BOOK REVIEW

S Farran, E Örücü and SP Donlan (eds), A Study of Mixed Legal Systems: Endangered, Entrenched or Blended, Ashgate Publishing, 2014

1 The problems facing small “mixed” legal jurisdictions are well known. Historical resources are limited. There are not usually any universities or law schools that teach exactly that law, and few text books that set it out. The “mixed” nature usually differs from that of other small mixed jurisdictions. So legislators and their draftsmen cannot borrow from elsewhere, and must reinvent the wheel every time law is changed. There are few judges, and they change quite often, making continuity of approach more difficult. The original language of the law may no longer be the language, or the main language, of the community to which it applies, which diminishes its acceptability. All this means that economies of scale are hard to find.

2 This volume, containing essays about the legal systems of nine different “mixed” jurisdictions by individual contributors, and framed by an introductory overview and an endnote by the editors, appears in a series called Juris Diversitas, the diversity of law. It raises some interesting and important questions about the nature of and problems facing so-called “mixed legal systems” in the world today. From the point of view of the Channel Islands, particular local interest is found in the fact that the editor of this Law Review has contributed an essay on the legal system of Jersey. The other systems covered here are: Scotland, Guyana, the Philippines, Mauritius, the Seychelles, Quebec, Santa Lucia and Cyprus.

3 First of all, a small point. The actual title of the book is both misleading and selective. As to the first adjective, it is not so much a study of mixed legal systems, as a series of studies of individual legal systems, each of which has some claim to being called “mixed”. As to the second, the deliberate absence of a question mark at the end of the title suggests that the adjectives “endangered”, “entrenched” and “blended” are exhaustive of the possibilities. Yet they are certainly not the only ones that might be applied to such systems. What about “thriving”, “increasing” or “triumphant”, for example? In fact the editors’ overview makes clear that they are aware of this problem, even if they cannot resolve it.

4 More important than either of these two points, there is also the question of exactly what is meant by “mixed” legal system. As the editors themselves note in their essays, in one sense, every legal
system is mixed, because it is influenced by and contains elements of different kinds of system: “each is a hybrid; each continues to evolve over time”.\(^1\) So, defining a “mixed” system is difficult.\(^2\) Indeed, the editors accept that the essays in this book illustrate that difficulty.\(^3\)

5 For example, English law may be considered the quintessential common law system. Yet it has been greatly influenced by other systems. Even from its very feudal beginnings, Roman law lapped around the edges of native “English” law. The university courts and the admiralty courts, for instance, were entirely governed by the learned law. The ecclesiastical courts—covering the whole of what we now call family law, but also important other elements such as the law of defamation—were governed originally by canon law. Until the 1875 structural reforms of the system, doctors and proctors of the civil law formed separate (and substantial) legal professions in England.

6 Thereafter, many civilian and ecclesiastical ideas were taken over into the new system. Institutions of the common law, such as discovery (disclosure) in civil procedure,\(^4\) and trusts in the law of property,\(^5\) may have come from Roman or ecclesiastical sources. In the eighteenth century, Lord Mansfield imported wholesale large chunks of the \textit{lex mercatoria} of continental Europe into English law and, in modern times, the law of the European Economic Community (now the European Union) has been absorbed into English law,\(^6\) to the point where whole political parties have been founded to try and drive it out again.\(^7\)

7 Conversely, \textit{French} private law did not even exist until Napoléon Bonaparte produced his \textit{Code Civil des Français} in 1804. Before then, each region of France had its own private law. These included the \textit{droit coltumiers} of northern France, some based on, or at least influenced by, feudal systems and the customs of the Germanic tribes across the Rhine, and the \textit{droit écrit}—largely but not entirely based on Roman law in the south. One example of the former, familiar to Channel Island readers, will suffice. This is the absence in Norman customary law of community of matrimonial property regimes, popular

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\(^1\) Introductory overview, at 2–3.
\(^2\) Endnote, at 242.
\(^3\) Endnote, at 245.
\(^4\) See eg Holdsworth, \textit{A History of English Law}, Vol. XII, at 678–680; see Gilbert, \textit{History and Practice of the High Court of Chancery} (1757), Ch 2.
\(^6\) European Communities Act 1972.
elsewhere in France, and in other civil law systems. In 1804, the Norman point of view disappeared in mainland France. For the future, a more or less unified community system ruled. Not so in the Channel Islands.

8 French private law was therefore an amalgam of both Roman and not so Roman ideas. And Germanic ideas persisted in the eastern French province of Alsace, where even today the formalities of succession are conspicuously different from—and more German than—those of the rest of France. And, just as EU law has imported civil law ideas into English law, so it has imported common law ones into French law. Most striking of all (though hardly surprising) is the way in which the procedure of the European Court of Justice, which in the 1960s closely resembled that of the French Cour de Cassation, nowadays much more resembles that of the UK Supreme Court.

9 So is the question “mixed or not mixed” just taxonomic? If it is, frankly, we would do better just to ignore it as dependent on the whims of the individual classifier, and look instead at the substance. In the latter case, the question becomes how much influence on a system, and of what kind, makes a system “mixed”? However, the essays in this book tell us very little about this question. Throughout the essays there is a broad assumption that such systems are more or less self-evident to the observer. There is a further assumption that the unmixed systems concerned are civil law and common law respectively, and nothing else. And there is a third assumption, that it is always civil law systems that are influenced by the common law, and never the other way round.9 The editorial comments—in the introductory overview and the endnote—however, are more nuanced, and add tantalising snippets of ideas for bottoming out some of these problems. It would have been good to have full essays covering at least some of these points.

10 A further question, not really touched on here, is whether the reference to a system being “mixed” refers only to a particular part of the system (such as private law), or to several such parts, or even to the whole system. Historically, comparativists looked at the private law component of a given system in deciding whether it was mixed or not. Nowadays, they are more catholic in their approach.

There is a lot of jargon, too. One word that looms large is “mixity” (in French mixité). Unfortunately there is a large academic literature on this idea, forming a kind of private chatroom for some theoretical comparative lawyers. To ordinary lawyers, let alone laypeople, it is largely incomprehensible. Although some writers dress it up a bit, at bottom all it means is the state or quality of being mixed, or of being a mixture. In other words, when you refer to the “mixity” of a system, you refer both to the fact that, and to the degree to which, it is a mixed system. This of course does not resolve the question as to what is a mixed system in the first place.

All that said, it does not take away from the interesting ideas expressed in the nine separate essays. It just makes this collection something less than a complete whole, a sort of toolbox with some of the parts missing.

Scotland

The essay on Scotland, by Sue Farran, will be of interest to those interested in the constitutional questions arising from the potential break-up of the United Kingdom. It is a mirror of the political debate between the nationalists and the rest. There is also some useful sociological information about lawyers and law schools in Scotland today. But for those interested in comparative private law, it is something of a disappointment. Obviously the essay could not cover everything. But there really is very little private law, not much public law, and far too much politics dealt with here. Personally, this reviewer would like to have seen more closely examined the question of how far Scotland was ever a civil law system in any meaningful sense, say, by comparison with France or Italy. There is a lot more to be said about customary tribal law (and Scotland is a very tribal country), and legal procedure, and their impact on the present legal system than is mentioned here. And, in relation to the former, although it presents different challenges, the Republic of Ireland, for example, would have been an interesting comparator.

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10 Professor of Laws, Northumbria University, Adjunct Professor at the University of the South Pacific.
Guyana

The essay on Guyana, by Christine Toppin-Allahar, also gives us some useful data on Guyanese lawyers, but is about the mixture of peoples and customs to be found in Guyana. It reminds us that the Roman-Dutch law in force in the Dutch colonies (as in parts of South Africa and former Ceylon) remains—with common law admixtures—the basis of the law of current day Guyana, and then trots smartly through the history of the legal system with reference to servitudes and Amerindian lands. The author points out the obvious difficulties for the common law trained judges trying to understand, let alone apply, the civil law properly. But the essay again is mostly about public law aspects of the civil-common law mixture (which she calls “muddle”), in this case Crown title to land. She certainly sees a threat to the principles of Roman-Dutch property law in Guyana.

The Philippines

In the essay on the Philippines, Pacifico Agabin demonstrates vividly how the Spanish law imposed on the Philippines by its coloniser in stages from the sixteenth to the nineteenth centuries was in turn superseded by North American common law following the Spanish-American War of 1898. The islands became US possessions, and the US Congress legislated for them, naturally in accordance with American ideals. William Taft (a former federal judge, later elected US President) was appointed civil governor of the islands. He appointed only Americans as judges in the new system, refusing to appoint any Filipinos. Although the Spanish civil code of 1889 remained mostly (but nominally) in force, the American judges (who after all knew little or nothing of the civil law) interpreted both it and the new US laws for the Philippines in accordance with US case law and US ways of thinking. Law schools were reorganised on US lines, and turned out lawyers in the American mould.

In these circumstances it is frankly surprising that any remnants of the civil law tradition survived there. Unlike the previous two essays, this one does discuss the changes wrought to the private law in some detail. The trouble is, although it is interesting as a story of the system itself, it does not tell us anything very important from an intellectual comparativist point of view. On the contrary, it is a statement of the obvious. If a tsunami of American military force, commercial interest

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11 Attorney-at-Law, Trinidad and Tobago, specialising in environmental, planning and land law, and legislative drafting.
12 Professional Lecturer at the University of the Philippines College of Law, and practising attorney.
and political control sweeps over your civil law system when it is weak to start with, it is hardly going to survive in that form. This one certainly didn’t.

**Jersey**

17 The fourth essay is on the Jersey legal system, and is by Sir Philip Bailhache, who needs no introduction to the readers of this *Review*. It is elegantly written, with a clear progression from setting out its stall at the outset, through the medieval and later history, building in some aspects of the private law changes, to the important social, linguistic and legal changes of the later twentieth century. These are seen as the threats to the survival of the system. There is then a short but impressive discussion of the impact of these changes on some important areas of private law, followed by sections on the institution of a part-time Court of Appeal staffed largely by non-local judges, and other influences, including international ones.

18 The appellate system of a small jurisdiction is particularly important, because in the wrong hands it could do great damage to an indigenous law. The Jersey Court of Appeal (which is run similarly to that in Guernsey) cleverly makes use of up-and-coming British advocates rather than existing judges from elsewhere. They are highly intelligent (obviously), anxious to impress (because still “up-and-coming”), very quick (because they are otherwise self-employed, and time is money), and loyal to the local system (because not sitting elsewhere full-time). So, even if they do not always completely understand it, they take care not to try to subvert it. And, going further, the comparative rarity of second appeals to the Judicial Committee of the Privy Council, coupled with the experience of that tribunal in dealing with the laws of many diverse systems, making them reticent to impose English views on everyone, has meant that their influence on the Jersey system has been modest, and largely benign.

19 Sir Philip refers to the recent creation of the Institute of Law (teaching and examining students who wish to qualify as local lawyers) as a significant element in the current system, encouraging the study of local law, modestly forbearing to mention his own crucial involvement both in its setting up and its continued running. Without him, indeed, it would never have happened. But he unaccountably does not mention at all two other important features of the modern Jersey system, for which he was also responsible and which assist the

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13 Former Solicitor General, Attorney General, Deputy Bailiff, and Bailiff of Jersey. Subsequently a Commissioner of the Royal Court, and now a Senator of the States of Jersey, the local legislature.
Institute greatly in its work. These are the creation of a freely accessible website of Jersey law, properly kept up to date, and the launching and maintenance of this scholarly Review, the first of its kind in an offshore finance centre. The first helps to keep the local people on side, because lack of access to legal texts, except by consulting expensive local lawyers, has long been a popular complaint. And the second provides a focal point for pride in the local law, and for peer recognition by publication in it.

For Sir Philip, however, education is undoubtedly the key to the survival of the indigenous system in its current form. It is a conclusion with which, tsunamis apart, this reviewer respectfully agrees, although he would also add two other things. The first is the importance of keeping the system relevant and useful to the population covered by it. Popular revolt can take many forms, including refusing to submit disputes to the courts, and instead resolving them outside it (as the early history of Quebec shows). In this respect, Jersey’s insistence on keeping important aspects of its law in French obviously carries a price.

The second is the need for the judges of the system to reflect the ideas and values of the system. As Lord Steyn (an outstanding English judge from South African roots) once said, “The judges hold all the votes”. Where judges do not have relevant experience of the practice of the indigenous law, do not speak the language of the legal system, or are parachuted in from outside, it is less likely that they will reflect those ideas and values. Jersey is lucky in this respect. It has a need for only a handful of judges at first instance, and has found nearly all of them—certainly all the full-time ones—from amongst its own legal practitioners. Other jurisdictions with smaller legal populations, or forming part of larger, federal constitutions, are not always so fortunate, and take a risk accordingly.

**Mauritius**

The next essay is by Tony Angelo,\(^\text{14}\) about Mauritius. The story of Mauritius’ legal system is interesting. A French colony with French laws, including the *Code Napoléon*, it was taken over by the British in 1810 and ceded to Britain in 1814, but the inhabitants were allowed to preserve those laws. Subsequently, areas of law important to commerce (notably employment, bankruptcy, shipping and company law) developed outside the French codes. And public and

\(^{14}\) Professor of Law at the Victoria University of Wellington, New Zealand, and former Special Advisor in the Office of the Attorney-General of Mauritius.
constitutional law reflected the political reality of British control. After independence in 1968, political power shifted away from the minority francophone community to the majority ethnic Indian community, speaking many Indian languages, but also English.

23 But, in 2001, a new Civil Code was promulgated for Mauritius, based heavily on the French Code Civil, and written in French, though taking account of local specificities. The lawyers were previously educated in the English system, though now there is a local, bilingual legal education programme. The courts, however, are still organised in a typical common law way, and the majority of foreign precedents referred to are English. Professor Angelo considers that there are no current threats to the existing system, save Anglo-American style globalisation. However, he considers that if the language in which the code is expressed were changed to English, then that would threaten the present system. On the face of it, it is difficult to see why that should make so much difference, given that the existing linguistic preferences of the population and the anglophilie organisation of the courts have not posed any sufficient threat so far. But the history of the Seychelles (below) may have influenced this view.

The Seychelles

24 Mathilda Twomey\textsuperscript{15} has written the chapter on the islands of the Seychelles. These originally constituted the French colony of a French colony (Mauritius). Like Mauritius, they were surrendered to the British in 1810 (after the Code Napoléon had been introduced) and ceded in 1814. Like Mauritius, too, the organisation of the courts in the twentieth century has been on English lines. But its politics since independence in 1976 have been more turbulent, and the reduction after 1945 of French as a medium of education may ultimately have led to the decision to promulgate the Civil Code in 1975 in English. Legal education was previously based on English law. Since 1996 other routes are available, including qualification in Mauritius, qualification in France, and qualification in the Seychelles (through in effect a University of London degree). But it is too soon to know what influence this change will have. In the meantime, the new offshore finance industry has opened up the system to globalising influences. The author says that the greatest danger to the Seychellois legal mixité is that most of the transnational law received is from the common law tradition. Picking up the point made by Tony Angelo about Mauritius, it is interesting that she does not refer in this connection to the decision

\textsuperscript{15} Justice of Appeal, Seychelles Court of Appeal; PhD candidate, NUI Galway.
to enact a civil code in English (although she also criticises some parts of the English text on substantive grounds).

Quebec

25 The chapter on Quebec is written by Sophie Morin.16 The French colony of Quebec was governed from 1664 until 1866 by the Coûtume de Paris, with a single gap of ten years from 1764, when the conquering British unsuccessfully tried to replace French law. In 1866, a new Civil Code of Lower Canada was adopted, mixing together elements of civil and common law and the lex mercatoria. From this date, Quebec law could be regarded as containing some element of mixité, even if an ordinary common lawyer would probably strain to see it. But, from 1867, Quebec had in addition to contend with federation with Upper Canada, which became Ontario, and then with other provinces too. Quebec’s legal system became a minority amongst the traditional common law systems found elsewhere. The Canadian Supreme Court had jurisdiction over Quebec appeals from 1875.

26 Whilst, therefore, Quebec private law (under the 1866 Code) was largely civil law, all the public and constitutional law, and the court systems, all the way to the Supreme Court and on to the Privy Council (until 1949), bore a common law stamp. And, again, the identity and experience of the judges who decided cases in or from Quebec proved to be key. If they did not speak French, or did not understand the civil law principles, or treated the Code as they would a common law statute, they were in danger of going wrong. Civil lawyers argued vociferously that they had done so, many times. The second half of the twentieth century brought both linguistic wars and demands for political separatism. They undoubtedly contributed to the movement for the enactment of a new Quebec Civil Code, which came into force in 1994.

27 Sophie Morin considers this Code to mark a turning point in Quebec legal history, “an affirmation of identity, the gateway to an era of confidence, and an expression of autonomy”. It is only twenty years on, and therefore much too soon to tell.17 Of course there are some substantive changes from the old law. One is the introduction of la fiducie (which Sophie Morin calls “the law of trusts”, when really it is just the patrimoine affecté so beloved of Pierre Lepaulle, which was

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16 Professor of Law, Université de Montréal.
emphatically not a trust). Another is the insertion of a preliminary provision, making clear the nature of the Code as a statement of the *ius commune*, and its primordial status *vis-a-vis* other, complementary laws. A third is the removal of references on to French (and even English) law which were in the old Code, so making it more self-contained. But the style of the Code is of the civil law, like the old, and the greater part of the substance is too.

So overall one has to wonder whether the new Code has really changed much in the system. As a civil code may be seen as an element of cultural and linguistic identity, it may conceivably turn out, for example, simply to have been something which occupied the civil lawyers so that they felt that they had played their various parts in the separatist debate of the time. The problems of diversity of language and of methods of thinking and reasoning between the different communities of Canada remain today exactly as they were. If they were threats to Quebec’s civil law before, then it is not explained why they are not still so today.

**Saint Lucia**

The next chapter, on Saint Lucia, is written by Jane Matthews Glenn. There are interesting parallels here with Quebec (and incidentally also with Mauritius). The British captured Saint Lucia from the French in 1803, at a time when the *Coûtume de Paris* applied there. It was ceded formally to Britain in 1814, though preserving French law. Subsequently the British Colonial Office sought to regionalise its colonies, and located Saint Lucia initially in the Windward Island confederation, whose other members were all common law territories. Regionalisation in some form or another has continued ever since.

The legal profession was anglicised and English adopted as the language of the courts. Practical and social difficulties meant that it became increasingly difficult for the lawyers and the judges to ascertain what the law of Saint Lucia was. Curiously, however, the old French law was not thrown over in favour of English law. Instead, a new Civil Code was prepared, in English, based on the Civil Code of Lower Canada of 1866, which was adopted in 1879. One advantage of this was that the Saint Lucia lawyers could refer to the Quebec case law on *its* Code.

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18 Trusts are not patrimonies, because English law simply does not have the concept of a patrimony (in the classical Aubry and Rau sense of the word).
19 Emeritus Professor of Law and Urban Planning, McGill University, Montreal.
Nevertheless, the civil law component parts of the Saint Lucia legal system declined in importance thereafter. This may have been because of the continued regionalisation of the courts structure, the continued dilution of the civil law experience of the local legal profession, and even the reduced lack of access to civil law materials following a serious fire in the capital in 1948. There may also have been racial factors in play. Unlike in Quebec, the majority of the population was black, excluded from political power at the time of the 1879 Code, and for a considerable time thereafter. The debate about preserving the civil law may well have been seen as an internal squabble amongst the white elite, scarcely relevant to blacks.

In 1956, the Code was significantly amended to bring in more English law, often simply referring to “the law of England” on particular points. Recently Saint Lucia has decided to change its third level (final appeal) court from the Privy Council in London to the Caribbean Court of Justice in Trinidad. What effect, if any, this will have on the Saint Lucia legal system is difficult to predict. For collateral reasons, it is however likely that there will be at least one judge on that court with Caribbean civil law experience (though not necessarily French), and this may assist in the preservation of the civil law elements.

Cyprus

Finally, there is a chapter on Cyprus, written by Achilles C Emilianides. In historical terms, Cyprus has been something of a legal football, kicked about between wildly different teams. Ruled by Greeks until 58 BC, when it became a province of the Roman Empire, Cyprus was subsequently a province of the Byzantine Empire from 325 to 1191, when it fell under the rule of the English King Richard I. Thereafter it came under the rule of the Knights Templar and the Kings of Jerusalem. From 1489 to 1571 it was ruled by Venice, and from 1571 until 1878 by the Ottoman Empire. Then it was ruled by Britain until 1960, but, towards the end of that period, with increasing disputes between the Greek Cypriot and Turkish Cypriot communities.

In 1960 it became independent, but with continuing inter-community troubles, which led to the Turkish invasion of 1974 and the establishment of a largely unrecognised breakaway (Turkish Cypriot) Republic in the north in 1983. It is a country where legal theory and what happens in practice are two different things. All this history makes it particularly rich to study and analyse, but difficult to pigeonhole. Perhaps its most interesting characteristic, from the point of view...
of view of the systems represented in this book, is that it is one in which the public law is dominated by civilian thinking, and the private law by common law thinking, the reverse of most of the other mixed systems discussed.\textsuperscript{21} Even so, a lot of the private law is actually dominated by non-common law—primarily Ottoman—legal ideas.

35 The lawyers of Cyprus are largely trained in either England or Greece, and prefer to use the language and ideas, and modes of thinking, appropriate to their training. The judges are appointed from the ranks of practising lawyers, as in common law countries, rather than from graduates of a school for magistrates, as in civil law ones. In practice, the majority of both lawyers and judges are faithful to the English common law, rather than to the Greek civil law. This means that even the civil law elements of the system are interpreted in a common law fashion. Even so, Professor Emilianides does not consider that the Cyprus mixed legal system is currently under threat. The system itself is the product of a series of historical accidents. Another such accident may send it spinning off in a different direction. In that, rather special, sense, every legal system is always under threat.

General comments

36 The nine authors of the essays come from diverse backgrounds. Six of the nine are wholly or mainly academic lawyers. Three have been wholly or mainly practitioners. An overlapping three of the authors come from outside the territory they are writing about. No explanation is given as to why it was not possible to find a local author in those three jurisdictions, or how the non-local author concerned came to be selected. A different three are comparative lawyers. The rest are not. Because of these significant differences between the authors, the balance between the essays is rather uneven. Different things matter to different authors. So the essays are not easily comparable, and the value of each is rather different.

37 If this reviewer has a general gripe about the essays, however, it is this. It is not made clear why, if the local population would prefer something other than the current indigenous system, for instance (though not necessarily) more common law-orientated, that would be such a bad thing. For example, Sir Philip Bailhache, in writing about Jersey, refers to local criticism of laws and draft laws in French, when the local population and most of the lawyers are monoglot English speakers. Now, local understanding of local laws is clearly improved when they are written in the vernacular. Moreover, a more

straightforwardly common law (or civil law) system might well have advantages of scale which a small native “mixed” system does not. Indeed, in the past in Jersey there were even those lawyers who argued for English law to be introduced tout court, either generally, or in particular areas, in order to make the law clearer and cheaper, even though to do so might have severely weakened the political independence and legal autonomy of the island.

38 The point being made, however, is not that indigenous law is bad and (say) English law is good. It is that a preference for preserving the small, indigenous system ought to be justified. For instance, one justification might be that small is beautiful. Another might be that old and ancient is better. A third, that the transaction costs of changing would outweigh the benefits. A fourth, that local rules are better suited to the needs of a small insular population, rather than those of (say) a large maritime or trading nation. And so on. But there is no justification given. The authors might respond to this gripe by saying that it was no part of their brief to deal with this aspect of the matter. The essays are about threats to the systems, and not whether they should be retained or replaced by another. But one man’s threat is another’s opportunity. Threats imply the value judgment that there is something worth defending. The editors do at least ask the question of whether it matters that some mixed systems appear to be endangered.22 But they do not answer it.

Conclusion

39 This is a useful collection of essays on some of the problems facing small, mixed jurisdictions. As the editors say, it provides new information for the study of mixed systems.23 Above all, it shows us how varied such systems and their histories are. Whether it gives us any real pointers as to how such mixed systems become endangered, and what might be done to protect against that, is much more difficult to say. To this question the editors themselves give a qualified “Yes”.24 But without knowing more about what counts as a mixed system for this purpose, and what the threats are in the case of a particular such system, this reviewer is, however, not so sure.

Paul Matthews is a solicitor and Visiting Professor at King’s College, London. He is the author of Jervis on the Office and Duties of Coroner

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22 Endnote, at 246.
23 Endnote, at 245.
24 Endnote, at 246.
(13th ed, Sweet & Maxwell, London, 2014) and a founder member of the Editorial Board of the Jersey and Guernsey Law Review.