IN THE ROYAL COURT OF THE ISLAND OF JERSEY

89/1

Before: Sir Peter Crill, C.B.E., Bailiff

Jurat J. H. Vint, Lieut. Bailiff

Jurat P. G. Baker

Jurat C. L. Gruchy

Jurat Mrs. M. J. Le Ruez

H. M. ATTORNEY GENERAL

- v -

DEREK GEORGE FOSTER

Solicitor General for Prosecution

Advocate R. G. Day for Defendant

This is a reserved judgment in the case of the Attorney General v. Derek George Foster. Foster was indicted before the Assize Court in November 1988 and charged with "Fraud, contrary to the common law of Jersey". It may be said that the last seven words of the indictment add nothing to the offence if it is found to be a crime known to the law of Jersey. This judgment is to be read as if it had been given at the conclusion of the submission of Advocate R. G. Day on behalf of the accused after the Jury had been empanelled, but before the Solicitor General had opened for the Crown, or called any witnesses. Moreover, in the middle of the accused's cross-examination by the Solicitor General, his Counsel asked for a short adjournment. When the Court resumed the accused changed his plea to guilty and some days later, after the preparation of a background report, was sentenced to a substantial fine. He has now appealed against the Court's decision to reject his Counsel's submission. This judgment, therefore, sets out the reasons for that decision. The plea in Bar was as follows:-

"1. In all the circumstances of the case it is oppressive and an abuse of the process of the Court to seek to prosecute a Defendant when:

(a) the alleged offence is unknown to the modern law of Jersey;

(b) more than seven years have passed since the dates of the alleged offence; and

(c) most of the witness statements were taken more than three years after the date of the alleged offence.

2. The Indictment contravenes Article 1 of the Indictments (Jersey) Rules 1972 in that it contains no statement of a specific offence with which the accused is charged as would be necessary to give him reasonable information as to the nature of the charge he faces.

3. That even if the facts stated in the Indictment were proved, these would not constitute an offence punishable by law.

4. That if the Defendant is sent to trial on the Indictment, he will suffer grave prejudice in that:-

(a) fraud per se is not an offence known to the modern common law of Jersey and no definition of such a crime is to be found in Jersey case law or in the writings of learned authors;

(b) the Indictment is so defective that it is impossible to deduce from its terms a definition of any crime known to the law of Jersey.

In the course of Advocate Day's address it became clear that the accused's case could be stated thus:-

1. The offence of fraud was not known to the common law of Jersey, and
2. even if it was, to require the accused to submit to a trial some seven years after the events, would be oppressive.

Advocate Day accepted that the particulars in the indictment were sufficient for the accused to know what the facts were which he had to meet. Nevertheless, whilst he took issue with the statement of the offence itself, he agreed that if the concept of fraud as a crime was accepted by the Court, then the indictment did not offend against the Indictments (Jersey) Rules, 1972.

Advocate Day submitted:-

1. The Law of Jersey, like the common law of England, does not have a general offence known as fraud, but rather a number of specific offences in which fraud is an essential ingredient.
2. The Royal Court no longer has the power to create new offences, (AG v. Thwaites J.J. (1978) 179). All the "precedents" in Poursuites Criminelles where fraud was charged, indicate that, in each case, the crime alleged could be encompassed in one of the known specific forms of fraud, e.g. forgery, obtaining by false pretences, etc.

3. The Court of Appeal's ruling in Mariott on the 23rd September, 1987 meant that, in respect of offences of a fraudulent nature, the Royal Court could not look outside the Larceny Act 1916 which had replaced the earlier common law of the Island, because the Larceny Act had picked up types of fraud not previously

4. None of the ancient commentators and authors such as Le Geyt, (who had been said by the Court of Appeal to be of great authority in Jersey), Pipon and Durell, or Hemery and Dumaresq, apart from one passage in Pipon and Durell, supported the Crown's contentions that there is a general law of fraud. Moreover the Court could not legislate for any act that it deemed should be criminal which was not already mentioned in the Code of 1771.

5. Even if the law had developed after the time of Pipon and Durell at the end of the 18th century, by the time the Commissioners came to write their report on the Criminal Law of Jersey in 1847 it had crystallized to a great extent. The answers of Advocate Hammond indicate that the Royal Court's ancient method was to assess what conduct was worthy of punishment and to deal with it accordingly, and temper the sanction depending on the gravity of the offence but that practice had become obsolete by the time the Commissioners sat.

6. The case of A.G. v. J. T. Williams (1963) 36 P.C. 27 was authority for the submission that specific offences of fraud were the only ones known to the law of Jersey because Williams was in fact charged with the specific offence of falsifying accounts which was an identifiable offence. Even if the common law offence were found to exist by the Royal Court that offence derived from an English statute.

7. In every criminal case it was essential to identify the offence with precision. (A.G. v. Ahier J.J. (1981) 29)

8. To declare that the concept of an offence of fraud was known to the law of Jersey would be to move the law back into the 18th

Before turning to the Crown's reply, it may be helpful here if the Court indicated its views on the Indictments (Jersey) Rules, 1972. Those Rules were designed merely to change the form of presenting indictments but not to declare actions which were not offences, offences, nor to remove offences that were such from the list of crimes or delits. The former way of presenting indictments, which had always been in French up to 1963, was to set out the facts, or particulars, as they are now called, together with the offence charged, but not to break them down into separate parts, as the Indictment Rules now require. Thus, had the present accused been indicted under the old form of indictment, it would have been something along the lines, (and in French); "the said Derek George Foster, charged with having committed the crime of fraud, by falsely and criminally, etc".

The Solicitor General submitted:-

(1) The case of Mariott must be read in conjunction with the case of Williams. Taken together these cases do not show that the Larceny Act 1916 displaced all the previously known common law offences of fraud. For example, the obtaining of a service by fraud was not included in the Larceny Act yet was well known in Jersey and persons have been prosecuted for it. (Letchford P.C. 10.6.88.)

(2) The Courts in Jersey have felt able to look beyond the English horizons and the English common law. Where there is a conflict between the English common law and the French law, then if the law of Jersey is not clear, French law is preferred. The law of the Commonwealth is not excluded.

(3) The Larceny Act consolidated existing English law but many cheats and frauds effecting the public welfare, and causing an actual prejudice, were indictable at common law. It was essential that confidence in the finance industry be maintained, and even though the cheat or fraud was directed, as it was in this case, to the bank itself by an employee of that bank, it was public in the sense that it could undermine that confidence.

(4) The case of Scarfe v. Walton (J.J. (1964) 387) indicated that the Jersey Courts could and did look to Roman law. For example, the Jersey law of contract was much closer to Roman law, via the civil law, than the English common law. Only where Jersey law is unclear or out of date will the Court then turn to English common law. In the case of Le Carpentier v. the Constable of St. Clement J.J. (1972) 2107 the Court said at page 2110, "The duty of the Court was to ascertain what was the correct test of obscenity under the customary law of Jersey and it should not turn to the English common law unless the Jersey law was unclear or out of date. We accept that submission." The Jersey law was not out of date because it had developed differently from the English common law of fraud, or rather of fraudulent offences.

The Solicitor General might have added that further authority may be found in the case of I. D. Warner (nee Rimeur) (Executrix of W. J. Warner, Dcd) v. Hendrick JLR (1986) at page 366 a case concerning a defective building. At page 371 the Court said:-

"First of all, we have to decide whether we should look at the English law on the matter of whether we should seek to find what the Jersey law is; that, of course, would be the common law of Jersey traceable to Norman customary or common law. It is clear to us that, in matters of this sort, as the Royal Court said in the case of Wood v. Wholesale Elecs. (Jersey) Ltd. (1976) J.J. 415 which was a slightly different case since it was to do with the sale of goods in a contract: 'We think that on this issue, Pothier is to be preferred in this jurisdiction.' Now, in a case of this nature, we are satisfied that, so far as English law is concerned, Mr. Binnington's client would not be prevented from bringing this action but we decided that it would be right, as Mr. Pallot invited us to do, to look at the common law of Normandy, our customary law, to see what the position was there, bearing in mind, as I have said, that payment was made by the late Mr. Warner."

(5) Although the Attorney General v. Thwaites (1978) J.J. 179, laid down that the Royal Court no longer had the power to declare offences, that case which concerned an allegation of public mischief did not exclude the concept of the common law offence of fraud. The Court said at page 190: "We accept, of course, that to say that there is now no power in the Court to declare new offences does not mean that well-established principles are not to be applied to new facts. For example, fraud may take many forms and a conviction may well be sustained although the fraud has taken a novel form."

In that same case the Court cited two passages from D. R. Renouf v. the Attorney General for Jersey a Privy Council case decided in 1936. The first passage is as follows:-

"..It appears from the first (Jersey) report of the Royal Commissioners appointed in 1846 for enquiring into the criminal laws of the Channel Islands, that there was not in any Act, Order in Council, or even in any work of authority published in Jersey, any specific definition of crimes for their punishments...In fact, however, there has been a long established practice in Jersey which has apparently permitted the Royal Court to introduce alterations in regard to the Criminal law and its punishment.."

The second passage qualifies the first one and is as follows:-

"..In modern times, however, it has been usual to refer to English legal works and precedents as authorities, and the Royal Court has in many cases regarded the English law as a guide in laying down the modern law of Jersey."

Their Lordships conclude:-

" Criminal law in Jersey thus rests almost entirely on the modern practice of the Royal Court and this tends more and more to imitate English models. It may not be improper to add that a similar practice has been adopted in a number of British dominions, including those where English law does not prevail, without in many cases any statutory authority for such a course."

(6) The ancient writers on which our customary, or common law, was founded were fully acquainted with the concept of fraud. They were to be preferred whenever they conflicted with the usually - quoted text book of Archbold.

(7) It was possible to look at what had happened in the jurisdictions of South Africa, Scotland and Canada, where the common law of fraud had evolved and had not been superseded, at least not wholly, by statute.

(8) If the argument of the accused was right, then why had not the common law of Jersey adopted the Theft Act? It had not done so because in accepting the Larceny Act it was following the principle of the Act which had done no more than to consolidate the law on fraud and similar offences. The Royal Court had to distinguish between the nature of an offence of fraud and the words used to describe specific offences involving fraud set out in the Larceny Act.

As we have said, the Court ruled that the offence of fraud was one known to the Common Law of Jersey and that it was not oppressive to require the accused to stand trial.

It will be convenient to look at the laws of other jurisdictions first. It is clear that English law has taken a path separate and different from, for example, Scotland, South Africa and Canada. Yet inspite of the tendency in English law to confine crimes involving fraud to specific statutory offences, the concept of a punishable fraudulent act is well known.

Arlidge and Parry on Fraud at para. 1.31 cite the classic definition of Stephens as follows: "I shall not attempt to construct a definition which will meet every case which might be suggested, but there is little danger in saying that whenever the words 'fraud' or 'intent to defraud' or 'fraudulently' occur in the definition of a crime two elements at least are essential to the commission of the crime: namely, first, deceit or an intention to deceive or in some cases mere secrecy; and, secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy".

The authors continue "The alternatives 'deceit' and 'mere secrecy' are well established in the modern law of fraud. It may be fraudulent either to obtain some economic benefit by deception or simply to take it for oneself. Strictly speaking fraud is not even confined to the economic sphere: as we shall see, the mere evasion of legal regulation (with or without deception) may be sufficient". After examining the authors' commentary on the element of deception in fraud, and the cases of Withers (1975) A.C. 842 and A.G.'s reference (No. 1 of 1981) - (1982) Q.B. 848, the Solicitor General submitted that at that point the discussion breaks down, with the authors reminding themselves of their objective. The Solicitor General then further submitted: "It should be borne in mind that in discussing the English Law in general terms of 'fraud' we are looking at a system which has supplanted an old Common Law offence with 'a bewildering variety of statutory offences' - some of which outlaw particular activity in order to limit the instance of original "fraud". The further away from original fraud that you the more likely it is to dilute the true meaning of the word."

Nevertheless the question we have had to ask ourselves is whether the development of fraudulent statutory offences has supplanted the common law concept of fraud as applied in Jersey and thus has excluded a general offence of fraud. English common law is of little help in examining our own law of fraud, except where, as in Mariott, the Court of Appeal has assimilated, in part at least, an English consolidating statute, that is to say the Larceny Act 1916, into the common law of Jersey.

We think, therefore, that it is more profitable for us to leave the English common law and look at the laws of South Africa, Scotland and Canada, where the law on fraud, or fraudulent offences, has developed along different lines from England, and where, because of a common souche, i.e. Roman law, through the civil law, and it may be said that their laws have a closer resemblance to our law than that of the common law of England in this particular sphere of the criminal law. But if Advocate Day's submissions about the effect of the Mariott judgment is right, then an examination of other countries' laws becomes equally unnecessary. Accordingly we should first of all look at what the Court of Appeal said in Mariott.

Before doing so, however, there is a passage in the judgment of Hoffman J. A. in in re. Barker (1985/86) J.L.R. 186 which is of interest. Barker's case concerned an appeal from a decision of the Royal Court permitting a debtor to enter a remise de bien after his real property had been adjudged renounced. At the conclusion of his judgment Hoffman J. A. at page 195 says this: "If I may add an individual remark, coming as I do from a country in which the common law is the customary law of the Netherlands province of Holland before the Napoleonic Codes, I am conscious of the pride which the legal profession in this Island takes in its unique legal system but such pride can only be justified if the legal institutions are sufficiently adaptable to enable the court to do justice according to the notions of our own time. The court should not be left with the uneasy feeling that in following the old authorities, it might have perpetrated an injustice upon one of the litigants. I think that to accede to the

appeal in this case would leave the court with such a feeli. _ and I am glad that the medieval past casts no shadow upon the power of the court to endeavour to do justice today".

Advocate Day would say that to rule that there is such an animal as a crime of fraud, tout court, would be indeed to permit the medieval past to cast a shadow over the Court. Per contra, the Solicitor General would say that the Court has a duty to apply the law, even if it is of great antiquity, provided that proper authorities and precedents are found, so that the Court may indeed do justice, according to the notions of our own time, but not forgetting that justice involves also the prosecution as well as the defence. In the instant case the actions of the accused were clearly fraudulent in failing to advise his employers, the Hong Kong and Shanghai Bank, that he was to receive a share in the commission, and it may be said that he regarded his failure to do so as the offence to which he pleaded guilty but on the accused's side it should be added that his change of plea was influenced by the Court's ruling on Advocate Day's submission.

The question before the Court of Appeal in Mariott was what constituted the law of fraudulent conversion in Jersey. In that case the Court said (at page three of the judgment): "Fraudulent conversion is not in Jersey a statutory offence. What has happened has been that the provisions of the statutes which created this offence in England have been assimilated and made part of the law of Jersey and those provisions which are statutory in England here have effect as part of the common law of the Island".

We find it difficult to accept from what the learned presiding Judge said that the judgment intended to exclude all other sorts of fraud from the law of Jersey, so as to prevent the Royal Court from setting boundaries of any fraudulent offence according to the law of Jersey. (Makorios (1979) J.J. page 85)

Further it may be said that in Thwaites the Court's attention was not directed to at least one other case of public mischief which, had it been cited, might have caused the Court to decide otherwise, because what the Court said at page 183 was that "We were informed that, so far as is known, there has been only one prosecution in Jersey for the offence of committing a public mischief. On the 15th August, 1967 Emile Julian Thebault was charged at the Police Court with having, etc..."

However, the case of Bressat is enrolled in Causes Criminelles on the 11th September, 1937 and the offence was one of affecting a public mischief. The report reads as follows:-

> "William Frederick Bressat saisi de fait par le Centenier Cuming de la paroisse de St. Hélier et présenté en Justice par le Chef de Police de ladite paroisse sous prévention d'avoir Vendredi le 10 Septembre 1937 vers onze heures trente du soir de propos délibéré, tenté d'alerter les membres de la Police Salariée sous un faux prétexte, en téléphonant au Poste de Police demandant leurs services, ce qui était de la pure imagination de la part du prévenu."

There is no doubt that the Court's decision in Thwaites was influenced by the fact that the prosecution could only produce the one case but Bressat was another. Be that as it may, the word "assimilate" does not, in our opinion, carry with it the connotation of totality or exclusion. Nor does the expression "become part of the common law" mean "has been substituted for".

The Court of Appeal was not asked to decide if there was a common law offence of fraud in Jersey, and therefore was dealing with one small part of a (now repealed) statute. No Jersey authority was cited to the Court and, in particular, the cases of Bott (1895) 23 PC 524 and the Attorney General v. Williams (1963) 36 PC 27 were not cited to the Court. Williams was charged with 24 counts which were divided into 12 sets of pairs, each pair relating to a specific sum of money, which it was said he had stolen from his employers by falsifying the accounts. In the event he was acquitted by the Jury. His Counsel had earlier submitted a plea in bar to the effect that the charges of "falsification of accounts" were not such as revealed any crime or offence punishable according to Jersey law. He argued that this was a statutory offence which had not been enacted in local legislation. In rejecting the plea it may be said that the Court recognised that the language of the English statute was merely an approriate way of particularising the fraud perpetrated by Williams, but the fraud itself was known to the law of Jersey without the need for statute being at least known in Roman times and quoted in Justinian. This case is yet another example of the Royal Court looking beyond the Norman commentators to the Roman law in preference if it may properly do so in the light of authorities and precedents to the English common law.

The wording in the indictment against Williams is quite plain. As regards the falsification of accounts, it as as follows:-

"Criminellement et frauduleusement omis du livre de caisse et du livre d'inventaire appartenant à ladite société un de particularité materielle, c'est-à-dire, la recette par lui même de la somme de deux livres douze chelins onze pennys payée par un client de ladite société; et ce avec l'intention de commettre une fraude."

There were eleven other pairs of identical charges and eleven consequentional charges of theft of the monies.

It is not clear from the reports of Williams if the case of Bott (1895) 23 P.C. 524 was cited to the Court. If so it would have added to the Crown's contentions. Bott was charged as the permanent secretary of the Oddfellows Friendly Society with false accounting and thus committing the fraud to the prejudice of the members of the Society and appropriating £22.

The distinction between the approach of the English Courts and those countries with a wider approach is shown in a passage from Arlidge and Parry on Fraud at paragraph 1.01, which is as follows:-

> "Contrary to popular belief, English law knows no crime by the name of fraud. Instead it boasts a bewildering variety of offences which might be committed in the course of what a layman (or for that matter a lawyer) would describe as a fraud; and this book deals with some of the most important of these offences. What the law does possess, however, is a concept of fraud, a broad notion (broader, indeed, than the layman's) of what it means to defraud someone. There are several reasons for undertaking a preliminary survey of this general concept before descending to specifics. In the first place it obviously represents a common theme uniting the offences considered, although it is in no sense a definition of the scope of the book: many of the offences we discuss do not strictly require proof of fraud at all. On the other hand many of them do. It has in the past been common for an express requirement of "fraud", or a requirement that something be done "fraudulently" or "with intent to defraud", to be included in the definition of an offence. Admittedly the modern trend is to eschew these expressions in favour of more everyday language; but in many cases (e.g. the redefinition of forgery, or the replacement of larceny with theft) the change is one of terminology rather than substance."

It may be asserted also that if the Appeal Court in Mariott had been considering the common law offence of fraud, its attention, so far as English law is concerned, would have been directed at least to chapter 70 of the 11th Edition Russell on Crime, rather than the 63rd chapter. Chapter 70 deals with cheats, frauds, false tokens and false pretences. At the head of the first main paragraph is to be found the following statement: "At common law many cheats and frauds affecting the public welfare and causing an actual prejudice are indictable". If the Court of Appeal had been asked to decide whether by the assimilation of the Larceny Act 1916 into the common law of Jersey the Courts were then precluded from considering fraud outside offences increased in the Larceny Act, it may be doubted if the Court's answer would have been in the affirmative.

We may now look, therefore, to the principles that can be extracted from other jurisdictions where the development of the common law has diverged from that of England, that is to say, Scotland, South Africa, and to a lesser extent, Canada.

The development of the law of fraud in South Africa and Scotland has been the subject of an unpublished study on the crime of fraud by Dr. Brian Gill, a Scottish Advocate, which was submitted for the degree of Ph.D. from the University of Edinburgh 1975. A further author was cited to us by the Solicitor General, namely, Mr. Gerald Gordon on the Criminal Law of Scotland. At pages (29) to (30) of his introduction and summary Dr. Gill says this:-

" In contrast with the Anglo-American jurisdictions where the law has traditionally consisted of statutory offences such as false pretences and deception, the Scottish and South African systems have developed a general crime of fraud applicable to a wide range of cases involving deception. In both systems the crime of fraud was closely connected in its early stages with a series of specific offences of falsehood in a manner strongly suggestive of the influence of the corresponding Roman law.

The advantage of flexibility offered by such a crime is however balanced by the corresponding uncertainty as to the range of protected interests relevant to the crime. The latter question has remained a matter of acute controversy in modern times in both systems. An important consequence of the flexibility of approach made possible by the general conception of fraud has been that in both systems the development of the crime has not been impaired by the creation of numerous ad hoc statutory offences of misrepresentation under, for example, the Trade Descriptions Act 1968 or, in South Africa, the Insolvency Act 1934. In each system, the statutory offences have tended to supplement the ambit of liability of the common law crime rather than vice versa.

> The distinction between fraud and theft has been one of recurring difficulty in both systems and in each the influence of English doctrines associated with larceny and false pretences has been particularly strong. In Scots law, the original conception of theft, which limited the crime to cases where the goods were obtained by violence or stealth rather than by deception, has been greatly modified, not least because of English doctrines imported into the law of contract. In South Africa, a similar modification has resulted from the importation of the crime of theft by false pretences, with its obvious origins in the English larceny legislation. Even today, its proper place in the South African criminal law has never been clearly worked out."

The importance of the civil law and the earlier Roman Law is well known in Jersey and in many aspects our customary law is to be preferred, for example, in matters of contract and real property, to the English common law.

It is, therefore, arguable that the Royal Court should have proper regard to those aspects of Scottish and South African law, and indeed Canadian law, which either derive from a common source, such as Roman law, or have sufficient similarities. Early Scottish law recognised the Roman law of crimen falsi which preceded the more recognisable crime of the fraud stellionatus. The ancient commentators on our law were familiar with the concept of stellionatus. Domat describes stellionat as a particular form of dol which he defines (MDCCXLV in the Mouchet edition) at page 144 as follows:-

> "On appelle dol toute surprise, fraude, finesse, feintise, & toute autre mauvaise voye pour tromper quelqu'un."

Le Geyt refers to the crime de dol at page 383 in his "Traité des crimes". It is true that this writer specifies a number of offences which gives some support to Advocate Day's argument that specific offences involving fraud were known to Jersey law, but not the generic term of fraud as a crime. The Solicitor General submitted that Le Geyt's work had been prepared from a manuscript left by the author and was not intended to be exhaustive. It is interesting that on page 401 Le Geyt says this:

> " Lors qu'on produit une pièce suspect de fausseté, il faut demander au produisant s'il s'en prétend servir. Il est obligé de se déterminer, et nul n'est receu à maintenir fausses les pièces contre luy produites, sans s'inscrire en faux. C'est la Jurisprudence de France, ou l'on dit que les inscriptions ne sont pratiquées qu'en matière de faux. Vid. le Caron, Cod. Henry III., et Foller in addit. ad Marant. Cependant Papon, au Liv. IX. de son Receuil d'Arrests, Tit. 2. N. II., rapporte un notable exemple d'un Contrat corrigé sans aucune inscription. Le Contract portoit qu'on avoit vendu tout un héritage, et l'on receut à prouver que le vendeur avoit plusieurs fois déclaré ne vendre qu'une partie, et que l'acheteur scavoit que le vendeur n'avoit pas celle qu'on prétendoit être aussi comprise dans la vente. Il y a dans le meme Arrestographe un autre exemple de la preuve d'une erreur ou omission dans un Acte de Cour, sous instance de faux. Vid. Guid. Pap. Quaest. 503. On trouve là-dessus des Jurisconsultes fort opposez l'un a l'autre. A Jersey les inscriptions ne se réduisent qu'à donner caution, l'un, de poursuivre, et l'autre de défendre. Cela se fait ordinairement dans des accusations criminelles qui s'intentent à l'instance de quelques particuliers ajoints avec le Procureur du Roy, sans aucune différence du crime de faux d'avec les autres. Voyez Terrien, en son Commentaire.

Il y dit, ce me semble, quelque part, entre autres choses, que s'il y a fausseté apparente ou vice visible dans l'instrument, il n'est besoin d'inscription. En effet, il y a quelques Loix qui semblent établir qu'on pourroit impugner une pièce civilement. L.5, 9, 16 et 24, C. ad legem Cornel. de fals.

Quant à celuy qui s'aide d'un instrument faux, sans faire aucune protestation, "il enchet", dit Masuer, "en crime de faux, mais il n'est pas si grièvement puni que s'il avoit fait la fausseté."

At page 402 he says: "Celuy qui fait usage d'une pièce fausse, est privé de l'émolument qu'il en auroit pû remporter, comme celuy qui se met en possession par force, est privé du droit qu'il peut avoir a la chose."

At page 404 he refers to "D'Autres Espèces de Faux" and at the bottom of page 405 Le Geyt adds these important words: "Mais il y a bien d'autres crimes sur quoy, non plus que sur celuy-cy, je n'ai pas dessein de m'étendre." Thus supporting the submission of the Solicitor General that his works thus far printed were not meant to be totally comprehensive. A fifth volume of Le Geyt's manuscripts has, for example, never been printed.

On page 19 of Volume 2 of the Bugnet Edition of Pothier, the author defines dol thus: "On appelle dol, toute espece 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." Lastly Terrien in the du Puys Edition at pages 488/9 deals extensively with the "crime de peculat" and his definition of that offence derives in turn from the Lex Julia.

.t may be said, therefore, that there is a common thread which links the law of fraud in Jersey through the commentators on the customary law of the ancient Duchy, and the laws of South Africa and Scotland, and that link is clearly the Roman law and its derivative, the civil law. It is only necessary for us to say that, as regards Scottish and South African law, Gill, after examining in detail the various cases, came to the conclusion at page 38, that those cases "have been to establish the possibility in modern Scottish practice of a liability scarcely less wide ranging than that of the South African offence so that any form of dishonesty not constituting some other recognised common law or statutory fraud can be brought within the ambit of fraud."

In Gerald Gordon's book, The Criminal Law of Scotland, at para. 18.01, he adopts Macdonald's definition of fraud as "the bringing about of some definite practical result by means of false pretences".

For this author simple fraud requires three ingredients: (1) a false pretence, (2) a definite practical result and (3) a cause or link between the pretence and the result. (Paragraph 18/02).

The editors of Gardiner (which the Court was told was understood to be the South African equivalent of Archbold), acknowledged that in South Africa there has been a blurring of the Roman law concepts of crimina falsi stellionatus, but at page 712 they seem to accept this with some satisfaction. They say at the end of that page and overleaf: "The resulting state of the law is relatively certain and seems to be socially satisfactory. It certainly gives little comfort to people who act dishonestly. Indeed the tendency has been to regard more and more types of fraudulent misrepresentation as potentially prejudicial, and more and more types of non-proprietary harm as prejudice, with the result that though it is still inaccurate to say the law punishes as fraud, the mere making of any misrepresentation with intent to defraud, we are not very far from that result".

In South Africa it seems that some sort of prejudice must appear to have been caused to the complainant, but in the Jersey case of Pillet (1882) 21 P.C.301 no such prejudice was alleged. Here the accused obtained employment by means of a forged reference. It was the falsity of the document that counted, not the prejudice caused to the employer, who would in any case have had to pay the wages of a replacement. The element of prejudice was not stressed in the indictment, it was the falsity of the document presented by the accused which constituted the fraud.

The law of fraud in Canada has been dealt with extensively by J. Douglas Ewart in his book entitled "Criminal Fraud" 1986, which presents a comprehensive analysis of the criminal law of fraud in Canada, with particular reference to its historical developments. There, it is true to say, fraud has been defined by statute as follows "338.1. Everyone who by deceit, falsehood, or other fraudulent means, whether or not it is a false pretence, within the meaning of this Act, defrauds the public or any person whether ascertained or not of any property, money, or valuable security, etc..." But even with a statutory definition the Canadian Courts have felt free, certainly since the case of R. v. Olan (1978) 2SCR 1175 to apply the law of fraud in the words of the author: "Whenever one person's dishonesty has caused detriment, prejudice or risk of loss to the economic interests of another person."

The key principles, the author considers at page 77, to have evolved following the Olan judgment, were these:-

"1. The freeing of the concept of fraudulent means from deceit and the resulting establishment of dishonesty as the key stone of fraud;

2. The abolition of the necessity of there being actual economic loss and the adoption of a broad concept of deprivation;

3. The elimination of the rules that an accused must practice some artifice on the victim and must thereby cause the victim to act to his detriment;

4. The abolition of technicalities in concepts of what constitutes property for the purposes of the offence."

We do not think it necessary to consider the detailed development of the Candian law since that case, but venture to suggest that the case is an example of what every Court must do (see again Makarios), that is to declare the limits of every sort of offence, be it common law or statutory. Ewart also refers to the "dynamic yet evolutionary character of the law on fraud". We feel that, so far as it may be possible to do so, the Royal Court should not prevent the evolution of the law of fraud in this Island if that is consistent with the basic principles which have evolved through the cases over the last 120 years or so. We must therefore look as these cases, but before doing so we must examine shortly the development of the law in Jersey in the 18th and 19th centuries from sources other than case law.

Apart from the development of the law, as can be extracted from the cases inscribed in the Poursuites Criminelles, in the Judicial Greffe, there are three sources to which we must turn. They are, firstly the Code of 1771, secondly, the Royal Commission on the Criminal Law of 1847 and the evidence tendered before it, and thirdly, the reports of Messrs. Hemery and Dumaresq, and Pipon and Durell. The Code may be ignored for these purposes, however, because it changed none of the substantive law. Pipon and Durell writing in 1790 under the general heading of perjury said this: "This, and another kind of falsifying and perversion of evidence, highly injurious to society, is punished as are the preceeding offence: other frauds, such as are cheats of various sorts, are punishable by fine and imprisonment, at the discretion of the Judge according to the circumstances of each case". In 1786 there was obviously a dispute between the Crown and the States over the state of the Criminal Law, and on the 21st July, 1789 the Privy Council made an Order that Pipon and Durell, then respectively Attorney General and Solicitor General, and Hemery a Jurat, and Dumaresq a Constable, should prepare reports "concerning the mode of proceeding in Jersey, and of going to trial in all causes, criminal, civil and mixed, containing therein what they apprehend to be the true law of the Island". They were also required to report on what they conceived to be the Criminal Law of Jersey. Hemery and Dumaresq submitted that the Grand Coutumier of Normandy could be considered no more than a civil code. They made the extraordinary assertion (with which we do not agree) that: "Generally speaking we must say there is no Criminal Law here." The Commission dealt with the submissions of Pipon and Durell very shortly; it said, at page 14: "The counterstatement of Messrs. Pipon and Durell contains many attempts, altogether unsuccessful, as it appears to us to deduce the present Criminal Law from the ancient Norman Law." At page 22 the Commissioners conclude that the Criminal Law cannot be extracted from the Grand Coutumier in a definite form, but that even if it could it would be ill-adapted to the present state of society. On the other hand, they acknowledged in the same paragraph, that they did not feel competent that they had fully understood the law found there

The conclusion the Commissioners reached was that the class of offences or crime, i.e., cheats and frauds, could not be traced back to the Norman customary law, but it will be clear that we are unable to agree with them either. Moreover, at that time there was an underlying belief at the English Bar, in the efficacy of English law, for all people, and lands, and it was an article of faith in the breasts of some Judges, that English law was the best possible law for everyone, an attitude that was parodied by W. S. Gilbert in Iolanthe. Contrary to the conclusions of the Commissioners we feel that this Court can with propriety invoke the customary Norman Law, which, through adaptation and growth through the Civil Law, based as we have said several times earlier on the Roman Law, has a great deal in common with the laws of two of the three countries we have mentioned, Scotland and South Africa, in its ability to grow and not to be stifled by statutory definition or judicial restraint, and adapt itself to the needs of the 21st century. The view regarding the difficulty of determining what the law of Jersey is from sources within the Island, was expressed in the judgment of the Privy Council in La Cloche v. La Cloche in 1870 (nine years after the Royal Commission on the civil law of Jersey) at page 398 of Moore's reports. Their Lordships say this: "In determining the abstract question raised by this appeal, their Lordships have felt anxious to form their decision entirely upon the proper evidence of the law and custom of Jersey, without being influenced by considerations of convenience or by analogies derived from the laws or custom of other countries. Their Lordships have, however, much difficulty in ascertaining what are the recognised authorities on the law of Jersey."

Neither Counsel have suggested that such difficulty exists to quite the extent suggested by their Lordships.

One of the most important witnesses before the Commission of 1847 was Advocate Jean Hammond, later Bailiff of Jersey from 1858 to 1880. He cites Terrien and the crime of peculat (paragraph 251). It is interesting to see what their Lordships in the Privy Council case of La Cloche v. La Cloche thought of Terrien. At page 399 they said: "The commentary of Terrien, therefore, may be reasonably regarded as the best evidence of the old custom of Normandy and also of the Channel Islands before the separation of Normandy from the English Crown." The conclusions we may reasonably draw from Advocate Hammond's submissions to the Commissioners are:-

1. The range of the Criminal law was: "Pretty wide" (paragraph 248).

2. There is an absence of definitions (paragraph 249).

3. The language of English phraseology in defining the ingredients of a crime has been used merely to describe behaviour that was already a criminal offence in the Island.

Advocate Hammond considered the report of Pipon and Durell as "a high authority".

At paragraph 260, after having agreed with the Commissioners that the law of England on fraudulent pretences was by that time statutory, Advocate Hammond says: "We should be guided in the way of adjudicating the punishment by the nature of the fraud and the magnitude of it." It is apparent also from the words of Advocate Godfray, which were interposed with those of Advocate Hammond, that the use of English textbooks were of recent practice. At paragraph 284 Advocate Hammond says: "I would only observe that, when we have quoted from English books, it has been an elucidation of a particular fact or circumstance which is brought forward connected with the Criminal

For instance as to what would savour of reality, and what would not, I should look to the English Authorities to see their definition, and so with regard to the question of burglary, to ascertain what would be a breaking." The English authorities were used, he pointed out, to throw light in some measure upon the arguments of members of the Bar and reasoning upon the different questions which they had to submit. The English Authorities were looked at for the purposes of explanations and definitions of crimes, but it was not necessary, he said, to enforce them as law. The phraseology of the accusation would be taken from English law, but the circumstances would be related in the mise en accusation, (paragraph 256).

Following the Indictments (Jersey) Rules 1972 such full circumstances are no longer required to be set out. It may be said, therefore, that in 1847 at least there was still a strong degree of fluidity in the criminal law of Jersey, and the cases show the variety of fraudulent actions that were judged by the Courts, not because they were thought worthy of punishment, as had been the case in the past, but because the facts disclosed a well known offence.

The index to Volume 8 of the Poursuites Criminelles of 1824 - 1829 discloses some 10 case of fraud of different sorts, including 1 of fraudulently introducing cattle into the Island (Le Ruez) and another (Le Hucquet) of swearing a false oath on an export declaration to the prejudice of His Majesty and of the Public Revenues.

Between 1829 and 1834 the index to Volume 9 of the Poursuites Criminelles discloses that there were 15 cases of fraudulent actions mainly dealing with the fraudulent importation of tea or tobacco. There was one case, that of Jean Benest, who was charged with fraud on the insurers by destroying his ship.

The index to Volume 10 for 1834 - 1837 discloses a wide variety of fraudulent offences, ranging from fraudulently obtaining washing (!) (Dubois) to circulating false bank notes (Faux)(Chapotte Ed. and Chatellier).

Two notable frauds occurred during Advocate Hammond's term of office as Bailiff, and were those of Jurat Le Bailly (1873) 20 P.C. 77 and Neel and Ahier (1873) 20 P.C. 139. Le Bailly, who was Chairman of a local bank, was charged with six counts of fraud, including the depositing, as collateral, with a London Bank, of bonds owned by a customer of his bank and abusing the trust reposed in him as a trustee. He was also charged with withholding from a report as Chairman information to the shareholders to hide from them the true position of the bank, which was that of insolvency, and by fraud and deception, hiding from the shareholders the true state of the bank.

In the same year Neel and Ahier, who were respectively the Chairman and Secretary of another local bank, were charged with a number of frauds, including two of interest in this context. The first, count six, charged them with criminally, and with the intention of deceiving and to commit a fraud to the prejudice of the shareholders, presented a false report to them, so as to induce them to buy shares and as a result one particular named shareholder was induced to buy a number of shares at an inflated price. The words of the indictment read: "au risque d'encourir la perte des sommes d'argent considerables". The second, count seven, charged them with the crime of, in effect, abuse of trust by presenting, again as in the case of Le Bailly, a report which did not disclose the true facts about the finances of the bank.

Here indeed were two cases which covered a number of fraudulent actions, and showed that the Courts at that time, some 25 years after the Royal Commission of 1847, were prepared not to fetter the concept of fraud, but were not slow to accept that changing circumstances and the needs of society could lead to charges based on fraud but, as the Court said in the Thwaites case, expressed in novel forms. It should be remembered that, at that time, the joint stock company was comparatively new in the business world of the Island.

In 1882 21 P.C. 277 Cantin was charged with obtaining money by false pretences charged under the offence expressed as "escroquerie".

There are a number of other cases enrolled in Volume 23 of Poursuites Criminelles between 1890 and 1893 which support the Solicitor General's submission that the crime of fraud, (sometimes in the guise of "faux"), however expressed it may be, and depending on the circumstances, was well known to the Courts. Examples of this type of case are the following:-

De Kersel at page 12 where the accused was charged with having "fraudulently and criminally obtaining from Metivier trading in the Parish of St. Helier a quantity of material called (Merino) by means "of faux pretexte" in that he produced a piece of writing purporting to come from a Miss Allette addressed to Monsr. Melayer and asking him to send by the bearer on return eight and a half measures of the material." At page 19 Le Bas was indicted of the Crime de faux by forging endorsements and/or signatures of acceptance on letters of credit. The Crime de faux is expressed as requiring an intention to utter and obtain money to the prejudice of the person whose signature is forged. On the 5th March, 1891 (at page 73) Ernest Williams Marshall was charged on three counts (on which in fact he was acquitted) of "criminally with the aid of false and fraudulent representation of pretexts knowing them to be such, attempting to obtain with a view to appropriating for himself the sum of

What Marshall did was to write letters to leading members of the community offering to deliver to them the manuscript and author's identity of a number of less than complimentary articles which had appeared in the Jersey Reformer, a local paper of the time. At page 162 William Durrant, Harry Horatio King and Arthur Studley, were charged on the 30th January, 1892 on two counts. The first was that they broke open the horse boxes and stole "crin" belonging to the Great Western Railway Company and the second that they knowingly and criminally attempted to dispose of the stolen goods by seeking to induce a Mr. Hunt to buy them by means of false pretext and fraudulent representations and "maneovres". Prejudice was alleged both towards the Great Western Railway Company and Hunt himself, but no fraud, as such, was alleged. On the 2nd November, 1893, at page 323, we find the case of Jane Le Gresley. The accused's husband endorsed a bill to her husband with a receipt in the name of Huelin, the creditor. With this she attempted to cheat the Viscount and thus allow her husband to escape payment of the bill. She was charged with attempting to commit a fraud to the prejudice of Huelin's creditors.

We may say, therefore, that in the late 19th century the Royal Court was still developing the law of fraud along common law lines and not by way of statutes, as in England. One of the most interesting cases to illustrate this point is that of Gardner (1868) 19 P.C. 295. He was charged with what, in fact, amounted to embezzlement of funds due to the militia. The accused submitted a plea in bar relying on the Larceny Act 1861. The Full Court ruled that the statute did not have the force of law in Jersey. The decision of the Court may be said to be the converse of that of the Court of Appeal in Mariott. It did not say that English statutes could never become part of Jersey law by assimilation.

There are two further relevant line of cases. The first concerns the gas and electricity fraud cases, and the second the ticket fraud cases. In Leithbridge (1887) 22 P.C. 266 the Royal Court had the opportunity to define fraud. It declined to do so and contented itself by saying that: "In such cases it was essential that the criminal intention is alleged in express terms". In other words, the Court said that every accused must know with precision what is alleged against him.

In the instant case Advocate Day argued that the accused should not have to face an undefined offence. The Solicitor General submitted, however, that it should be borne in mind that in discussing the English law in general terms of "fraud" one was looking at a system which had supplanted an Old Common Law offence with "a bewildering variety of statutory offences" - some of which outlaw particular activity in order to limit the instance of original "fraud" - and that the further away from original fraud one got the more likely it was to dilute the true meaning of the word.

The first case in the meter offences is that of De Renty (1894) 23 P.C. 379 who was charged with defrauding the Gas Company by by-passing the gas meter by a "clandestine installation" avec le déssein de commettre une fraude .... criminellement détourné et consumé un quantite considerable dudit gaz et ce au préjudice". It is important to note that the fraud is alleged by way of intention as much as the device of carrying that intention out. In England in 1894 De Renty would have been guilty not of fraud but of larcency under the common law. See R v. White, Dears 203; R v. Firth L.R. 1 C.C.R. 172.

Turning to the electricity cases, it is interesting to note that the fraudulent appropriation of electricity at that time would also have been larceny, under the provisions of section 23 of the Electric Lighting Act 1882 later sections 10 of the Larceny Act 1916. The fraudulent abstraction of electricity is now governed by section 13 of the Theft Act 1968, which has given rise to a number of difficulties which need not concern us in this judgment.

So far as Jersey is concerned, as recently as 1937 there were a number of cases concerning the fraudulent use of electricity, and it may be said that if the Courts had totally assimilated the Larceny Act in all its ramifications the common law offences could not have been charged. The first case is that of Quentin, (1937) Causes Criminelles 937, who was charged with having committed a fraud to the prejudice of the Jersey Eelectricity Company by using electricity from cables laid by the company, "le tout en contravention des Règlements de la susdite compagnie". The relevant law under which the States acquired the Jersey Electricity Company Limited was passed on the 6th April, 1937 before Quentin's conviction. It was not in force at the date of his conviction and, therefore, the fraud of which he was charged could not have been a statutory offence. Nevertheless, in the charge there were words included: "le tout en contravention des Règlements" which appear to have been intended to refer back to the words "en se servant de l'energie électrique" and not to the words, "commis une fraude". It was therefore alleged that Quentin used electricity in a way that contravened the provisions of the Regulations and he was guilty of the common law of fraud. It was not alleged that the Regulations made the use of electricity fraudulent, and that by using the Company's electricity Quentin was guilty of the statutory offence of fraud. In the case of Burley (1934) Causes Criminelles 3, he was charged with having committed a fraud to the prejudice of the Jersey Gas Light Company Ltd. by removing a pipe from a gas meter, substituting a rubber one, and using a quantity of gas.

There then follow the words "et ce en contravention de l'Article 116 de la Loi dite "Loi établissant et constituant la Société à responsabilité limitée dite Jersey Gas Light Co. Ltd." which, of course, is the Law of 1918.. Article 116 is the first Article in the part of the Law which is headed "Détournements du Gaz, etc." It is clear that the Article does not create a criminal offence. Anyone who is guilty of a "contravention" under the Article is to pay to the Company a sum (not a fine) not exceeding £5 and any damages actually suffered by the Company. The amount is not described as "une amende", and furthermore, the provision as to the payment of a sum to the Company was stated to be "sans préjudice à tout autre droit ou remède pour la protection de la Compagnie ou la punition du contrevenant". This is clearly, therefore, a statutory recognition of an existing common law criminal sanction of what had been done inter alia "frauduleusement" and what Burley had done was fraud just as it was in the De Renty case some 40 years earlier.

If Advocate Day's submission is right that the Larceny Act 1916, at some stage between two World Wars, had become, or was beginning to become assimilated into the common law of Jersey, then it is strange that the appropriate section which we have mentioned, namely section 10 of the Larceny Act was not used in the case of Quentin.

If Advocate Day's argument is correct about the Larceny Act of 1916, then having regard to the Larceny Act of 1861, all the Jersey cases after that date, insofar as they conflict with the terms of that statute, should be regarded as wrongly decided or, at any rate, decided in the absence of argument. We think that to adopt the doctrine of common error in respect of these many cases would be to take that step to its utmost limits and we do not think we will be justified to do so.

Moreover since the Court expressly excluded the Larceny Act of 1861 in Leithbridge, it is difficult to see how an argument after 1861 that, for example, the Malicious Injuries to Property Act 1861 or the Forgery Act 1861 should apply to Jersey because both the offences covered by those Acts so far as Jersey is concerned were, and have remained, the common law offences of malicious damage and forgery.

It may be appropriate here to cite a passage from a work on the Australian Constitution by M. Coper:

> " The High Court is not an assembly of Wise Persons, free to soar on the wings of policy as it sees fit. Nor is it an assembly of legal automatons, releasing the law on the slot machine theory of jurisprudence. It hovers somewhere between these two extremes endeavouring not to stray so far from the latter that it endangers its legitimacy, nor to come so close to it that it endangers its credibility."

The first sentence of this extract fits Mr. Day's argument exactly. The second sentence inclines towards that of Mr. Sowden. For our part, we venture to hope that this judgment follows the advice of the author in the third sentence.

The ticket cases were those enrolled in Causes Criminelles of Gregory 1934 and Cain and Hamp 1935. Gregory was charged with having commited a fraud to the prejudice of the Southern Railway Company by travelling from Brighton to Jersey by rail and steamship while only in possession of a ticket which had expired. He was also charged with forgery. It is clear from the first charge that the fact of his travelling on an expired ticket deliberately and dishonestly constituted the simple crime of fraud. Cain and Hamp were charged in 1935 with having, in complicity, committed a fraud on the Safety Coach Service Limited.

Cain by travelling "frauduleusement" in one of the company's buses, using a ticket which had been issued to Hamp, with the intention of causing the driver to believe that he was the holder of the ticket and Hamp by "frauduleusement" giving the ticket to Cain with the intention of allowing to commit the said act. It was sufficient that the fraudulent use of the transport service constituted the simple offence of fraud.

Having looked at the Jersey cases we have cited, and having considered the growth of Jersey common law side by side with the development of the common law of fraud in Canada, Scotland and South Africa, we think that the submission of the Solicitor General as to the ingredients of fraud in Jersey are correct. The requirements to be proved in the offence of fraud are:-

1. An overall unlawfulness, that is to say the act must be done without lawful justification, e.g. accident or mistake, etc.

2. Falsity of some kind, some deception or misrepresentation, or other pretence or clandestinity (De Renty (1984) 23 P.C. 379).

3. An intention to defraud (Leithbridge (1887) 22 P.C. 266).

4. Prejudice, actual or potential. (Neel and Ahier (1873) 20 P.C. 139). (Bardoul and Devin (1895) 23 P.C. 483).

5. A causal link. The accusation in all the Poursuites Criminelles cases is clear in this particular by using such words as ainsi and par le moyen, etc.

We therefore find that conduct which fulfills the five requirements we have set out, may be, although not necessarily is, depending on the circumstances, fraudulent conduct and, as such, punishable by the law of Jersey as fraud.

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