of ownership, particularly if coupled with other acts of enjoyment of the right of soil. Where the Crown grants the right of wreck it is probable that the Crown grants the right of soil also; but if the Crown grants the right of wreck alone, by that grant the party would have the right to come and take the wreck as an incident to the grant, otherwise the grant of the right would not be a grant of anything whatever. Everything necessary for the enjoyment of a right passes incidentally with the grant.”

112 In the leading case of *Lestrange v Rowe*, Earl, CJ took the principle further—

“Again in respect of the right of wreck—things thrown up by the sea, coming with the rise of the tide and left upon the shore when the tide goes out—the person has the grant of the wreck of the sea must go down upon the shore to collect that wreck, and therefore it is that that has been taken to be very good evidence upon which the jury is justified in presuming the Crown, in granting a manor with those additional rights, intended to grant the foreshore of the manor wherever those rights were to be exercised.”

113 Later cases involving wreck illustrate another aspect of Holroyd, J’s *dictum*, namely that a grant of wreck “coupled with other acts of enjoyment of the right of soil” generates a very positive presumption of ownership of the soil. What further evidence is required then to establish ownership of the foreshore? Acts which have been coupled with wreck in as it were a reinforcing capacity are varied. In *L’Estrange v Rowe*, for example, wreck coupled with anchorage and groundage amply sufficed. In *Hamilton v Att Gen for Ireland*,⁹⁰ wreck coupled with the right to flotsam and jetsam and waifs and strays were held to be admissible to prove a title to the shore. In *Att Gen v Jones*,⁹¹ fishery, wreck and the right to take gravel sufficed. In *Calmady v Rowe*,⁹² wreck coupled with anchorage was held to be good evidence in title to the foreshore. There are cases from Scotland, too.

⁸⁹See Hale, *de Jure Maris*, printed in Moore *op cit*, at 394, 648 and 649.

⁹⁰(1881) 5 LR Ir Ch 555.

⁹¹(1863) 2 H & C 347.

⁹²(1884) 6 C.B. 861.

The genesis of a Crown claim to the foreshore in Jersey

114 As observed above, we have so far found in Jersey, from the 13th to 18th centuries, no evidence that the English king ever claimed other than the rights of his ducal predecessor in relation to the foreshore. The evidence is all the other way. The King of England indeed over that long period—whatever the position in England or elsewhere in the British Isles—made no attempt to change Norman Custom in relation to rights in land. Nonetheless, it is not in doubt that in more recent times Crown claims by the Crown inconsistent with Custom have been asserted. Our reviews of the history of Crown behaviour in relation to the foreshore over the last two centuries shows it to have been guided more by policy in a particular case than by settled principle.

115 Evidence for a *prima facie* Crown claim to title to the Jersey foreshore, when we consider the behaviour of the Crown in the two centuries before that claim first emerges, is for the most part, as we have seen, negative. The following examples emphasise that fact.

116 By his Letters Patent in 1669, Charles II granted to the Governor, Bailiff and Jurats rights to duties on wines and spirits. The States were particularly concerned to use these revenues, the primary source of income available to the States of Jersey, towards the building of a harbour at St Aubin. The first initiative undertaken involved the commissioning of one Nicholas Bailhache to build the harbour and pier. The Acte of the States records (in translation)—

“... it has been agreed and concluded: first as to the place of the pier that the said Bailhache shall construct in accordance with the offer and proposition made by him to the States ... provided that the said Bailhache shall cause to be built the said pier ... finishing at the said time two years thereafter ... that the said Bailhache shall join the said pier ... to make it convenient and to cause it to go as far as the roadway ... and shall also cause to be made a pier proper and satisfactory ... and such steps as shall be necessary for boarding vessels and loading and discharging men and merchandise such as are appropriate for a good haven.”

117 The consideration for these works would be—

“... for the better encouragement of the said Bailhache and the more rapid advancement of the said pier the Governor and the Crown Officers have agreed with the said Bailhache that he shall have for his own private property in the future for himself and his heirs in perpetuity the use of a certain place and area of foreshore which is between the said Rocher des Ancres and the rock from the point of the Boulevard as far as the high tide co-extensive with the points between the said rocks ...”

118 After some delay it was decided it would be better to build the pier from St Aubin's Fort and that is the pier which stands today. Bailhache withdrew and the enterprise was

taken up by the Governor of the Island, Sir Thomas Morgan. The States petitioned the king for consent and part of the consideration would be—

“... that the place of sand which is betwixt the Anquor Rocke of the Bulworke pointe to the full sea marke at St Aubins be leased to the Governor and his heirs for ninety-nine years at the annual rent of a peppercorn (if demanded).”

119 Responding, the king confirmed the arrangement by his letter of 1673. This included the following—

“That the said Sir Thomas Morgan receive the said space all petty customes and emoluments arising from the said peere and appointe a water bayliffe for that purpose. That a small Creeke below the full sea marke ... be given to the said Sir Thomas Morgan and his heirs for ever to build to a key or otherwise to dispose of it provided Sir George de Carteret, Vice Chamberlain of our household *who is lord of the mannour do approve thereof ...*” [Emphasis added.]

120 Later the king concludes—

“But for as much as the said Sir George de Carteret claymes the Propriety of the small creeke mentioned in the sixth article, that the same be only leased unto the said Sir Thomas Morgan for ninety-nine years at a peppercorne rent yearly payable to the said Sir George de Carteret or his heirs upon demand, and that the said Sir Thomas Morgan do improve upon the said creeke by building key or houses thereupon or something that may become serviceable to the said peere ...”

121 It seems that at the outset the Crown Officers and the Governor had assumed the foreshore at St Aubin to be at the unfettered disposal of the Crown. It is possible that the boundary between the Crown fief on which part of St Aubin stands and the Fief of Noirmont had not been considered.⁹³ What is clear however is that the Governor and the Crown when reminded of his rights conceded that the foreshore belonged to de Carteret. Accordingly, the Governor in return for his works of improvement would now have part of the “creeke” and would have the fruits of his improvements for ninety-nine years, the reversion to fall to the benefit of de Carteret’s posterity in the fullness of time.

122 We have considered the grant by Royal Patent of the Fief of Noirmont and other fiefs to Sir George de Carteret in 1643. In terms the grant makes no express mention of foreshore rights. De Carteret successfully based his title on Custom.

123 In 1678 the Seigneur of the Fief of La Fosse entered into a contract of arrangement and partition with the inhabitants of the Vingtaine de la Ville to compromise their several rights in the Mont de la Ville, the common of that fief. The contract *inter alia* provided that should the inhabitants dispose of any part of the common, the proceeds (in translation)—

⁹³This is the same boundary which so concerned the monks in the centuries earlier, *vide supra*, para 93.

“... should be employed in building a harbour at Havre des Pas according to such plan then in existence and if there emerged any obstacle which might impede such a design, he, the Seigneur, would consent that the proceeds be employed for other public uses ... touching which uses he and his successor Seigneurs of Samarès, La Fosse *etc* should be notified and their consent thereto required ... and if the said harbour should come into being, the said Seigneur ... bound himself to cede over his land a satisfactory roadway to go and come thereto ...”

124 We have seen above that the foreshore at Havre des Pas was part of the Fief of La Fosse. The permission of the Seigneur was accordingly necessary for any development upon it by the municipality. Significantly, there is no record of any Crown involvement in this transaction which must have been the case had the Crown claimed that foreshore.

125 In 1700 an Acte des Etats records a full sitting of the States at which the Lieutenant Governor and Crown Officers were present to hear a proposal by certain entrepreneurs for the reclamation of the foreshore and the construction of a new cattle market, a new quay and the reclamation of land. The Acte or Minute describes the work to be carried out as follows a (in translation)—

“those who shall be put to the expense of the said works shall have the property by way of reward in all of the land which shall be to the south of the said rock ... that they may enjoy for themselves and their heirs in perpetuity.”

126 The States gave their blessing to the work and undertook to give assistance in the carting of materials. Significantly, the Dame of La Fosse on whose foreshore the bulk of the works were to be carried out, was also present. Her consent was recorded. The Acte des Etats makes no reference to any Crown interest in the matter. The inference must be that in 1700 the Crown was silent because it recognised that it had no property in the foreshore of the Fief de la Fosse.

The de la Garde claim

127 In 1797 Philip and Thomas de la Garde caused some quarrying to be carried out on the foreshore of La Fosse at the base of the cliff and under the bank which supported the main road from the town to the harbour. Fearing collapse of the bank, the Vingtaine de la Ville brought a possessory action before the Royal Court against the de la Gardes to stop their trespass and obtained judgment. The case illustrates another interesting aspect of the ownership of the foreshore.

128 The value attributed to stone on the foreshore may be observed from feudal records.

129 In 1619 the Rolls of La Fosse record that one Brie Messervy had committed an offence: “...*en desaisant le fieu en levant quelque pierre du havre*” [in dispossessing the fief by lifting stone from the harbour]. In 1620 the same Rolls record that Jean Gourey had

been charged with having: "... *tyre de la pierre à la banque de la commune vers la mer*" [taking stone from the bank of the common towards the sea]. In the Rolls of the fief of Noirmont we find that in 1735 a tenant was fined for taking stone and a sturgeon from the foreshore of Noirmont.

130 In the first incident the charge is that the offender had taken stone from the Fief within the harbour. In 1619 the *havre* would have meant either Havre des Pas or, perhaps a haven near La Folie where a small pier was later to be built. The reference is in the clearest terms to the solum of the foreshore. In the second case, the reference is to the rocks on the edge of the foreshore. These amount, in our opinion, to important proofs demonstrating not only Seigneurial jurisdiction but also Seigneurial property in the solum of the foreshore.

131 The de la Gardes were alive to the value of the stone and commenced quarrying on a commercial basis. As noted, the Vingtaine de la Ville was successful at first instance before the Royal Court in its possessory action to stop the trespass of the de la Gardes. The Seigneur de la Fosse was later party to a Grande Vue de Justice at the *locus in quo*, but otherwise seems to have played no active part in the proceedings. The de la Gardes appealed to the Privy Council, but no formal judgment issued, the cause being returned to the Royal Court for hearing. In the event the matter was resolved by compromise. It is perhaps worth noting, however, that while liberty was given in the Privy Council to the Attorney General to intervene for the Crown interest, if any, no intervention is recorded. As will be seen below the Crown would later disclaim any interest in this foreshore.

132 The de la Garde claim was founded on a Grant made in 1663 by Charles II to Sir Edouard de Carteret. It was limited to a grant of *percages*, commons and wastes on the Crown fiefs. It was an empty claim with no relevance to the issue of Seigneurial title and ultimately abandoned.⁹⁴

Quarrying and Le Quai des Marchands

133 The area where the de la Garde quarrying had taken place was, within a few years, the subject of reclamation undertaken by entrepreneurs and the Vingtaine de la Ville with the object of raising money to build a new harbour which the commerce of the Island then desperately needed. The rocks and sands below Pier Road were reclaimed using the spoil created by the escarpment of the hill below Fort Regent. The new harbour and the sites for all the merchants' houses and warehouses to be built on them represented the most significant property development in the Island. The reclaimed land was also potentially

⁹⁴An opinion was given in 1865 to the Treasury Solicitor by Roundell Palmer and RP Collier, respectively Attorney General and Solicitor General for England, in relation to the claim of one Colonel Packe to all the foreshores of Jersey. Packe was a successor in title to the de la Gardes and ultimately to Edouard de Carteret. The advice was that the grant of Charles II in 1663 was couched in too wide and vague terms to pass the foreshore. Extraordinarily, this very narrow opinion which does not touch on the law of the foreshore, would, in 1993, be invoked on behalf of the States to deride the feudal claim of *Les Pas Holdings Ltd*, *vide* para 194.

very valuable in terms of Seigneurial rights. The project was placed before the States on the express understanding that the Crown had no claim to the foreshore. When the States adopted the scheme, the Attorney General confirmed that the Crown had no claim (“*aucun droit*”) to the new land: eloquent testimony to the prevailing view of foreshore title in 1813. This is, of course, consistent with the position adopted by the Crown in 1700. No Crown fief was involved.

134 In 1813—unlike the case in 1700—the Seigneur of La Fosse was not specifically mentioned in the Acte des Etats of 1813 as a consenting party. It was however, never in doubt that the proposed reclamation would be on the foreshore of La Fosse. Indeed, this fact was recognised with the utmost formality by the Vingtaine and the Crown, and arguably by the States, in the transaction described below.

135 In 1817 the Vingtaine having initiated the new harbour project and the creation of the site for the Quai des Marchands, then transferred to the States responsibility for continuing the works. A contract of 18 December 1817 records an interesting transaction.⁹⁵ Both Crown representatives, the Attorney General and Solicitor General, appeared before the Royal Court to take “in the name of the Public” from the representatives of the Vingtaine de la Ville (in translation)—

“... all and such lands as may remain with the landed proprietors of the said Vingtaine to the west of the Mont de St Helier *etc* ... with all and as many rights, appurtenances and dependencies as may belong to the said lands without any reserve or retention whatever, the said lands situate in the Parish of St Helier on the Fief of La Fosse ...”

In all subsequent transactions involving transfers of title the reclaimed land is described as being on the Fief of La Fosse.

136 The Seigneur had no need to be actively involved in the investment. Each costly development on the foreshore by the entrepreneurs materially added to his wealth: all the relevant contracts of conveyance contained an acknowledgement under oath by both parties that the land passing was “*sur le fief de la Fosse*”; the property of the Seigneur and, accordingly, subject to Seigneurial rights. Moreover, when the Quai des Marchands was built, all the new owners by making their “*aveux*” declared formally that these parcels of land were indeed held from the Seigneur of La Fosse, acceptance by all the leading merchants of Seigneurial title to the foreshore.⁹⁶

Crown Policy and *prima facie* title, 19th century

⁹⁵RP, vol 124, Folio 25.

⁹⁶The *Aveu* was an important formality. Made by an incoming tenant of the fief, it constituted a solemn binding acknowledgement of the relationship of Seigneur and tenant.

137 Thus far, that is to say by the mid-19th century, we have found little evidence of any general claim have been made by the Crown in Jersey to the foreshore. In England in contrast, the policy was increasingly to promote a *prima facie* Crown claim based on ancient prerogative title and so to force claimants to show either a specific Crown grant or sufficient evidence of possession to raise the presumption of a lost grant.

138 The Crown position was supported by Hall's Essay (1830) "On the Rights of the Crown in the Seashore". This influential, albeit short work made a confident claim for the Crown against the subject. It was largely to challenge Hall's Essay and make the case for the subject that Stuart Moore wrote his magnum opus in 1888.⁹⁷

139 We have seen no specific documentary evidence to support the allegation but we suspect that the source of instructions to the Receiver General and the Crown Officers in Jersey in the mid-19th century will have been advisers to the Lords Commissioners to the Treasury keen to promote a Crown claim in Jersey based on English Law and taking no account of the Customary position.

140 We will not overburden our text with English matter but we have seen written advice given in 1867 by Sir Thomas Farrer entitled "Memorandum as to the Board of Trade's Dealings with Foreshore".⁹⁸ This document has a somewhat Machiavellian flavour about it. The Board of Trade is advised to implement policy rather than to be too nice about the subject's claims. Thus in relation to the duties of the Board, Farrer says on the question of ascertaining title—

"This which logically ought to be the first thing done, it will probably be prudent to postpone."

A Crown Officer's embarrassment

141 In 1860 the Crown in Jersey was already ambivalent on foreshore ownership as witness minutes of evidence taken before the Royal Commissioners.⁹⁹ These record that JW Dupré, then Attorney General, was asked a series of questions in connection with Seigneurial rights.

142 On wreck, Mr Dupré stated—

"... this is really the old law of Normandy. Every Lord has the wreck on his own Manor where it borders the sea, except certain things which belong to the Sovereign in right of his crown; those rights are clearly accepted ..."

143 On foreshore—

⁹⁷*Op cit.*

⁹⁸Moore *op cit.*, at 596 *et seq.*

⁹⁹*Report of the Commissioners to enquire into the Civil, Municipal and Ecclesiastical Laws of the Island of Jersey, 1861*, para 6392 *et seq.*

6392 “In regard to the ownership of the space between the high and low water mark, is there any uniform and well-established rule in the Island?”—“Anything covered by the sea *is supposed to be in the power of the Crown.*” [Emphasis added.]

6393 “Is it, in this Island, usually granted with the Manor or not?”—“It is considered that the *rights of the proprietor* end at the point where the sea covers the soil. No doubt any wreck of the sea at low water mark, would belong to the Seigneur of the adjoining land.” [Emphasis added.]

6394 “Does the vraise or seaweed belong to the Lord?”—“Certain Lords of Fiefs have a right of vraising one tide before the generality of the people, but, after that, everyone has an equal right.”

144 The above questions and answers are, in our view, significant. First, we note Mr Dupré’s answer to the specific question relating to the ownership “of the space between high and low water mark”—“Anything covered by the sea is *supposed to be in the power of the Crown*”. This hardly amounts to an unambiguous claim to Crown property in the soil. It might equally represent a statement of the *ius publicum* or public right vested in the Crown. Again the answer to question 6393, whether the foreshore is “usually granted with the Manor or not?”—“It is considered that the *rights of the proprietor end at the point where the sea covers the soil*” is at best, ambivalent. It is certainly not clear who is meant by “the proprietor”. If the Attorney General was referring to a tenant of the Fief (a more appropriate candidate for this description) having on the edge of the sea his title defined by the *plein de mars*—the high water mark—there could have been no argument. Dupré avoids answering a question which was clearly aimed at establishing the seaward extent of the Fief and curiously avoids any reference to the Custom with which he must have been familiar. It is perhaps, a pity that the Commissioners did not press the point.

145 We suspect that the reason for the Attorney General’s evasive response to a simple question lay in a degree of uncertainty prevailing in certain quarters in Jersey at this time. There was, for example, the case of Frederick Clarke mentioned below. There was also, more fundamental, the matter of a new draft law to allow for the proposed new railway to run on the foreshore. The draft law languished before the Privy Council and, it appears, was held up there, at least in part, because of the unresolved dispute over Frederick Clarke’s shipyard. Dupré was heavily involved in these matters as Attorney General. It seems likely, therefore, that delicate political issues lay behind Dupré’s uncharacteristically evasive response to the Commissioners’ questions.

Frederick Clarke’s shipyard

146 In the mid-19th century the scandalous case of Mr Clarke and his shipyard at West Park, raised the issue whether the public as represented by the States of Jersey had any claim to the foreshore. The ship builder Clarke had created a yard on the beach extending

over some two acres.¹⁰⁰ He had become the largest employer of labour in the Channel Islands. To secure his position Clarke obtained by hereditary contract a perpetual lease of the relevant part of the foreshore from the Seigneur of the Fief of Melesches against payment of a perpetual wheat *rente*. Clarke then approached the Lords Commissioners of the Treasury to make assurance doubly sure (perhaps in relation to public rights). The Lords Commissioners agreed to sell the Crown title to Mr Clarke for a consideration and instructed the Crown Officers to enter into the appropriate contract with Mr Clarke. The contract was never passed. Mr Clarke's shipyard stood in the path of a proposed new railway line which would join St Helier to St Aubin. There were serious conflicts of interest. Many of the *dramatis personae* in both the Royal Court and the States were promoting the railway. Their interest and their perception of the Public interest combined to stop Mr Clarke who despite the support of the Seigneur and the Crown was eventually ruined.

147 So far as the States were concerned:¹⁰¹

“... it is respectfully submitted ... and until the question to which [these facts relate] has been finally adjudicated upon viz whether the right to the sea shore belongs to the Crown and the States to be held by them for the use and in the interests of the inhabitants of the Island, to the Seigneurs of Fiefs bordering on the shores, or to an individual claiming under a pretended grant or concession from the Crown ... Upon the main question regarding the claim of the Crown to the sea shore between high and low water mark, the States beg leave most respectfully to represent that at no period of the history of the Island has the absolute right to the Crown to the foreshore been claimed by the Crown. On the contrary, it has been held and considered that the foreshore was vested in the Crown as Trustee or Conservator for the Public who at all times have had the free use and enjoyment of the same and moreover, that no portion thereof could be appropriated to other uses without the consent of the Crown and the people; that is without a law passed by the States of the Island and sanctioned by Your Majesty in Council ... If a different construction were to be admitted it would be difficult to resist the claims of the representatives of Sir Edward de Carteret or of Lords of Manors laying a claim to the foreshore as forming part and parcel of their Manor, and as such comprised within the terms of the Grants made to them at various times by some of Your Majesty's Royal predecessors.”

148 Unfortunately the Treasury Appendix does not record any answer to the States claim. Certainly, as we shall see, the States abandoned this position in the 20th century. On record however is the brusque demand of the Privy Council that its Order in Council to give a right to Mr Clarke by contract be obeyed. The details of this sad history need not detain us. Relevant here however is the co-existence of—

¹⁰⁰The Jersey Maritime Museum displays a scale model of the shipyard. It is also shown in a large topographical print made by Felix Benoist for his *Album l'Île de Jersey* 1870.

¹⁰¹The Jersey Prison Board, Treasury Appendix (Part II), at 796 Represent-ation of the States of Jersey against an Order in Council of 14 April 1869.

(a) The Seigneur of Melesches' belief that he had an alienable property in his foreshore;

(b) An inchoate and undefined notion of a Public claim to the foreshore; and

(c) The perception of Crown title to a foreshore below a private fief.

149 It was not until a dispute over the foreshore near the Ronez Quarry became the subject of dispute between a concessionaire and the Crown that the above issues would again be debated.

The Ronez case

150 The issue of the Crown claim to *prima facie* title was not, it appears, raised again in Jersey until a dispute arose over Ronez Quarry—the case of *La Recette v Croft Granite Co Ltd* in 1913. There the Crown had purported to lease the foreshore to a quarry company for a jetty. The lease was expressly made under “The reserve of all private rights which could exist in virtue of Royal Charters, Letters Patent or by prescription”. When the Crown demanded payment of a toll on the rock passing over the foreshore in addition to rent, the company challenged the Crown title and alleged that the foreshore belonged not to the Crown but to the Seigneur of Lulague dit Mourier. That interesting claim was never decided because it was ultimately found that the company, having paid rent to the Crown, was estopped from pursuing its third party title argument.

151 The case for the company was however, interesting. It rested on many of the propositions advanced in this article. Relevant here, is that a general Crown claim to a *prima facie* title to the foreshore was receiving its first airing in Jersey. The speech of the Attorney General was summarised on the 14 June 1913 in the *Chronique de Jersey* thus (in translation)—

- “(1) That by the Law and Custom of this Island the foreshore of the sea within the limits of the *plein de mars* and the low water and the bed of the territorial waters are in the property of the king;
- (2) That the Defendant Company cannot be heard to contest the right of the Crown because in its letter of 21 March 1912 its agent declared that his clients were not in a position to test the fact that the right in the foreshore of the sea belonged to the Crown;
- (3) The Defendant's case referred to the petition as a result of which the right to establish fisheries had been suspended for as long as the Company had the enjoyment of the area and in consequence the validity of the *ius privatum* of the Crown was acknowledged;

...

- (9) That the contention of the Defendant Company that the Crown, not having exercised its rights insofar as concerns the Public Authorities which have established quays or harbours for public use, has not the right to exercise its prerogatives in respect of a private company exploiting quarries for the profit of its shareholders, is a thesis unsustainable in law;
- (10) That the right of concession of the foreshore to private persons by the Crown is not limited to the Island of Jersey but is of general application and in Alderney the Crown has for many years exacted a toll by way of wayleave on stone passing over the foreshore. The claim that the States in exacting rights of harbour over the merchandise embarked from Ronez had acquired a proprietary possession in the quay is inadmissible;
- (11) That even if the Court, par impossible, found that the right of the Crown was limited to the protection of the public right, this fact would not come to the aid of the Defendant Company;
- (12) That the Loi sur les Parcs à Huîtres, 1882 defines the foreshore (in translation): as 'all that which covers and uncovers during the new and full moons and as far as the Great Flood of March can extend over the beaches ...' and Article 18 is couched thus: 'It is not intended to derogate by the present law from the rights which private persons might have to certain parts of the edge or foreshore of the sea in virtue of Charters, Letters Patent or immemorial usage.' That this declaration had all the authority of the Legislative Chamber confirmed by the Sovereign and *necessarily implied that the Crown has the right to cede certain parts of the foreshore to be used for private purposes* and reduces to nothing the contention of the Defendant Company that the Sovereign solely enjoys the foreshore as *Conservator of the Public right*. The States themselves declare in that law that they will not infringe the private rights confirmed by Charters, Letters Patent or immemorial usage in establishing oyster concessions ..." [Emphasis added.]

152 A number of points emerge from the above:

(1) As noted above, here, for the first time is an unambiguous albeit unsubstantiated Crown claim to the foreshore and the seabed under the territorial waters;

(2) This is an unequivocal contention that the Crown's alleged right to the foreshore is a proprietary one, a *ius privatum* quite separate and distinct from the *ius publicum*. The record discloses that the Crown had levied tolls for wayleaves on the rock passing over the foreshore;

(3) The Crown conceded that if the foreshore had been the subject of grant, the right passing to the grantee could be exploited for gain.

(4) It emerged from the address of Advocate ET Nicolle for the company that the Crown records showed that leases had been made and concessions given over the foreshore and the revenue arising had always been treated as Crown, as opposed to States revenue;

(5) Such concessions had, up until that time, been given only over the foreshores dependant from Crown Fiefs; and

(6) There is no record of any attempt by the Attorney General to deal with the Defendant Company's substantive case.

The Crown's position as reflected in certain 20th-century contracts

153 During the 18th century and under constant threat of invasion from France, the Crown had built a number of towers and batteries on offshore rocks around the coast of Jersey after the Great War and having by then lost all their military value, these towers were ceded to the Public of the Island by contract in 1923.¹⁰² This contract, is, from our perspective, a significant document. In form, it is strictly conventional. Some of the towers conveyed are located on the coast, others on rocks on the foreshore. In each case the particular tower is described by reference to its *tenans et aboutissants* (its boundaries and extent) and, critically, located by reference to Parish and Fief. For Archirondel, Seymour, Icho and Rocco Towers, which lie respectively off the south-east, south and west coasts of Jersey, in each case the seaward boundary is given as *le Plein de Mars*. Archirondel and Rocco are stated to be respectively on the fiefs of Anneville and Luce de Carteret, Seymour and Icho on the *Fief du Roi*. In the case of Icho the contract is in error because there is no Crown fief in the Parish of St Clement. The identity of the fief is however, not material. The essential point is that the rocks on which the towers stand are clearly stated to be on a Seigneurial, not Crown foreshore.

154 A second conveyance by the Crown to the Public of Jersey was made in 1923.¹⁰³ This time the fortification was not a Napoleonic tower but St Aubin's Fort built by the Crown in the Reign of Henry VII. This fort protects the town of St Aubin and stands on the shore to the west of St Aubin's harbour. Significantly again, although this fort had been in Crown hands for perhaps five hundred years, it was said (in 1923) to be located "... *en la paroisse de St Brelade sur le fief de Noirmont ou autre fief*". The particular fief here is not material. What is material is that notwithstanding the antiquity and importance of this Royal fort it was the concern of the parties to determine the particular fief on whose foreshore the fort stood.

155 These two important transactions occurred some ten years after the *Ronez* case. They both proceeded on a basic assumption of law wholly at variance with the English view expressed by the Crown in the *Ronez* case. Yet that assumption will have

¹⁰²Contract 1923, 3 February, Sa Majesté et le Public de cette Ile, RP Livre 389, Folio 50.

¹⁰³Registre Public, Livre 390, Folio 231.

represented the understanding of people whose business it was to deal in landed property in Jersey at that time. It must also be deemed to represent what was then (in 1923) the contemporary view of the parties—the Crown and the States.

156 A lease was made by the Crown of part of the foreshore of La Fosse to the Jersey Swimming Club in 1894. The term was extended for a further thirty years in 1978. The leases are essentially identical in form. Both were made subject to this significant reserve—

“SIXIEMEMENT Que le présent Bail est fait sous réserve de tous droits particuliers à ladit étendue de grève ou partie d’icelle qui pourraient exister en vertu de Chartres Royales, Lettres Patentes ou par prescription.”

157 The Club leases identify the “*étendue de grève*” in question by reference to a plan which was evidently attached to the Club’s original petition to the Crown, but that is now lost. The Club has been in possession over the years of only a small portion of the area which one assumes is the area leased. What is significant is that during the period of subsistence of the first two leases the Seigneur simultaneously enjoyed his own possession over this area via the exercise of foreshore rights. The right of wreck having of course been abolished in 1966 with the Seigniorial Rights (Abolition) (Jersey) Law, one wonders what the Crown had in mind in making the reserve in the clause quoted above if not a reference to the Seigniorial gravage, *i.e.* the soil of the foreshore.

158 In 1950, the Crown purported to lease to the States for a term of 25 years (with an option of a further 25) “*tous terrains, rochers et plages comprenant le rivage de la mer ou ‘foreshore’ gisant entre le niveau de la haute mer ou ancien plein de Mars et le niveau de la Basse mer*”.¹⁰⁴ The Crown lease to the States in 1950 was a purported lease to the States on behalf of the Public to enable the States to grant beach concessions over the entire foreshore of the Island, save for those parts already granted to the Jersey Swimming Club and to Jersey Granite and Concrete Ltd at Ronez. The term expired, unnoticed it seems, on 1 January 1975. The lease was retrospectively renewed on 17 June 1988.

159 Both the lease and its renewal contained the following—

“Que ledit public de cette Ile aura le droit de reclamer durant ledit bail et tout prolongement d’icelui tous les droits de varech ou bris ou naufrages [flotsam and jetsam] dans les limites desdits terres et rivages ou “foreshore” présentement loués que possède actuellement sadite Majesté, ledit public de cette Ile étant substitué au droit lieu et place de sadite Majesté et des successeurs à tout égard en ce qui concerne lesdits droits dans lesdites limites le tous sans prejudice aux droits de

¹⁰⁴Registre Public, Livre 452B, Folio 156.

varech et gravage attachés à certain fiefs et ce conformément au chartres ou titres à ce sujet.” [Emphasis added.]

160 Like the latest of the Jersey Swimming Club leases, the Crown lease of foreshore to the west of Ronez Point to a quarrying company Ronez Ltd also contains an important limiting clause—¹⁰⁵

“*Que le présent Bail est fait sous réserve de tous droits particuliers au public à ladite étendue de rochers et terrains ou partie d’icelle qui pourraient exister en vertu de Chartes Royales, Patentés ou par prescription.*” [Emphasis added.]

161 Thus the possession given under the 1950 lease of the Island’s foreshore was expressly limited to those parts of the foreshore “*que possède actuellement sadite Majesté*”. It did not, moreover, include rocks on the foreshore which are not covered by *le Plein de Mars*. It is difficult to see what other “possession” the Crown could have given outside its own fiefs unless it were that this contract represented an attempt to lease the *ius publicum* or the Crown’s right of sovereignty. If this were the case, the so-called lease could only have been a contractual transfer of the administration of the public interest in navigation, fishing *etc*, from one public body to another, without implication for the private right in the soil of the foreshore. Certainly there is an acknowledgment inherent in the 1950 lease that the “Public” as represented by the States did not have an interest in the foreshore prior to 1950. That which is vested in the Crown is only transferred to the States for the public for the term of the lease.

162 The reference to the rights arising under Royal Charters, patents and prescription are a recognition and acknowledgement by the Crown of its grants and confirmations of grants by patents. It is an acknowledgment therefore, *inter alia*, of the maritime fiefs’ titles and their validity.

163 One week after the registration of the abolition of Seigneurial Rights (Jersey) Law, 1966 the States purported to make a long lease of land, including part of the La Fosse foreshore, to the Jersey Electricity Company Limited as a site for a new power station. Extraordinarily, no provenance was given for the lessor’s title. In our opinion, the Lessor had none, at least in relation to the area of foreshore included in the lease.

164 Finally, in the 1970s and 1980s the Crown purported to sell areas of the foreshore of La Fosse to the States for the purpose of land reclamation and development. None of the relevant contracts contains any recognition of Seigneurial title. The provenance given is ancient Crown domain. It was this, in our opinion, baseless claim, which ultimately led to the *Le Pas* proceedings.

Ouaisné Bay and GFB de Gruchy

¹⁰⁵Registre Public, Livre 693, Folio 234.

165 In 1933 GFB de Gruchy, Seigneur of Noirmont, was in dispute with the Receiver General over access which the Seigneur proposed to give to his tenants over the beach in Ouaisné Bay, St Brelade, to enable them to operate his quarry. Ouaisné is on the Fief of Noirmont. The Receiver General had challenged de Gruchy's right to the beach and right over it and this led to interesting correspondence now preserved in a file at the Public Record Office.

166 At the same time as this dispute erupted, a parallel correspondence was in train between the Attorney General for Jersey and the Treasury, concerning the railway between St Helier and St Aubin: the same railway planned half a century before and which had played an important rôle in the ruin of the unfortunate Mr Clarke. This correspondence also concerned the status of land reclaimed from the foreshore. The record contains allegations of embarrassing conflicts of interest on the part of Crown Officers (Receiver General and Attorney General in the 1890s).

167 It should be noted that GFB de Gruchy, as we have seen, was no mean scholar. His work, "Medieval Land Tenures in Jersey" would be published posthumously in 1957. It was reviewed by Professor John Le Patourel whose contribution to medieval studies we have noted in the first part of this article.¹⁰⁶ Le Patourel's concluding remarks are these—

"This book will be recognised as having permanent value because it is critical, scholarly and basically sound ... He has the right approach to feudalism and the whole evolution of medieval civilisation ..."

168 The reviewer had clearly read de Gruchy's book. Indeed the subject matter is close to Le Patourel's own interest in feudal history. It seems most unlikely therefore that the reviewer would not have challenged de Gruchy's trenchantly stated remarks about the Seigneurial foreshore had he not agreed with them.

169 If further imprimatur for de Gruchy were required, we note that the preface to his work was written by Sir Alexander Coutanche, Bailiff of Jersey, and that Philip Le Couteur, Judicial Greffier and Sydney Bisson, Deputy Judicial Greffier, both highly respected scholars, had compiled the Index and verified the many references and authorities.

170 On the foreshore de Gruchy wrote¹⁰⁷—

"There can be no doubt that in Normandy the foreshore belonged to the holder of the adjoining fief that is, to the King-Duke for his demesne or to the Lords for the other fiefs".

¹⁰⁶*Bulletin of the Jersey Society in London*. See also Everard and Holt, *op cit* at 202; de Gruchy, *Medieval Land Tenures in Jersey* (Jersey 1957) is an excellent account of land tenure in medieval Jersey.

¹⁰⁷*Op cit*, at 120–121.

171 “Medieval Land Tenures” was written in the Second World War during the German Occupation of Jersey. In 1933 however, the question of the ownership of Ouaisné beach was of practical concern. He wrote on 2 October 1933 to JF Giffard, HM Receiver General. After reviewing the need for access over Ouaisné beach he wrote—

“... the nature of my claim as Seigneur to the foreshore. In the first place it is a special right of the Seigneur de Noirmont, not a general right of Jersey Seigneurs. [He had amended his views when he wrote his book some years later.] Secondly, I have always taken it to be subject to the full and unobstructed use of the public for fishing, vraicing, carting and all other lawful activities ... I have always considered that the Crown held its part of the foreshore on like tenure ... as regards the rights of the Seigneurs of Noirmont in the foreshore of the Fief, now challenged by the Crown, for the first time, I only know that a distinguished lawyer some time ago went into the matter and advised me that my right could not be contested. What is quite certain is that it has been held for centuries that the foreshore formed part of this Fief. As an example, the Feudal Court, which could only sit within the bounds of the Fief on occasion sat on the foreshore, e.g. on 30 April 1701. Also the Rolls of that Court show that it used to deal with the offences of taking stone and shingle from the foreshore (e.g. Acts of 2 December 1696, 16 December 1696, 13 October 1735 and 13 October 1736).

Whatever my rights may be, the threat of litigation by the Crown leaves me defenceless because the financial crisis has left me so embarrassed financially that I am in no position to fight an action at law, especially one which would no doubt be carried to the Privy Council ...”

172 The Ouaisné affair was first considered by G Stuart King, Treasury Solicitor, who in a memorandum stated—

“After considering these papers and, in particular, the report of the Attorney General of the Island, I find myself in some difficulty in expressing any definite opinion on the prospects of a successful claim in this matter. *It would seem that there are special considerations of local law which will have to be considered and with regard to which I have, of course, no knowledge.* It is for instance suggested that the question of the ownership of foreshore in the Island may to some extent depend on the ancient feudal law of Normandy and that under that law the foreshore belongs to the Lords of the Manor. This plea was raised in the action between the Crown and the Croft Granite Company Limited in 1913 [Ronez] and although the Crown was successful, this point does not appear to have been determined by the Court ...” [Emphasis added.]

173 Unfortunately, the file does not contain the Report of the Attorney General (then Alexander Coutanche). It was certainly not discovered by the Crown in the *Les Pas* case settled in 2002. What is important here is evidence that in 1933 the adviser to the

Treasury in London appears to be acknowledging that the question of foreshore ownership could turn, not on English law, but on the Custom of the Island.

174 Stuart King then referred the papers to George Sinclair a specialist on foreshore law at the Board of Trade. His advice in response of 11 October 1933 confirms that he had read the file which he had found “of great interest especially the reports of the Attorney General of Jersey”. Sinclair had been asked—

“To advise on the footing that the case was one *which had arisen in this country* particularly from the point of view of the way in which the claim should be framed and the evidence by which it should be supported.” [Emphasis added.]

175 Pursuant to that instruction Sinclair goes on to look at the English cases including the *dictum* of Lord Herschell in *Att Gen v Emerson*¹⁰⁸—

“... that a subject can only establish a title to any part of the foreshore either by proving an express grant thereof from the Crown or by giving evidence from which such a grant though not capable of being produced will be presumed.”

176 The writer then considered the Letters Patent granted to Sir George de Carteret in 1643 of the Manors of Melesches, Grainville and Noirmont on the basis of English Law:

“I do not think that the words ‘with all their rights and appurtenances ...’ are material, but the fact that ‘the wreck of the sea, flotsam and jetsam and lagan within *the fees and manors*’ are granted is one that should be taken into consideration. We have frequently been advised by Counsel that the taking of wreck *within* a manor is good (though not by itself conclusive) evidence of a title to the soil of the foreshore where wreck is washed up ... The question then arises having regard to any acts of ownership exercised by Mr de Gruchy and his predecessors over the foreshore whether the Grant of 1643 could be construed to include the foreshore. The evidence of user contained in your file is very scanty ... My conclusion is that if this were an English claim, I would be prepared to give it further consideration. I do not think the Courts would hold that it had been established on the Grant of Charles I alone. I would ask the claimant to submit a full statement of claim pointing out that the onus of proof is on him ... I merely state what is the practice in this Department and you may not of course consider it advisable to adopt this course ...”

177 We have quoted only enough of this important advice to indicate that even in the light of English law, de Gruchy’s claim had to be considered. Moreover, the file before Sinclair, as he admitted, was far from complete.

178 We have ourselves considered the 1643 Grant by Royal Letters Patent to Sir George de Carteret. It must, of course, be construed in the context of Jersey Law and Custom.

¹⁰⁸HL 1891 AC 653.

Sinclair seems not to have understood that the Patent represented not only a new root of title, but also expressly passed on all those customary rights *etc* which had previously been in the Fief when confiscated from the Abbot of Mont-St-Michel two hundred years earlier.

179 Moreover, Sinclair could not have foreseen the decision of the International Court of Justice in 1953. Had he been advising on the same matter twenty years later, his advice must surely have been very different.

Charles Sydney Le Gros—Le Droit Coutumier de Ile de Jersey (1943)

180 We have already quoted Le Gros' citation of Stuart Moore in the above work. Le Gros' own opinion, however, is of particular relevance. This was the life's work of a lawyer who had been successively *écrivain*, advocate and HM Vicomte of Jersey. His scholarship in the field of Norman Custom had earned him a doctorate *honoris causa* at the University of Caen. His object in writing the book is set out in his preface. It was to provide his fellow citizens and in particular, his professional colleagues with a reliable statement of the Custom as it stood towards the middle of the 20th century. Le Gros' success in that object and his continuing status as a commentator on Customary Law has recently been recognised by the publication in 2007 of a facsimile edition of his work, with added index and notes. In his introduction to this edition, Sir Philip Bailhache, Bailiff, had this to say—

“His great work, the *Traité du Droit Coutumier de l'Isle de Jersey* is ... a testament to his endeavours and to his profound knowledge of the Island's Customary Law. It has been cited in numerous judgments in the Royal Court and Court of Appeal. In many instances it has been treated as the decisive authority ... the text forms an important part of the *doctrine* of Jersey law.”

181 Although Le Gros in his chapter *Du Varech*, except in quoting Stuart Moore, does not expressly deal with foreshore title, seigneurial property is clearly implicit. We find that view underlies Le Gros' remarks on the important word “*Gravage*” which we discussed in the first part of this article¹⁰⁹ and where we quoted him (in translation) as saying—

“We report here several judgments which concern objects found at sea or brought *to the gravage* [the beach, edge of the sea] on a fief.”

Again—

“If [the right of wreck] permits Seigneurs of fiefs to recover objects thrown by the sea *on the coasts or foreshores of their fiefs*” [*sur les côtes ou rivages de leur fiefs*] [Emphasis added.]

Le Gros had no doubt.

¹⁰⁹Part 1: *A Jersey Usage*, para 88–94.

Minquiers & Ecréhos Case 1953

182 This case is of interest to students of public international law. It is also, in our opinion, a decision conclusive of the ownership of the foreshore of maritime fiefs in Jersey. The judgment is perhaps not strictly binding upon a Jersey court, but its effect must be strongly persuasive.¹¹⁰ What was in issue, as Professor Wade, Counsel for the UK put it, was the Jersey title to the Minquiers and Ecréhos Islands from the Middle Ages to 1953.¹¹¹

183 The pleaded reply of the United Kingdom concerning the Fief of Noirmont contains this passage¹¹²—

“An essential fact to be stressed regarding the Fief of Noirmont is that the Minquiers were considered to be part of that Fief. In the submission of the Government of the UK, the Minquiers were included within the Fief of Noirmont by the Crown’s exercise of its manorial right to the wreck of the sea ... again though the French counter memorial questions whether the Court did give wreck to the Seigneur, this appears to have been so since the Court ordered its Sergeant to impound it, in one case at least, ‘until other provisions shall have been made’. The significance of the evidence of these Court Rolls lies in the fact that the Seigneur of Noirmont (who happened at the time to be King of England) laid claim to the wreck cast up on the Minquiers because these Islands were part of his Fief.”

184 Professor Wade’s oral arguments before the ICJ are particularly interesting not only in themselves but as a statement of the Crown position for the custom of Jersey as it stood in 1953.¹¹³ In this connection we note Wade’s remarks in disposing of the French Council’s argument:

“... It is totally contrary—this theory of *ratione personae*—to all those feudal concepts that seemed to have regulated such matters in Jersey, it is contrary to English law, and it is contrary to Jersey law *at the present time*.” [Emphasis added.]

185 It seems extremely unlikely given the presence of Cecil Harrison, Attorney General for Jersey, at Wade’s side that the last words were not prompted by him.

186 Considering the rolls of the Fief of Noirmont recording wreck found on the Minquiers in 1617, Professor Wade had this to say—

¹¹⁰*Minquiers & Ecrehos Case*, Judgment of 17 November 1953: ICJ Reports 1953, at 47 *et seq.*

¹¹¹Jersey, which is not part of the UK, was nonetheless and somewhat curiously represented by the UK which strictly speaking had no actual interest in the dispute. Professor Wade was at the time also Downing Professor of Law, Cambridge. Also representing the UK was Sir Gerald Fitzmaurice, later himself (1960–1973) a judge of the ICJ and Cecil Harrison, Attorney General for Jersey and later Bailiff.

¹¹²Vol I, at 533.

¹¹³ICJ pleadings, oral arguments, documents, vol II, at 127.

“Now, according to feudal law, the Lord of any land or territory was entitled, if not at once to ownership, at any rate to ‘custody’ in the first place for a period, of any wreck washed up on his land, and his court had jurisdiction in this matter of custody, as well as of ownership. Of this there is no vested doubt; but it is obvious, for otherwise anyone could have taken wreck off another lord’s land and taken it onto his own land, and the lord of the land would have had no redress. Now, feudal ideas being pre-eminently territorial, that state of affairs would not be tolerated: but if, however, in addition to his undoubted jurisdiction *ratione soli*, the lord also had jurisdiction *ratione personae*, impossible conflicts would have arisen. For instance, one lord’s men might have found wreck on another lord’s land. What would have happened then? All the finders might have been men of different lords—as for instance, in the very probable case of finding wreck by the crews of some vessel. Such a position, I suggest, could only be regulated by importing wholly modern ideas about conflicts of laws, at a time when nothing was known of them.

There can only be one conclusion: the basis of jurisdiction and of the claim was territorial and only territorial. If a claim was made, or jurisdiction exercised, it could only be on the basis that the wreck had been *washed up on the Lord’s shore*.

Now under Jersey law, the Crown only had a right to gold objects and suchlike articles. Other things went to the owner if he—the owner—could be found. If, as was probable in the case of wreck, the articles were still unclaimed after a certain time, then they went to the lord of the fief on whose shore they had been washed up. Therefore the normal procedure was for the wreck to be kept in custody — to be impounded—in the first place, until the necessary interval of time had elapsed ...

... [!]n the third case, the anchor had already been taken from the Minquiers to St Malo on the French coast. The finder is therefore adjudged to be ‘in default towards the officers of the Seigneur for having taking away an anchor found on the Minquiers and carried it away to St Malo’. Surely, Mr President, it is obvious that the whole basis of this judgment was the fact that the anchor was found at the Minquiers ... The simplest explanation is that the Minquiers was part of the Fief of Noirmont. If this were so, the Seigneur would be entitled absolutely to the wreck found there.” [Emphasis added.]

187 The relevant part of the finding of the Court is as follows¹¹⁴—

“The Rolls of the Manorial Court of the Fief of Noirmont in Jersey contain the entries for the years 1615, 1616 and 1617 concerning certain objects shipwrecked at the Minquiers. The Court, which was held ‘on this Fief’ ordered the Sergeant to take charge of the objects until other provisions should have been made. The United

¹¹⁴Judgment at 57.

Kingdom government contends and the French Government contests that these entries show the Minquiers were part of the Fief of Noirmont.”

188 Having referred to the *Grand Coûtumier de Normandie* (de Gruchy edition), the Court went on—

“The Coûtumier enumerates the things to which the Duke of Normandy was entitled and continues: ‘all things other than these shall enure to the Lord in whose fief the wreck is found’. The Court inclines to the view that it was on the basis of this ancient Norman Custom that the Manorial Court of Noirmont dealt with these two cases of wreck found at the Minquiers. It dealt with them on behalf of the ‘Lord on whose fief the wreck is found’, the Lord of Noirmont. As the jurisdiction of the local court such as that of a manor must have been strictly territorial and, in cases concerning wreck, limited to wreck found within the territory of its jurisdiction, it is difficult to explain its dealing with the two cases unless the Minquiers were considered to be part of the Fief of Noirmont.”

We need not emphasise that the pleaded and the oral case of the United Kingdom and the terms of the judgment of the ICJ are wholly consistent with the writers’ views and the opinion exchanged with the defendants and the pleadings in the *Les Pas* case.

HM Receiver General v. Selab Securities Ltd¹¹⁵

189 In 1985 the Royal Court heard this case. It concerned the ownership of land immediately behind a seawall at St Clement. The Crown claimed that the land had formerly been foreshore and therefore belonged to the Crown. The defendant claimed the land up to the sea wall. If it had been originally foreshore, it was asserted that foreshore was part of Samarès or one of its dependant fiefs. It had ceased to be foreshore by reclamation and the defendant’s title was based on prescription. The Court found for the defendant on a preliminary point and the substantive issue was not determined. Interestingly however, the Crown’s amended reply contained the following propositions—

- “1. That the foreshore of this Island has since feudal times belonged to the Sovereign as Duke of Normandy and that it only passed to the Seigneur of the adjoining fief by express grant, and was not included by implication in a grant of the lands of that fief, or of any rights exercisable over the foreshore such as a right of wreck;
2. That no such express grant exists in relation to the fief on which the said property Rocque Berg is situate;
3. In the premises that the foreshore adjoining the said fief was not granted out by the Patent under which the said fief is now held and therefore belongs to the

¹¹⁵1985 JRC 14.

Sovereign against whom neither the Defendant nor its predecessors in title can obtain a prescriptive title;

4. Further and in the alternative that if par impossible the Court were to hold that in feudal times the foreshore passed to the Seigneur of the adjoining fief by reason of a grant of the lands of the fief or of any rights exercisable over the foreshore, the Customary Law of this Island had so evolved that by the 19th century when the said wall was built the foreshore had reverted to the Crown which held it as 'custodian for the public benefit'."

190 This is, of course, an unreconstructed statement of English law which ignores the existence of the Customary Law which informs this article. It is totally at variance with the contentions argued for the Crown in the *Ronez* case where the notion that the Crown holds the foreshore as 'Custodian for the public benefit' was specifically rejected. It is at variance with the view of the Privy Council in *Att Gen v Turner* which confirmed that the Crown estate in Jersey is quite discrete from that of the Public or the States.¹¹⁶ It is substantially at variance with the (admittedly tentative) views expressed by the Treasury Solicitor and its adviser Sinclair in the Ouaisné matter. Crucially, it ignores the inconvenient presence of the "elephant in the drawing room" in the shape of the proceedings and judgment at the ICJ only thirty years before.

191 In the light of the somewhat eccentric position adopted in *Selab*, it would have been interesting to know what evidence the Crown would have advanced to show that "the Customary Law of this Island had so evolved *etc*". In our opinion the Crown case as pleaded could not have withstood scrutiny.

La Fosse

192 In 1989 the ownership of the foreshore of the Fief de la Fosse was put in issue by Les Pas Holdings Ltd, a company which had acquired the Seigneur's rights three years before. Les Pas brought an action against the Crown and the States in support of its project to build a marina and waterside development on the foreshore at La Collette and Havre des Pas. The defendants were summoned to "show title to the foreshore and in default to give up possession *etc*".¹¹⁷ The Crown was, of course, the principal defendant, but the States were also joined having purported to purchase and thereafter reclaim and develop part of the foreshore in issue. It was not claimed that the public of the Island had any independent title save by purchase from the Crown. This at least disposed of the claims noted above which had, at times, been advanced by the States particularly in response to the de la Garde claims and later in relation to Frederick Clarke's shipyard.

¹¹⁶[1893] AC 326, at 12 *et seq.*

¹¹⁷Action "*pour exhiber titre*" brought before the Heritage Division of the Royal Court by one who is out of possession of land challenging a possessor to show by what title he has possession and failing to do so, to surrender the land *etc.*

193 We must not burden our text with the history of this claim but a few narrative details demonstrate the continuing force of Sir Thomas Farrer's advice of a century before. The Crown had little to show by way of title, but it was not wanting in aggression. Before filing pleadings, the parties (at the suggestion of the plaintiff) made some effort to resolve the issues out of Court by the exchange of opinions to be prepared by UK counsel.

Unsurprisingly, the opinion of Michael Fysh, QC, for the plaintiff, a collaborative effort by those advising the plaintiff relied upon the matters discussed (albeit compressed) in this article. The joint opinion of Raymond Kidwell, QC and George Gadney, on the other hand, surprisingly, failed to address voluminous matter volunteered for their consideration *e.g.* the evidence of Delisle, Dupont and Bottin. Extraordinarily, even by reference, counsel failed to touch on the all important Minquiers and Ecréhos judgment of the ICJ in 1953. The predestined conclusions of the joint opinion led Michael Fysh to describe them, aptly in our opinion, as "Procrustean".

194 This informal initiative came to nothing when the then Solicitor General TC Sowden, QC advising the defendants, abruptly declared Les Pas's case to be "entirely without merit". Extraordinarily, this advice repeated thereafter at intervals in the States and the media, was, on the Solicitor General's own admission, based not upon the matter and argument revealed in the competing opinions, but upon the advice of Messrs. Roundel Palmer and Collier given in 1865 and which, as we have seen, had no bearing whatever on the law of the foreshore.

195 Because the Planning Authority had deferred indefinitely a decision on Les Pas's project for the rejuvenation of St Helier, the question of foreshore title and its resolution lost momentum. In the absence of a public archive the defendants' discharge of its discovery obligation extended to some four years. Interestingly however, this mammoth exercise revealed little new evidence to support the Crown case and, as we noted at the outset of this article, the dispute was ultimately settled by the transfer of a parcel of reclaimed land to the plaintiff company in exchange for which, it disclaimed any further title or interest in the foreshore of the Fief de la Fosse.

196 As we review the long, indeed exhaustive, research carried out on the law of the foreshore in Jersey and of which this article is but a brief epitome, it remains our opinion that there is no evidence to support an original title to the foreshore in the Crown. Indeed, this view was shared by the Crown and its courts in Jersey and in the Privy Council into the mid-19th century. We believe the claim to a *prima facie* Crown title to be of comparatively recent origin in the Island and which as we have earlier suggested has been advanced on occasion only for pragmatic reasons. It is, we believe a claim largely without foundation.

197 There are, of course, other issues which could be explored in relation to this subject, *e.g.* the distinction between possessory and proprietary rights, *ius privatum* and *ius publicum*, immemorial possession and prescription. All such matters are of great interest in themselves. They all have some bearing on the matters we have discussed but they

would, however, open new fields which lie beyond the bounds which we have set for ourselves.

Richard Falle is an advocate of the Royal Court of Jersey, and a consultant with BoisBois, 2, Bond Street, St Helier. He is currently the acting Magistrate. He was a shareholder of Les Pas Holdings Ltd. John Kelleher is an advocate of the Royal Court of Jersey. He is the author of The Triumph of the Country, JAB Publishing, 1994.