

The Sources Of Jersey Law

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This modest note is a voyage of personal exploration, not a statement of judicial views. Suppose that an English and Welsh/Scottish/Northern Irish QC receives the honour of appointment to the Court of Appeal of Jersey. He (or she) knows nothing of Jersey law and its sources. Where does he or she begin? The starting point now, as always since the Jersey Court of Appeal came into existence in 1964, is to consult Sir Godfray Le Quesne QC, whose advice, crisp, to the point and accurate, has unfailingly sustained several generations of non-Jersey members of the Court of Appeal. After that one must consult the books.

Much help can be found in the Reports of the Commissioners appointed to enquire into the criminal law of Jersey (1847) ("the Criminal Report") and the civil, municipal and ecclesiastical laws of Jersey (1861) ("the Civil Report"). These Commissioners had the tasks of carrying out a thorough investigation of the laws and courts of Jersey, and not surprisingly they started with the sources of Jersey law, considering these under the two heads of common or customary law, and legislation.

It is convenient to refer first to legislation, of which there are these kinds:

1. Royal Charters, which are listed in the appendix to the Criminal Report of 1847, including a charter attributed to the reign of King John (see the same Appendix at page 72) which, whether authentic or not, and of whatever date, has been recognised as correctly recording established privileges of the inhabitants of Jersey.
2. Laws passed by the States of Jersey (or before 1771 by the Royal Court) and sanctioned by Orders in Council. Laws passed by the Royal Court were collected in the "Code" of Jersey which was ratified by Order in Council in 1771. The *Recueil des Lois* containing the Laws thus passed by the States and sanctioned since 1771 run to several volumes. Taking the Advocates and Solicitors (Jersey) Law 1997 as an example of the procedure this Law was passed by the States on 22nd October, 1996, sanctioned by Order in Council on 12th February, 1997, and registered in the rolls of the Royal Court on 28th February, 1997.
3. By virtue of an Order in Council of 14th April, 1884 the States may enact and renew provisional laws of a purely municipal and administrative nature for periods not exceeding 3 years, without these laws having been sanctioned by Orders in Council [\[1\]](#) and provided that they are not expressly disallowed by Order in Council [\[2\]](#). These are called "triennial regulations".
4. Acts of the British Parliament or parts of such Acts which are expressed to apply, or by necessary implication apply, to Jersey, and which are sent to Jersey accompanied by Orders in Council directing their registration (though it seems not to be finally decided whether

such registration is necessary for the Acts to become binding as part of Jersey Law).

Whether laws can be imposed on Jersey simply by the making of an Order in Council which is commanded to be registered in Jersey (without the concurrence of the States or the assent of the British Parliament) remains an undecided question, though the undelivered argument of Mr. Haldane Q.C. (later Lord Chancellor) in the *Prison Board* reference to the Privy Council remains the *locus classicus* for the view that the Crown has no such power. Some of the 19th century battles over this question were gracefully recalled in Sir Godfray Le Quesne's Third Joan Stevens Memorial Lecture to the *Société Jersiaise* [3]. It is hoped that there will be no occasion for these battles to recommence.

Turning to the common or customary law of Jersey, the Criminal Report is of considerable interest. As early as 1846 when the Commissioners were taking evidence, the answers given by those in authority in Jersey indicated that though the criminal law of Jersey derived from the ancient laws of Normandy as cited in the ancient commentaries and considered by the Royal Court (together with legislation), in practice the authorities mainly relied on were English authorities [4]. Though differences could be found between the relatively undeveloped Norman law of crime and the 19th century English authorities, this was no doubt a pragmatic approach in view of the difficulty in determining the exact requirements of customary law.

How to ascertain the common or customary law was considered in both the Criminal and the Civil Reports at much length. I refer primarily to the Civil Report.

The continental part of the Duchy of Normandy was conquered by the King of France in 1204. Though it returned to the control of the King of England for relatively short periods after that, the divergence in legal systems between the continental part of the Duchy and the Channel Islands can effectively be dated from 1204. The ancient Norman law remained the common law of Jersey, and a separate body of law from that of England and Wales. In the Civil Report, page iii, it was concluded that the divergence between Jersey and English law at 1861 had certainly been greater than any assimilation.

The starting point is the *Ancienne Coûtume* as set out in *Le Grand Coûtume du Pays et Duché de Normandie*, a work probably of the time of Henry III usually cited in the 1539 edition with *Rouillé's* Latin commentary. The *Ancienne Coûtume* together with the main commentaries, especially those of *Terrien* and *Poingdestre*, is the springboard from which all researches into Jersey common law have to start.

The next stage is the *Coûtume Réformée*, a compilation in France of the law of continental Normandy existing in about 1585. By that time Jersey had been separated from continental Normandy for nearly 400 years. So the *Coûtume Réformée* could not in any event be as authoritative as the *Ancienne Coûtume*. In *Att.Gen. for Jersey v Sol.Gen. for Jersey* [5] the Privy Council considered relevant parts of the *Coûtume Réformée*. The Earl of Selborne in delivering the judgment stated (at p.333) that this "has itself no authority in Jersey", but went on to state (at p.333-4) that the relevant article of the *Coûtume Réformée* "might, without substantial error, be regarded as expository, not indeed of the text of the *Ancienne Coûtume*, but of the law and practice under it, agreeably to *Terrien's* Commentary". This could be done in that case, but not where the text of the *Coûtume Réformée* differed from the text of the *Ancienne Coûtume*. Earlier in *La Cloche v La Cloche* [6] the Privy Council had referred

at length to the *Coûtume Réformée* [7] as evidence of the custom of Jersey before the separation of continental Normandy. Further, in *La Cloche v La Cloche* [8] there is a material passage at page 334 which reads as follows:

"It was also contended that we could not look at what was called the Reformed Customs of the Duchy of Normandy. There seems upon that latter point to be a fallacy. These collections of Customs are not written laws at all; they are not legislative Acts within the letter of which persons are to be brought. They are written illustrations, written evidences, authoritative declarations of what the unwritten Common Law or custom of the Country was, and unless it can be shewn that in that to which their Lordships have been referred - the Reformed Custom - some new principle had been introduced by legislative or other sufficient authority in the Duchy of Normandy, subsequent to the separation, the Reformed Custom of the Duchy of Normandy can be looked at as evidence of what the old law was, just as *Coke upon Littleton* would be looked at as evidence in Maryland or Virginia of what the Common Law and Equity to this day are admitted as evidence in every country which has derived its law from England of what the old law was.

[A footnote follows]

It appears that the customary Laws of France were reduced to writing by the authority of the French Crown, and were afterwards reformed by the same authority"

The differences between the *Ancienne Coûtume* and the *Coûtume Réformée* appear for the most part not to be large, and during those 400 years the law of Jersey had not developed independently to any large extent. So in practice the *Coûtume Réformée*, and the main commentaries on it (especially those of Basnage; Bérault, Godefray et d'Aviron; Flaust; Houard; Pesnelle; Poingdestre and Routier) have played a considerable part in the development of Jersey law.

Mention must also be made of those who have written specifically on Jersey law, in particular -

1. Le Geyt wrote around 1700 but his works were not published until the 19th and 20th centuries. He wrote two works: *Privilèges, Lois et Coûtumes de l'Île de Jersey*, and *Manuscrits sur la Constitution, Les Lois et les Usages de Jersey*. He was described in *Godfray v Godfray* [9] as being "as high an authority as can be produced on the local law of Jersey".
2. *Poingdestre* wrote on *Les Lois et Coûtumes de Jersey*, and further manuscripts on the *Coûtume de Normandie* as practised in Jersey and Guernsey; viz. *Commentaires sur l'Ancienne Coûtume de Normandie* and *Remarques et Animadversions sur la Coustume Réformée de Normandie*.
3. two works of 1789 on the procedures of the Royal Court, by Hemery and Dumaresq, and Pipon and Durell (the unusual circumstances in which these were produced were described in *Foster v Att.Gen.* [10]);

4. Le Gros, *Droit Coûtumier de Jersey*; [11]
5. Le Quesne, *Constitutional History of Jersey*; and Bois (already cited); [12]
6. Matthews and Nicolle, *Jersey Law of Property*; [13]
7. Matthews and Sowden, *Jersey Law of Trusts*. [14]

So far all this will be rather familiar to Jersey solicitors and advocates. It is when we come to the influence of French law and English law that the picture becomes less clear.

French law as such is not authoritative in Jersey. But behind this brief statement lies a wealth of influence on Jersey law. It is necessary to take French law in historical stages:

1. At the time of the *Ancienne Coûtume* the law in the northern part of what is now the French Republic would have been in many respects the same or similar. The principal other *Coûtumes*, those of Paris and Orléans, provide useful evidence of what the law of Normandy, and particularly Jersey, was and have been referred to for this purpose.
2. Like the *Coûtume de Normandie*, the *Coûtumes de Paris* and *d'Orléans* continued to develop, but still provide helpful evidence of the ancient customs. So in *La Cloche* [15] the Privy Council referred to these *Coûtumes*

"for the purpose of testing the interpretation we have put on the custom as stated by *Terrien*, and also for the purpose of explaining the force and effect of particular expressions."

3. See also *Falle v Godfray* [16]. The Privy Council in this respect in *La Cloche* (1870) cited the description of these *Coûtumes* in the works of Pothier.
4. Pothier, who lived from 1699-1772, was the greatest authority on French law of the 18th century. He wrote on almost every aspect of French law at that time, including the *Coûtumes*. His importance as an authority lies not only in his mastery of his subjects (his *Traité des Obligations* was universally regarded as a major contribution to jurisprudence, and regularly cited in the English courts including the House of Lords in the 19th century), but also in the fact that he stated French customary law just before it was superseded by the *Codes Napoléon*. Not surprisingly *Pothier* has been much cited in the Courts of Jersey: see eg the Jersey Law Reports Index and Tables 1959-93 at pages 432-434 for the many citations during this period; and also *La Cloche* (1870) at pages 138-139. Similarly *Domat* has been much cited as a contemporary authority on French law before the Revolution.
5. The *Codes Napoléon* superseded the law of France as it previously stood. Many of the provisions of the *Codes* were intended simply to reproduce in the form of a code the pre-existing law. But the draftsmen of the *Codes* made numerous changes. It is therefore unsafe to assume that the *Codes* state the pre-existing French law unaltered, or that they can be taken as evidence of the law of Jersey derived from the *Ancienne Coûtume*, without detailed research to establish this.

6. French law after the introduction of the *Codes Napoléon* has been much cited in the Jersey Courts, as an examination of the references in the JLR Index and Tables 1950-93 shows. The references to *Dalloz*, *Merlin*, and *Planiol et Ripert* have been quite frequent. But any such reference has to be made with care. As I have indicated, changes were made in the *Codes*. Subsequently the jurisprudence of the French courts and learned commentators have developed the sometimes simplistic provisions of the *Codes* substantially. So any reference to French law as it stands today has to be made with considerable care, because it may bear no relation, direct or indirect, to the law of Normandy as inherited by the island of Jersey. That is why a caution was expressed recently by the Court of Appeal in *Maynard v Public Services Committee* [17] against the over-enthusiastic citation of modern French authority.
7. One of the questions on which further research is needed is the extent to which the Royal Court and the Court of Appeal have relied on French law in, for example, commercial matters, either to fill gaps in Jersey customary law or in lieu of reliance on English commercial law. This would require some detailed research into the decisions in Jersey over the last 50 years which unfortunately I have not had time to embark on before writing this note. But one day I hope to do so.

Turning to English law, it is inevitable that English doctrines have played a large part in the great development of Jersey law during the last 50 years. The references to Halsbury's Laws of England alone in the JLR Index and Tables 1950-93 show how large this part has been. As I have indicated, as early as 1847 in the Criminal Report the Commissioners drew attention to the extensive citation of English criminal law and cases. Citation of English law is naturally of assistance where Jersey law or procedure can be seen to be based on English legal principles or English procedure. One aspect where this is directly in point is in relation to the law of negligence, in which the Courts of Jersey have accepted the English principles, save to the extent that any separate Jersey rule has become established: see eg the judgment of Sir Godfray Le Quesne QC in *Picot v Crills* [18] with which Sir Charles Frossard agreed.

However, the notion that English law has only played a major role in Jersey over the last 50 years would not be right. English law has, for obvious reasons of common loyalty to the Crown and valued collaboration between Jersey and English lawyers, taken a major role in the development of Jersey law. This is of long standing. As early as 1700 Le Geyt was concerned that English principles might displace those derived from the *Ancienne Coutume* in the *Préface* to his *Manuscripts*. Inevitably with a larger neighbour the influence of England was bound to be considerable. It is not always one way, however, as can be seen with the citation in the English courts of the Court of Appeal decision on the duties of trustees in *Midland Bank Trust Co. (Jersey) Ltd v Federated Pension Services Ltd.* [19] See eg *Armitage v Nurse* [20].

However, in two recent cases a note of caution as to the acceptance of English law too readily as a guide to determining what is the law of Jersey has been sounded.

In *Maynard* (above) the Court of Appeal has expressed (*obiter*) some doubt whether the principle of English common law in *Cartledge v Jopling* [21] is to be regarded as the law of Jersey, and has referred to recent decisions of the New Zealand Court of Appeal (and one of

the Privy Council on appeal from New Zealand) as perhaps showing a more realistic way for the law of Jersey to develop, having regard also to the statutory rejection by the British Parliament of the *Cartledge v Jopling* principle.

One of the questions which will need further consideration is to what extent the Jersey courts consider and may even follow developments in jurisdictions other than England and Wales, rather than simply following English law. It can be seen from *Maynard* that where English law has become primarily the creature of statute and the earlier English common law has been replaced, there may be much to be said for looking to see in what way the same problem has been resolved by the courts of other common law jurisdictions, particularly where there is no difference in practical circumstances between the different jurisdictions. An opportunity to create a Commonwealth-wide common law jurisdiction was missed after 1945. Nevertheless in all the countries of the Commonwealth there is extensive citation of decisions from other common law jurisdictions. Each country seeks to learn from the good solutions or the mistakes of the other jurisdictions. For my part I welcome the opportunity to be able to put a difficult problem under Jersey common law in the context also of the decisions of, for example, Australia and New Zealand as well as those of England and Wales.

Another question which arises out of *Maynard* (and also arose in Guernsey in the case of *Morton v Paint* [22] referred to in the next paragraph) is to what extent the courts of Jersey take account of the influence of statutory developments in England and Wales, even when the statutes have not been expressed to extend to Jersey. So in *Maynard* the Court of Appeal did not disregard the fact that the principle of English law established in *Cartledge v Jopling* had been replaced by statute in a way which was much more consistent with the just solution which the House of Lords recognised could not be achieved in *Cartledge v Jopling*.

The other case involves a decision of the Court of Appeal of Guernsey, in *Morton v Paint*. In *Morton* it was argued that the law of Guernsey on occupiers' liability remained in the same state as English common law had been in 1956 before the statutory reforms in England and Wales of 1957 and 1984. The Guernsey Court of Appeal held that Guernsey law in this regard could not remain ossified in this way, but must develop in line with the statutory reforms in England and Wales and with developments elsewhere in the common law, particularly in Australia. The article by Jason Morgan [23] provides interesting observations on the decision in *Morton*. As indicated above, the Court of Appeal Jersey in *Morton* took account of the fact that English common law as it had stood in 1956 had been radically changed by statutes of 1957 and 1984, and the Court had regard to the policy underlying those statutes which had developed the law of England and Wales in the same direction as it had gone through the development of the common law in Australia and other Commonwealth countries. This is another example of a court in the Channel Islands taking a wider view than merely having regard to pre-1957 English common law, and trying by reference to principles developed by statute in England and in the common law elsewhere to ensure that Guernsey law is more in tune with the needs of the island community today.

I do not embark here on the choppy waters of European Law and its application to Jersey (to which the Editor made brief reference in his Foreword to the first issue of this Review [24] or the calmer but still rock-strewn waters of the European Convention on Human Rights. Those are topics for later consideration.

Finally I emphasise that this is no more than a voyage of discovery. No doubt there are others who can more successfully chart their way through the history of the development of Jersey law and correct my mistakes.

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Footnotes - [\(Top\)](#)

[1] - F. de L. Bois, *A Constitutional History of Jersey*, paras. 6/55 and 11/137-139

[2] - *Civil Report*, page vii

[3] - *Jersey and Whitehall in the mid-nineteenth century* pub. 1992 Société Jersiaise.

[4] - See eg answer no.3 of Sir John de Veulle, Bailiff, at page 9 of the Criminal Report

[5] - [1893] AC 326

[6] - (1870) LR 3 PC 125

[7] - See pp 136-138

[8] - (1872) LR 4 PC 325

[9] - (1865) 3 Moore PC (NS) 316 at p.338

[10] - 1992 JLR 6 per Sir Godfray Le Quesne at pp. 15-16

[11] - Jersey, 1943

[12] - London, 1856

[13] - London, 1991

[14] - London, 3rd Edition 1993

[15] - (1870) at page 138

[16] - (1888) 14 AC 70 PC at pp. 75-76

[17] - 1996, unreported

[18] - 1995 JLR 33

[19] - 1995 JLR 352

[20] - [1997] 2 AER 705 CA at p. 714 a-b

[21] - [1963] AC 758 HL

[\[22\]](#) - (1996) 21 Guernsey Law Journal 36

[\[23\]](#) - 1 Jersey Law Review 42

[\[24\]](#) - 1 Jersey Law Review 3