

# Journal of Civil Law Studies

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Volume 9

Number 2 *Conference Papers*

*The Louisiana Civil Code Translation Project:*

*Enhancing Visibility and Promoting the Civil Law in  
English*

*Baton Rouge, April 10 and 11, 2014*

*Part 2. Worldwide Perspectives*

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Article 6

3-29-2017

## Jersey: Vocabularies of Coûtume and Code

Steven Pallot

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## JERSEY: VOCABULARIES OF COÛTUME AND CODE

Steven Pallot\*

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## ABSTRACT

*The Channel Islands were an integral part of the Duchy of Normandy until 1204 when King John lost Continental Normandy to the French King, Philip Augustus. Jersey and Guernsey did not submit to the jurisdiction of the French King but retained allegiance to the King in England as Duke of Normandy. The customary laws of the Islands retain their Norman root to this day in spite of strong legal and cultural influences from England in the 19<sup>th</sup> and 20<sup>th</sup> Centuries. A rich legal vocabulary in both French and English has evolved in these mixed legal jurisdictions.*

*This article examines the linguistic legacy of Jersey's diverse jurisprudential heritage, including Jersey legislation, in part drawn from the Code civil des Français and other French statutes, and in part reflecting the peculiar legal usages of Jersey as a pays coutumier; and Jersey case law in which the application of Norman customary law, civilian law and the French Civil Code, is considered.*

Keywords: mixed legal jurisdiction, French Civil Code, customary law, coutume, droit coutumier normand, Jersey law, civil law, common law

## I. INTRODUCTION

As its title may convey, the intention of this article—more of a snapshot than a thesis—is to share something of the linguistic legacy of Jersey's diverse jurisprudential heritage, including the partially bilingual Jersey statute book, which has some parts drawn from the *Code civil des Français* and other parts which reflect the usage of a *pays coutumier*. This article will briefly trace the historical roots of Jersey law and its evolution into the mixed legal jurisdiction that it has become today.

The varied French vocabulary that this process of evolution has yielded, derived from the island's own internal customary usage as well as borrowed from the Norman *coutume* and the French Code, will be surveyed.

Jersey law is rooted in the *droit coutumier normand*, but it has not been codified in the Napoleonic style. It will, therefore, be necessary to speak about case law and to give examples of the approach

Jersey courts use when receiving legal authorities, but without advancing any view as to which principles—of Norman customary law, civilian law, the French Civil Code, or English common law—ought or ought not to be applied by the courts. There are sometimes divergent views about which one should prevail, but the Norman foundation of Jersey law, together with the historical link of the Channel Islands to the English Crown, have unquestionably resulted in the Jersey (and Guernsey) courts having an unusually wide range of authorities from which to draw when confronted with difficult legal questions.

## II. LES ÎLES “ANGLO-NORMANDES”

Jersey—along with its neighbouring, but separate, Channel Island jurisdiction of Guernsey—could arguably be said to rank as one of the earliest “mixed” legal jurisdictions.<sup>1</sup> Originally the *bailliage*, albeit physically separated from Normandy,<sup>2</sup> was culturally and legally a part of the Duchy, and continued to be so after Duke William II assumed the English Crown as William I of England in 1066.

In 1204, however, King John lost Continental Normandy to the French King, Philip Augustus. Jersey and Guernsey did not submit to the jurisdiction of the French King but rather retained allegiance to the King in England as Duke of Normandy. The link to the English Crown did not, however, link Jersey to English common law. Jersey continued—and continues to this day—to be a *bailliage*, or a bailiwick. Whilst mainland Normandy developed its body of law as a *pays coutumier*, the *coûtume de Normandie* was also built upon in Jersey and evolved independently on the Island—albeit often with reference to written works and authorities from mainland Norman and from the wider, pre-revolutionary French, law.

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1. Albeit from very different historical roots, Jersey’s jurisprudence has civilian and common law traditions not unlike those of Scotland. In relation to Scotland, see Stephen Thomson, *Mixed Jurisdiction and Scottish Legal Tradition: Reconsidering the Concept of Mixture*, 7 J. CIV. L. STUD. 51, 52 (2014).

2. Jersey is separated by a stretch of sea of some twenty kilometers between Carteret on the north-west coast of the Cotentin peninsula and Gorey on the east coast of Jersey).

### III. INFLUENCE FROM THE FRENCH *CODE CIVIL* AND 19<sup>TH</sup> CENTURY BRITISH COMMON LAW

Codification of French law in 1804 marked the end of customary law in France; and was to distance Jersey law further—but not sever it—from its continental Norman root.<sup>3</sup> French codification occurred as English influence on Jersey was set to grow throughout the 19<sup>th</sup> Century both culturally and legally. This is not to suggest that this influence dislodged the *coûtume* or that the *Code civil* itself was to exert no influence on the development of Jersey law (it did in several respects); but it did mean that the influence of English common law in substance and language was to become more pronounced to the point that Jersey was being labelled as a “mixed” jurisdiction by the early 20<sup>th</sup> century.

It had become mixed, in the sense not only of having absorbed both civilian and common law concepts, but also in the sense that its body of law had become part customary and part codified.

### IV. THE CONTEMPORARY APPROACH OF THE COURTS

The following cases are among the more prominent illustrations of how the courts in modern times have treated the reception of French and civilian law as sources of Jersey law. This is an illustrative list that demonstrates how the courts have considered such questions.

- (i) In *Selby v. Romeril*,<sup>4</sup> the Royal Court had to determine the applicable law to examine whether there was a supplementary or collateral contract. Its decision illustrates how parts of the *Code civil* were incorporated effectively into Jersey law.<sup>5</sup>

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3. See also, John D. Kelleher, *The Sources of Jersey Contract Law*, 3 JERSEY L. REV. (1999).

4. 1996 JLR 210.

5. The Court declared, in part, that:

Mr. Kelleher . . . submitted that there was no contract. He referred us to Pothier: ‘Il est de l’essence des obligations; 1°. qu’il y ait une cause d’où naît l’obligation; 2°. des personnes entre lesquelles elle se contracte; 3°. quelque chose qui en soit l’objet.’ It is true that Pothier has often been treated by this court as the surest guide to the Jersey law of contract. It is also true, however, that Pothier was writing two centuries ago and that

- (ii) *Snell v. Beadle (née Silcock)*<sup>6</sup> concerned the doctrine of *déception d'outré moitié du juste prix*. The court, in this case, stressed the importance of strictly adhering to the limits and characteristics of the remedy for *déception d'outré moitié* that were to be found in the customary law of Jersey.<sup>7</sup>

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our law cannot be regarded as set in the aspic of the 18th century. Pothier was one of those authors upon whom the draftsmen of the French Civil Code relied and it is therefore helpful to look at the relevant article of that Code. Article 1108 of the Code provides: 'Quatre conditions sont essentielles pour la validité d'une convention: Le consentement de la partie qui s'oblige; Sa capacité de contracter; Un objet certain qui forme la matière de l'engagement; Une cause licite dans l'obligation.' In our judgment, it may now be asserted that by the law of Jersey, there are four requirements for the creation of a valid contract, namely (a) consent; (b) capacity; (c) an 'objet;' and (d) a 'cause' . . . .

6. 2001 JLR 118 (Judicial Committee of the Privy Council).

7. The Court declared, in part, that:

Jersey derived its legal traditions from the pays de droit coutumier of Northern France and especially from the ancienne coutume of Normandy. The Norman origins of Jersey law remain of essential importance. The coutumiers prior to codification varied in their content from area to area, but they were much influenced by principles of Roman law which formed part of the *ius commune* of the civilian jurisdictions in countries such as France, Spain and Italy. In some instances, when the customary law came to be codified, the *ius commune* was transformed as it stood into a coutume. In other respects, after codification, the *ius commune* was resorted to when a coutume was silent on the point at issue. The present action relates to property rights under the law of Jersey, where the customary law has not been codified or enshrined in a coutume . . . . In this context, the word 'custom' is used to describe all sources of law other than statute . . . [c]ustomary law which, like the customary law of Jersey, has not been enshrined in an official coutume and changes over time. It is therefore capable of development by judicial decision as well as by statute. In this respect, it may be regarded as being what may be described, in modern terminology, as 'the common law' of the Island. Like other customary law systems, Jersey law had recourse to the *ius commune* for areas not covered by municipal customary law see Nicolle (id. at para. 14.7). The principle which is at issue in the present case is an example of the reception of a principle of Roman law through the *ius commune* into Jersey law by way of the customary law of Normandy . . . . For these reasons, . . . as the customary law of Jersey has not been enshrined in a coutume, the proper approach is to regard it as being still in a state of development. It is capable of being refined or clarified by judicial decision as the customary law is applied to a new set of facts. This may be done by reference to other customary law sources. In the present context, the search for guidance as to the content and the proper application of the principle must be conducted in the first instance by examining the works of the writers on the customary laws of Normandy. It will be helpful also to examine the Roman law, as the origins of the customary law rule lie in the Roman law. French law as it exists today in the French Codes or the current jurisprudence is unlikely to be of direct

- (iii) *Mendonca v. Le Boutillier*<sup>8</sup> concerned the maxim *en fait de meubles, possession vaut titre*. The maxim was found to have no place in Jersey law. In deciding whether such maxims formed part of the *coûtume* as applied in Jersey, the Royal Court stated that it was important to examine their origins carefully; and in this case, the maxim corresponded to an article of the French *Code civil*, which did not derive from a Norman customary source.<sup>9</sup> Similarly, weight could not be placed on English law where the common law had been replaced by a statute to which there was no Jersey equivalent.

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assistance here, for the reasons explained by Southwell. Nor is it helpful in this context to have regard to the solutions which have been adopted in the modern codified systems that are to be found in other civilian jurisdictions . . . . The Roman law rule, which the texts in the Code at C. 4. 44. 2, 8 attribute to Diocletian, was that in sales of land, if the price was under half of the true value *ultra dimidium justii pretii, ex re praesumitur dolus*. This gave rise to an exception to the general rule that if the price was genuine its adequacy was irrelevant. The so-called *laesio enormis*, where the sale of the land was at less than half its value, was a sufficient ground, without more, to entitle the disadvantaged party to dissolve the bargain unless the purchaser made up the price to full value . . . . This rather crude rule of thumb, which was much debated in the civilian jurisdictions, can be assumed to have been known also to Scots lawyers of the 16th century who were very familiar with the *ius commune*. But Scots law in the end rejected it, on the ground that a price is considered to be an equal and adequate price that pleases the parties to the contract . . . [r]eferring to the differing opinions which had been expressed about the Roman Law rule 'which our custom alloweth not,' described the rule that ultimately prevailed in Scotland in these words: 'If then the particular value or esteem be the first rule in such contracts, when both parties being free, do agree upon such a rate, there is here no donation, but a particular estimation, wherewith either party ought to rest satisfied.' . . . English law is of no assistance on this matter. It has been held that it is not legitimate to import the principles of English law into Jersey law relating to property rights, even if in any case this could be done . . . . It is important, therefore, when one is applying the rule to the facts, to confine one's attention strictly to the limits and characteristics of the remedy for *déception d'outre moitié* that are to be found in the customary law of Jersey (citations omitted).

8. 1997 JLR 142.

9. An action for the recovery of a movable is an *action personnelle mobilière*, so a prescriptive period of ten years applies. A person able to demonstrate possession in good faith for ten years or more will therefore obtain good title.

## V. THE APPROACH IN STATUTE

Nearly all Jersey legislation was enacted in French up until the Second World War, which is when English prevailed as the dominant language. Nonetheless, some legislation since 1945 has been enacted in French, some of the more prominent examples being the: (i) *Loi (1959) touchant la vente des immeubles de mineurs*;<sup>10</sup> (ii) *Loi (1960) modifiant le droit coutumier*;<sup>11</sup> (iii) *Loi (1991) sur la copropriété des immeubles bâtis*<sup>12</sup> (based in large part upon the French *Loi n° 65-557 du 10 juillet 1965 fixant le statut de la copropriété des immeubles bâtis*); (iv) *Loi (1996) sur l'hypothèque des biens-fonds incorporels*.<sup>13</sup>

When the legislature amends legislation that was drafted in French, they adhere to the original language and draft the amended version in French. A recent example was a *projet de loi* to amend the *Loi (1914) sur la voirie*.<sup>14</sup>

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10. L.5/1959.

11. L.25/1969, which provided that:

*Des héritiers, soit directs, soit collatéraux, ne pourront attaquer—  
(1) la validité d'un contrat passé par le défunt ni la validité d'un testament contenant des legs d'immeubles—*

*(a) de ce que la condition d'un héritier serait rendue meilleure que celle d'un autre;*

*(b) de ce que le défunt aurait donné ou baillé un héritage à un de ses héritiers, à un de ses descendants ou à un des descendants de son héritier, ou le lui aurait autrement mis en la main;*

*(c) de ce que le défunt aurait fait un acquêt d'héritage conjointement avec son héritier présomptif;*

*(d) de ce que le défunt aurait avantagé son conjoint en son héritage;*

*(e) de ce que le défunt et sa femme auraient acquis un héritage par ensemble constant leur mariage;*

*(f) pour n'importe quelle autre cause d'incapacité résultant, soit de la parenté entre le défunt et son héritier, entre le défunt et ses descendants ou entre le défunt et les descendants de son héritier, soit du mariage du défunt;*

*(g) de ce que le défunt aurait donné un héritage à son enfant bâtard ou le lui aurait vendu ou engagé ou en aucune manière mis en la main;*

*(2) la validité d'un contrat passé par la femme du défunt —*

*(a) de ce qu'elle aurait acquis un héritage constant son mariage avec le défunt; ou*

*(b) pour n'importe quelle autre cause d'incapacité résultant de son mariage avec le défunt.*

12. L.31/1991.

13. L.34/1996.

14. L.21/2013.



## VI. STATUTES IN ENGLISH REFLECTING CUSTOMARY LAW

Although English now predominates in legislative drafting, the underlying customary law is no less Jersey-Norman than it was when legislation was being drafted in French. The drafting has to reflect that reality, and illustrations of this are to be found in post-war legislation:

- (i) the Wills and Successions (Jersey) Law 1993,<sup>15</sup> which refers to the devolution not of “realty” or “personalty,” but of immovable and movable estate, employs French terminology such as *représentation*, *usufruit*, *biens-fonds*, *division par souche*;<sup>16</sup>
- (ii) the Supply of Goods and Services (Jersey) Law 2009<sup>17</sup> in which care was taken to define the word “warranty” to mean “*garantie* in accordance with customary law;”<sup>18</sup>
- (iii) the Social Security Hypothecs (Jersey) Law 2014,<sup>19</sup> article 2 of which has created a new species of *hypothèque légale* to enable the Minister for Social Security to take security on immovables in certain circumstances where the long term benefit has been paid.<sup>20</sup>

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15. L.18/1993.

16. *See, e.g.*, article 2:

In every collateral succession on intestacy, whether to movable estate or *acquêts*, any surviving descendant of a deceased brother, sister, uncle or aunt, whether of the whole or the half blood, shall be entitled to a right of *représentation* of such brother or sister or uncle or aunt, the division being *par souche*.

*See* article 4(1), which provides for intestate immovables to devolve “... subject to the operation of the right of *représentation*” in equal undivided shares between the heirs at law, and for such heirs to “take as tenants in common (*en parts égales en indivis pour eux et leurs hoirs respectifs*).” *See* article 4(2), which provides that in collateral successions of immovables “relatives of the half-blood whether *consanguin* or *utérin* shall each have a half share and relatives of the whole blood shall each have a whole share.”

17. L.14/2009.

18. *See, e.g.*, article 21(1) states that when dealing with the warranty (*‘garantie’*) of title, the seller is the one to warrant under a contract of sale of goods:

- (a) in the case of a sale, that the seller has a right to sell the goods; or
- (b) in the case of an agreement to sell, that the seller will have such a right at the time when the property in the goods is to pass.

19. L.4/2014.

20. Provision is made for the Minister to have a legal hypothec on all the immovable property of a debtor whether or not the property is owned jointly with a third party. The interaction of English and French terminology can be seen in article 2(4) which provides as follows:

VII. STATUTES DRAWING ON THE *CODE CIVIL* AND OTHER FRENCH  
LEGISLATION

A. *Loi (1880) sur la propriété foncière* (“the *Loi of 1880*”)<sup>21</sup>

This law governs charges on immovables. Much, although by no means all, of the terminology will be familiar to the trained-French jurist.<sup>22</sup> Some of the essential provisions on hypothecs are based to a greater or lesser extent on provisions contained in *Titre VIII, Chapitre III* of the *Code civil des Français*:

– article 2 of the *Loi of 1880*: “*L’Hypothèque, aux fins de la présente Loi, est un droit réel attaché à une... réclamation, en vertu duquel un ou plusieurs biens-fonds appartenant au débiteur sont spécialement affectés à l’acquittement de cette... réclamation...*”

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Where a hypothec has been created in circumstances where the property is owned jointly (whether or not with a third party) and a *dégrévement* is ordered ..., the title to the property shall, as from the date of the order, be taken to have been converted into ownership in common in equal shares (*en indivis en parts égales*) and the hypothec shall, with the debt secured by it, be apportioned accordingly.

Article 4 of the Law provides for the application of the *Loi (1880) sur la propriété foncière*. See, e.g. that article 4(4) provides that: “article 29 of the *Loi of 1880* shall apply to a social security hypothec except that the right of recourse to a third holder of the property (*le droit de suite*) shall not be barred by prescription.” The relevant provisions of the *Loi of 1880* are set out in translation in the Schedule; however, these translations are by way of information only and in the event of any conflict between the translation and the *Loi of 1880*, the latter prevails.

21. L.1/1880.

22. E.g.: “*L’hypothèque*” (*légale, conventionnelle, judiciaire*); “*droit réel attaché à une réclamation*”; “*biens-fonds*”; “*affectés à l’acquittement d’une réclamation*”; “*l’héritage*”; “*l’ordre de collocation*”; “*droit de suivre/suite*”; “*tiers détenteur*”; “*meubles/immeubles*”; “*biens futurs ou à venir*”; “*conjoint*” (which now includes a civil partner for this purpose); “*douaire/franc douaire*”; “*cessionnaire*”; “*jouissance actuelle*”; “*discuter les biens/discussion des biens*”; “*acte conservatoire*”; “*droit de préférence*”; “*nul*”; “*créanciers [non] hypothécaires*”; “*héritiers en leur propre et privé nom*”; “*acte ou jugement rendu contradictoirement ou par défaut*”; “*hypothèques foncières/simples*”; “*prescription/imprescriptible*”; “*exigible*”; “*l’assiette des maisons et édifices*”; “*titres de propriété*”; “*redevances et servitudes*”; “*un lot*”; “*l’état descriptif de division*”; “*bail à termage*”; “*provenance du titre*”; “*passation des contrats*”; “*sans fonds*”; “*exigible*”; “*contrat d’aliénation d’immeubles*”; “*créances chirographaires*”; “*détenteur de bonne foi*.”

This much of article 2 will be recognisable as deriving from article 2114 of the *Code civil*: “*L’hypothèque est un droit réel sur les immeubles affectés à l’acquittement d’une obligation.*” But the remainder of article 2 (in so far as is relevant today) reads:

*... et qui confère à son possession les avantages suivants, savoir: en cas ... de dégrèvement de l’héritage hypothéqué... (1) droit, dans l’ordre de l’hypothèque, de se porter tenant aux biens... dégrèvement, ou d’être payé par le tenant qui aurait accepté cette qualité en vertu d’un contrat ou hypothèque d’une date subséquente (2) en cas d’insuffisance des biens du débiteur: droit de suivre toute partie de l’héritage hypothéqué entre les mains du tiers détenteur, et, quoiqu’il ne soit pas directement chargé du paiement de la... réclamation hypothéquée, de l’obliger à payer ce qui en reste dû, ou à délaisser l’héritage qu’il détient. La renonciation par défaut ou autrement dans un... dégrèvement d’une... réclamation hypothéquée, aura l’effet de libérer les héritages soumis à ces diverses procédures, tant de la réclamation même, que de l’hypothèque qui y est attachée : mais ne privera pas le créancier du droit de suite à l’égard d’autres héritages grevés, s’il y en a.*

The term *dégrèvement* may be familiar to the French tax lawyer in the sense of *une décharge d’impôt*, but not in the context in which it is set in the *Loi* of 1880, namely, the realisation of charges (hypothecs) on the disencumbrment (*dégrèvement*) of a corporeal hereditament (*corps de bien-fonds*):

- article 5 of the *Loi* of 1880: “*Les hypothèques sont ou légales, ou judiciaires, ou conventionnelles.*” This will be recognisable as deriving from article 2116 of the *Code civil*: “[*L’hypothèque*] *est ou légale, ou judiciaire, ou conventionnelle.*”
- article 6 of the *Loi* of 1880: “*L’hypothèque légale est celle qui résulte de la loi,*” and article 12 of the *Loi* of 1880, “*L’hypothèque judiciaire est celle qui résulte des actes et des jugements soit de la Cour Royale soit de la Cour pour le Recouvrement de Menues Dettes, pourvu que les dispositions de la présente Loi aient été remplies,*” will be recognisable as deriving—with local modification in the case of judicial hypothecs—from article 2117 of the *Code civil*:

“*L’hypothèque légale est celle qui résulte de la loi. L’hypothèque judiciaire est celle qui résulte des jugements ou actes judiciaires.*”

– articles 17 and 18 of the *Loi* of 1880: “art. 17. *Les hypothèques conventionnelles sont celles qui résultent des conventions et du libre consentement des parties. Elles ne pourront, sous peine de nullité, être constituées, consenties, ou créées, qu’au moyen d’un Contrat passé devant Justice en forme authentique, et dûment enregistré;*” “art. 18. *Les hypothèques conventionnelles ne pourront être constituées ou créées que par ceux qui ont la capacité d’aliéner les biens-fonds qu’ils y soumettent.*”

These provisions will be recognisable as deriving—but with significant local modifications—from articles 2117, 2124 and 2127 of the *Code civil*: “art. 2117. *L’hypothèque conventionnelle est celle qui dépend des conventions et de la forme extérieure des actes et des contrats;*” “art. 2124. *Les hypothèques conventionnelles ne peuvent être consenties que par ceux qui ont la capacité d’aliéner les immeubles qu’ils y soumettent;*” “art. 2127. *L’hypothèque conventionnelle ne peut être consentie que par acte passé en forme authentique devant deux notaires, ou devant un notaire et deux témoins.*”

#### *B. Loi (1851) sur les testaments d’immeubles*<sup>23</sup>

This law provided for liberty to dispose of immovable property by will and was a departure from the Norman customary principle of *la conservation du bien dans la famille*:

– article 6: “*Les substitutions sont prohibées. Toute disposition par laquelle le légataire sera chargé de conserver et de rendre à un tiers sera nulle, même à l’égard du légataire. Toutefois la nue propriété peut être donnée à l’un, et l’usufruit à l’autre.*”

This is recognisable as deriving from articles 896 and 949 of the *Code civil*: “art. 896. *Les substitutions sont prohibées. Toute disposition par laquelle le donataire, l’héritier institué ou le légataire, sera chargé de conserver et de rendre à un tiers, sera nulle, même*

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23. L.2/1851.

à l'égard du donataire, de l'héritier institué ou du légataire;" "art. 949. Il est permis au donateur de faire la réserve à son profit, ou de disposer au profit d'un autre, de la jouissance ou de l'usufruit des... immeubles donnés."

C. *Loi (1991) sur la copropriété des immeubles bâtis*<sup>24</sup>

As mentioned earlier<sup>25</sup> this law was based largely upon the French *Loi n° 65-557 du 10 juillet 1965 fixant le statut de la copropriété des immeubles bâtis*,<sup>26</sup> but with modification of terminology to accommodate Jersey usage of French. Thus:

- the *syndicat des copropriétaires* in the French *Loi* becomes the *association des copropriétaires* in the Jersey *Loi*;
- the *syndic* in the French *Loi* becomes the *mandataire* in the Jersey *Loi*;
- the *règlement de copropriété* in the French *Loi* becomes the *déclaration de copropriété* in the Jersey *Loi*;
- where article 1 of the French *Loi* refers to “*lots comprenant chacun une partie privative et une quote-part de parties communes*,” the Jersey *Loi* refers also (in article 2) to “*lots comprenant chacun une partie privative et une quote-part des parties communes de l'immeuble*,” but then—importantly in the context of the Jersey law relating to *dégrévement*<sup>27</sup>—adds the words “*et constituant chacun un corps de bien-fonds*;”
- article 2(8) of the Jersey *Loi*—which provides that: “[c]haque lot est susceptible de constituer une tête de partie<sup>28</sup> dans une succession immobilière”—has no immediate counterpart in the French *Loi*.<sup>29</sup>

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24. L.31/1991.

25. See *supra*, Part V.

26. *Loi n° 65-557 du 10 juillet 1967*.

27. See *supra*, Part VII. A. (relating to article 2 of the *Loi* of 1880).

28. A *tête de partie* is a unit of immovable property, such as a house, not capable of sub-division among heirs.

29. Where the French *Loi* reputes (among other things) *le sol, les cours, les parcs et jardins, et les voies d'accès* to be *parties communes*, the Jersey *Loi* reputes (among other things) *le fonds; les cours, les bels, les terrains ouverts et jardins, les voies d'accès et les aires de stationnement* to be *parties communes*.

## VIII. FRANCOPHONE VOCABULARY MORE GENERALLY

The French word persists both in ordinary parlance and officially for offices such as the “Greffier” of the Parliament (*i.e.* the Greffier of the States), or of the Courts (*i.e.* the Judicial Greffier) without the English term—Clerk—ever having taken root. Additionally, the term for the head of the Jersey legal profession, bâtonnier, has never been translated into English.<sup>30</sup>

In the Code of Laws of 1771<sup>31</sup> (not a Code in the Napoleonic sense), the references *e.g.* to *curateurs*,<sup>32</sup> *tuteurs*, *administrateurs* and *procureurs* will be readily familiar to a civilian lawyer. Less familiar, in a contemporary sense at least, will be the (older) references *e.g.* to *dîme* [tithe], the *Cour d’Héritage*, and the *Cour du Samedi*.

The law relating to *dégrévement*—by which charges on immovable property are realised—has already been mentioned.<sup>33</sup> It is one only of several bankruptcy procedures in Jersey law. It is translatable into English as “discumberment” (or “disencumberment”) but in everyday usage the French term tends to be preferred. Article 8 of the Interpretation (Jersey) Law 1954 provides for references in any enactment to a person becoming bankrupt to be construed, *inter alia*, as references to:

- the grant of an application to place the person’s property under the control of the Court (*de remettre ses biens entre les mains de la Justice*);

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30. Similarly for parochial offices such as “Connétable,” “Centenier,” “Vingtenier,” and “Procureur du Bien Public.”

31. A Code of Laws for the Island of Jersey. [St. Helier, s.n.]: 1771. [ii], vi, 336, [53] pp.

32. See Mental Health (Jersey) Law 1969 article 43, which, whilst abolishing the institution of *curatelle*, maintained the function of curator: L.18/1969 (the institution of the *tutelle*—a *tuteur* and seven *électeurs*—existed under a mixture of customary and statutory law until 22nd August 2016 when the Children’s Property and Tuteurs (Jersey) Law 2016—L.13/2016—came into force and removed the requirement for *électeurs*).

33. See *supra*, Part VII. A.

- the declaring of the property of the person to be *en désastre*;<sup>34</sup>
- the grant of an application to make a general cession of the person's property (*de faire cession générale de tous ses biens-meubles et héritages*);
- a decision of the Court adjudging the property of the person to be renounced (*adjudée renoncée*).

#### IX. SPECIFIC VOCABULARY

The following is a non-exhaustive glossary of legal terms in Jersey:

*Acquêts (et propres)*—the distinction between immovables acquired by the deceased by purchase (*acquêts*) and patrimonial immovables (*propres*) was fundamental to the Jersey customary law of succession.

*Action en licitation (nul n'est tenu de rester dans l'indivision)*—co-owners, whether holding jointly or in common are *en indivis* and may apply to the Royal Court for an order bringing to an end the *indivision*.

*Assurance*—the *droit d'assurance* is the right of a lessor (*bailleur*) in certain circumstances to seize goods of the lessee to satisfy a claim for rental.<sup>35</sup>

*Caution*—guarantee.<sup>36</sup>

*Chose jugée*—this term competes for usage by the Jersey courts with the English/Latin “*res judicata*.”

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34. “*Désastre*” was not originally a term of art; it merely described a situation in which so many judgments had been taken against a person that his or her affairs were said to be “*en désastre*”—to have crashed—leading the Royal Court to appoint the *Vicomte* (the executive officer of the Court) to administer the *biens-meubles* of the debtor. It now extends by statute to the whole *patrimoine*—estate—of the debtor.

35. See article 1 of the *Loi (1867) sur la Cour pour le recouvrement de menues dettes* under which a *propriétaire* may: “*faire arrêter les biens-meubles du locataire qui se trouveront sur les prémisses qu’il occupe, ou qui en auront été enlevés: pour appliquer au paiement du loyer qui sera dû, et pour assurance de paiement du loyer...*”

36. There is no Jersey statutory definition of a guarantee. There are three types of guarantee or *caution*: *légal, judiciaire et conventionnel*.

*Contrat héréditaire*—a contract for the sale of land passed (on oath) before the Bailiff and two Jurats. It is essentially an *acte authentique*.

*La Convention fait la loi des parties*—this is Jersey’s slightly abridged counterpart to article 1134 of the *Code civil des Français*. The Royal Court said in *Incat Equatorial Guinea Limited et autres v. Luba Freeport Limited*:

. . . it is noteworthy that these requirements for the creation of a valid contract go some way to explaining the ancient maxim: *la convention fait la loi des parties*, which reflects art. 1134 of the French Code Civil, which is in these terms: ‘Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites’ . . . . At the heart of this provision in the French Code Civil and behind the maxim to which we are so accustomed in Jersey is the concept that the basis of the law of contract is that each of the contracting parties has a *volonté*, or will, which binds them together and requires that the mutual obligations which they have agreed be given effect by the courts. The notion of *volonté* as the foundation of the contract is sometimes thought to result from the political liberalism of the age of reason and of the economic liberalism of the 19<sup>th</sup> century, where obligations imposed from outside should be as few as possible. A man is bound only by his will, and because he is the best judge of his own interests, the best rules are those freely agreed by free men. However, it is to be noted that rather earlier the same rationale appears in the commentaries dating back to 1684, which states ‘Car la volonté est le principal fondement de tous contrats, laquelle doit avoir deux conditions, la puissance & la liberté . . .’ before going on to consider the restrictions which the law imposes on the making of contracts which are contrary to good morals or otherwise unlawful, notwithstanding the *volonté* which existed in the contracting parties.<sup>37</sup>

*Crime, délit, contravention*—French law distinguishes between *crimes*, *délits* and *contraventions*. However, whilst Jersey law appears to make the same distinction, the resemblance is merely superficial. The origin of the distinction in Jersey between *crimes* and

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37. Royal Court, 2010 JLR 287.



*délits*—both customary law offences—needs to be understood. *Délits* were essentially torts, proceedings for which were brought by the victim who convened the Attorney General by *adjonction*.<sup>38</sup> The Court could then dispose of the criminal as well as civil elements of the case. The Attorney General did not have discretion to prosecute a *délit* if the victim did not file a complaint. A *cause criminelle* by contrast was a public criminal proceeding, and thus involved the more serious type of offence prosecuted independently of the will of the victim. By the mid-19<sup>th</sup> Century,<sup>39</sup> the *cause en adjonction* was no longer the vehicle by which criminal proceedings for *délits* were brought. With the growth of the police force, *délits* came to be regarded as criminal offences, analogous to misdemeanours, prosecuted independently of civil delictual (tort) proceedings. A *contravention* is simply a statutory offence independent of any attribute of a customary law *crime* or *délit* save to the extent that the statute implicitly or explicitly provides for any such attribution.

*Le criminel tient le civil en état*—a customary law maxim signifying that where both criminal and civil proceedings arise out of the same circumstances, the criminal proceedings must generally be determined before the civil proceedings.

*Curatelle*—see under *tutelle* below.

*Demande*—a form of application to the Royal Court, e.g. seeking a declaration *en désastre*.

*Dol*—fraud in the civil context was known under Norman customary law as *dol*. This was referred to by Pothier and approved by the Royal Court *In Attorney General v. Foster*.<sup>40</sup>

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38. Commentary by *Le Geyt* recites that *délits*, along with *injures verbales* and *nouvelles dessaisines* are “*annaux*”—i.e. prescribed after a year and a day and that they could only be prosecuted through the Attorney General *en adjonction*.

39. i.e., by the time of the Criminal Commissioners Report of 1847.

40. 1989 JLR 70, 85 as follows: “*On appelle dol, toute espèce d’artifice dont quelqu’un se sert pour en tromper un autre : Labeo definit dolum, omnem calliditatem, fallaciam, machinationem, ad circumveniendum, fallendum, decipiendum alterum, adhibitam.*”

*Doléance*—a procedure (by petition) to have a decision of the Royal Court reviewed where no express right of appeal lies, in order to prevent an injustice.<sup>41</sup>

*Donner et retenir ne vaut*<sup>42</sup>—a customary law maxim meaning that when transferring an asset, the donor cannot both make the disposition and retain power and control over the asset. If he does so, the transfer will be void.<sup>43</sup>

*Douaire*—the right in the nature of dower in certain cases of a surviving spouse or civil partner to claim the *usufruit* of one third of the Jersey immovable property of the deceased.<sup>44</sup>

*Droit de discussion /droit de division*—customary law rights held by guarantors/co-guarantor:

- to require that a person enforcing a guarantee have recourse to and exhaust the assets of the principal debtor before making a claim against the guarantor.
- to oblige the holder of a guarantee to make simultaneous claims in appropriate proportions upon his co-guarantors, so limiting his own liability.

*Fondé en Héritage*—the status of a person who owns or who has the benefit of a long lease (i.e. of more than 9 years) of Jersey immovable property.

“Onerous contract” means a *contrat à titre onéreux*—definition in article 1 of the Supply of Goods and Services (Jersey) Law 2009<sup>45</sup>

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41. See *In the matter of the Doléance of Harbours and Airport Committee*, 1991 JLR 316.

42. See references to the maxim in *e.g.*, the Trusts (Jersey) Law 1984; the Foundations (Jersey) Law 2009; the Security Interests (Jersey) Law 2012; and the Aircraft Registry (Jersey) Law 2014.

43. See *in re Esteem Settlement*, 2003 JLR 188.

44. See Wills and Successions (Jersey) Law 1993, L.18/1993.

45. L.14/2009.

(see also the definition of “value” in the Security Interests (Jersey) Law 2012).<sup>46</sup>

*Prêt sur gages*—the *Loi* (1884) *sur le prêt sur gages* regulates pawnbrokers in Jersey.<sup>47</sup>

*Registre Public*—the land registry created in 1602 and referred to in ordinary parlance as “the *Registre*.” The *Registre* contains all contracts for the sale of land or the granting of leases over nine years, all *hypothèques* and certain powers of attorney (*procurations*).

*Saisie Conservatoire*—a form of *arrêt* available under the customary law by way of which assets are frozen pending a court decision.

*Saisie Judiciaire*—a statutory order which acts to freeze the property of a person alleged to have committed offences under the Drug Trafficking Offences (Jersey) Law 1988 and/or under the Proceeds of Crime (Jersey) Law 1999.

*Tutelle*—the law relating to *tutelle* (and *curatelle*) had its origins in Roman law and the civil law tradition as opposed to Norman customary law specifically. Whilst a curator is appointed to act in relation to the affairs of an interdict without the need—any longer—to convene *électeurs* to assist the curator, the *tuteur* in relation to the affairs of a minor could, until 22<sup>nd</sup> August 2016, only be appointed by the Royal Court on convening seven *électeurs* whose advice and counsel the *tuteur* was required to follow. The position is now governed by the Children’s Property and Tuteurs (Jersey) Law 2016,<sup>48</sup> which has removed the requirement for *électeurs*.

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46. “Value” means money, or money’s worth, sufficient to support an onerous contract, that is, a *contrat à titre onéreux*, no matter by whom the money or money’s worth is provided, and includes an antecedent debt or liability.

47. Amongst the requirements of which are: “*Celui qui voudra exercer l’état de Prêteur sur gages devra en donner avis par écrit au Connétable de la paroisse dans laquelle il a l’intention d’établir son commerce.*” “*Il ne pourra exercer ledit état sans la permission du Connétable, et il sera tenu de faire peindre ou écrire en caractères lisibles en dessus de la porte de son magasin ou de sa maison, son nom et prénom et les mots ‘Prêteur sur gages,’ ou ‘Pawnbroker’*”.

48. L.13/2016.

*Vues*—there are procedures in land and boundary disputes known as ‘vues.’ The initial procedure, conducted by the Viscount,<sup>49</sup> is a *Vue de Vicomte*.<sup>50</sup> A *Vue de Justice* is a form of appeal<sup>51</sup> against the *Vue de Vicomte*.

## X. CONCLUSION

It is hoped that the above will have conveyed something of the linguistic “sound and feel” of Jersey law and practice in the 21<sup>st</sup> century. As suggested at the outset, this article is no more than a snapshot, but it may help to demonstrate that, at a time when the Norman-French language of Jersey—*Jèrriais*—is heard infrequently and diminishingly, the law has certainly not been severed from its Norman-French root. Though it is true that the influences of the common law jurisdictions, and perhaps more importantly of British culture, have been very considerable, Jersey cannot really be said to have become an “Anglo-Saxon jurisdiction,” or likely to become one.

As with other mixed jurisdictions, however, when looking to the future, there tends to be a keener and continuing sense of being at a crossroads; but with an ability—not so readily available to others—to choose between elements of civil law and common law traditions. At all events, it can be seen that the Jersey legal tradition is a rich one, which sets this particular jurisdiction in good stead to continue to adapt, as all jurisdictions must, to an ever-changing world.

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49. The Vicomte (or Viscount) puts orders of the courts into effect, but has other responsibilities as well.

50. Governed by Rule 14/1 of the Royal Court Rules 2004. The Viscount summons a panel of 10 *experts*. The number of *experts* actually required for a *Vue de Vicomte* is 6. The decision of the *experts* has to be confirmed by the Royal Court and registered in the Public Registry (the *Registre*).

51. Governed by Rule 14/2 of the Royal Court Rules 2004 (held before the Bailiff and 12 *experts*).