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A VERY PARTICULAR REMEDY: DOLEANCE IN THE CROWN DEPENDENCIES

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This article examines the origin, scope and extent of the Doléance[1] *remedy in the Channel Islands and the Isle of Man, concluding that the remedy has developed on diverse lines, so that the common name gives rise to actions very different in scope when one compares the customary law with Manx common law.*

1 In the Guernsey case of *Bassington Ltd v HM Procureur*,[2] Collins, JA, President said—

> "The inhabitants of Guernsey, Jersey and the Isle of Man have certain very particular remedies each of which is named a *Doléance*. Both the Channel Islands and the Isle of Man have in the past considered the remedy peculiar to themselves, without apparent knowledge of the existence of a remedy similarly named in the other jurisdiction. Thus the Deemster in *Re the Attorney General of the Isle of Man*[3] considered it was unique to the Isle of Man, and there is one reference to it having been said that it is peculiar to the Channel Islands (see Bentwich—Practice of the Privy Council in Judicial Matters 3rd ed (1937), at p 54). The nature of the remedy and the means by which it is employed may differ. In the Isle of Man and Jersey it is already well established that the local Courts have jurisdiction to hear a *Doléance*. In Guernsey the position is much less clear."

Doleance in the Isle of Man

2 Before considering the position in the Channel Islands any further it is helpful to set out the main features of the doleance remedy in the Isle of Man, a jurisdiction where one would not expect to find the use of a French term. The Chancery Division of the High Court of Justice of the Isle of Man has a supervisory jurisdiction with respect to the lawfulness of decision-making by public bodies. The remedy is an important element of Manx jurisprudence being, in effect, the Island's equivalent to the remedy of judicial review as it exists in England and Wales. A 1982 essay recently cited judicially concluded that—

> "there are several differences between the two procedures, and it has always been stressed in the Manx courts that the petition of doleance is very much a

[1] In the Isle of Man the word is doleance (no accent). The distinction is maintained in this article when referring separately to the Manx remedy.
[2] [1998] 26 GLJ 105 at 113.
[3] 1997/8 1 OFLR 49 & 419; appeal case reported *sub nom In Re Frederiksen* 1996–98 MLR 286.

> uniquely Manx remedy and that it is not simply a rather quaint Manx term for the English procedures."[4]

However, with the changes in England and Wales following the new Order 53 in 1977 and the later developments, the two jurisdictions have become much closer in their respective approaches, as the following account of the development of the remedy intends to show.

3 The most comprehensive judicial account of the remedy is that of Deemster Doyle in the 2004 case of *MTM (Isle of Man) Ltd v Financial Supervision Commission.*[5] The Deemster stated that the term "petition of doleance" is explained as far back as 1524 as a proceeding by way of complaint,[6] and considered the Island's "well established jurisprudence in respect of petitions of doleance" including a reference to it in *Johnson's Jurisprudence of the Isle of Man* in 1811.

4 The classic definition of the petition of doleance, which has been approved in subsequent cases, is set out in *Corkish v Boyd*[7] in 1904 where Sir James Gell CR said—

> "This petition is one of doleance, seeking the relief which in England is obtained by the prerogative writ of certiorari. There is no such writ here, neither have we any of the English prerogative writs such as habeas corpus, mandamus etc. Substantially, however, the relief obtainable by means of these writs is obtained here by a different mode of procedure, namely the petition of doleance, formerly heard in the Court of the Staff of Government Division but, since the passing of the Judicature Act 1883 in (the Chancery Division) of the High Court … The procedure here is entirely different from that in England. A petitioner in this Island must prove his case as in any other matter of petition."

5 In *In Re Martin*[8] in 1943, Deemster Farrant described "doleance" as an obsolete word from the French meaning a complaint, stating that "this court has jurisdiction upon a petition of doleance to entertain cases such as would be in England applications for writs of certiorari and habeas corpus". This is, however, a narrow application of Sir James Gell's

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[4] ATK Corlett (now Deputy Deemster Corlett), *The Petition of Doleance in Manx Law and the Comparable Remedies in England*, The George Johnson Law Prize 1982, Isle of Man Law Society, cited in *In Re Haffner* 2007 MLR 180 at 193.

[5] 2003–05 MLR 415. For a later exposition of doleance from Deemster Doyle, see *In Re Haffner* 2007 MLR 180 at 192.

[6] See statement of Deemster Kneale at 1952–60 MLR 401 at 402. In the *MTM* case, Deemster Doyle cited the *Oxford English Dictionary* definition that included "complaining, complaint … 1524 St Papers Hen. VIII, iv. 104 Albeit ye make some doleance in your letter. 1524 in Strype Eccl. Mem. 1 App. xii. 30 Any motion, by way of complainte of doliaunce. 1591 Horsey Trav (Hakl. Soc) 198 All their dollinces herd and remedied." Though these references are not to doleances in the legal process sense, footnote 40 gives a further example of the word's use in England in the sixteenth century.

[7] (1904) C.P. 17; 1522–1920 MLR 389.

[8] 1921–51 MLR 317 at 319.

judgment and in *In Re Kerruish*[9] in 1971 Bingham, JA applied it rather more precisely, also describing its purpose as—

> "…to provide within a comparatively compact community a simple and speedy means for the ordinary citizen to obtain redress for injustices which in England would be remedied by orders of habeas corpus, certiorari and the like. The essence of the petition of doleance is that it should be simple and, therefore, unencumbered by legal formality and also speedy so that the cases can be tried quickly."

6 From the earlier Manx cases[10] it can thus be discerned that before the English jurisdiction had, in 1977, moved towards a single public law remedy, the Manx courts had developed a single, swift procedure for challenging the exercise of executive power.

7 A hallmark of the petition of doleance is its discretionary nature[11] and the fact that it is intended as a remedy of last resort, where no appeal or other remedy exists.[12] In *In re Nicholson (IOM) Ltd*[13] in 1980 Glidewell, JA said—

> "The petitions are what are known in the Isle of Man as petitions of doleance. A petition of doleance is a form of proceeding peculiar to the Isle of Man, which takes the place of the prerogative orders of mandamus and certiorari in England but may also be brought on the relation of the Attorney General. In essence, by a petition of doleance, a party is entitled to move the court to exercise its equitable jurisdiction to redress a wrong for which no other remedy is available. It is obviously a remedy of considerable scope and utility, and is intended to lead to a wrong being righted as soon as possible."

8 On the question of *locus standi*, the Court of Appeal held in this case that a Petitioner who is a private individual or company that has suffered particular damage is entitled to present a petition of doleance. If the wrong is purely a public wrong and the Petitioner cannot show any particular damage, the proceedings should be brought in the name of the Attorney General. It is also now established, however, that the court has a discretion to allow a petition by a private individual to redress a purely public wrong in the absence of the Attorney General's consent if he did not object and that post-1977 English authorities are of value in deciding how that discretion should be exercised.[14]

9 The grounds upon which administrative action is subject to control by petitions of doleance are set out in the *MTM* case and are those familiar to the English administrative lawyer: illegality, irrationality (Wednesbury unreasonableness) and procedural impropriety.

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[9] 1961–71 MLR 374 at 390.
[10] For an account up to 1984 see the note on the petition of doleance by Fiona McLean at 3 MLB 50.
[11] See also *In re Bride Parish Commrs* 2001–03 MLR 436 at 454.
[12] See *In re Kenyon* 2001–03 MLR 1; *In re Ackernley* 1961–71 MLR 354.
[13] 1978–80 MLR 327.
[14] *In re Cussons* 2001–03 MLR 418 and 539.

Deemster Doyle dismissed MTM's petition having examined these grounds, finding that the petitioner had failed to establish that the FSC had breached any of them. His judgment quoted the following passage from page 483 of *Solly's Government and Law in the Isle of Man*—

> "If a public body strays beyond its powers, then there is a procedure whereby a citizen affected by such *ultra vires* action can seek a remedy from the courts. Public bodies must act within the powers given to them by Act of Tynwald and they must exercise any discretion granted to them in a proper and reasonable way. Furthermore, these bodies and indeed other entities must act in accordance with basic principles of natural justice. They must give members of the public a fair hearing."

10 Deemster Doyle also referred to s 44 of the High Court Act 1991 which extended the remedies that can be granted by the High Court on the presentation of a petition of doleance to cover, in appropriate cases, injunctions and damages. There is also provision in that section for the High Court, if it quashes a decision to which the application relates, to remit it back to the decision-making body to reconsider the matter and there is also power for the court to make a declaration, when it considers it just and convenient to do so.[15]

11 There are many other cases that illustrate the application of the English principles. For example in *In Re Doleman*,[16] Deemster Luft declined to interfere with a decision on the basis that he had jurisdiction only where the decision maker had come to a conclusion that no reasonable decision maker could have come to or which was wrong in law or in excess of its powers. In *In Re Frederiksen*[17] it was held that the discretion of the Attorney General conferred by s 24 of the Criminal Justice Act 1990 (investigation powers in the case of serious fraud) was subject to judicial review and he was under a duty to act in accordance with the Wednesbury principles.

12 In *In re Kinrade*,[18] Acting Deemster Moran described a petition of doleance as "a wider and more flexible jurisdiction than the equivalent application for Judicial Review in England" though he refused to apply a different approach to permitting cross examination. He said—

> "This procedure, like that in Judicial Review in the United Kingdom, is … available as a means for an aggrieved citizen to have the court review a decision making process and if appropriate to have the decision set aside if any of the well-recognised vitiating factors can be seen to have operated. These of course include

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[15] But s 10 of the Act makes it clear that the High Court has no jurisdiction in respect of proceedings from the Court of General Gaol Delivery, the Manx higher criminal court.
[16] 1984–86 MLR 197.
[17] See footnote 3 *supra*. This was the case cited in the Guernsey case of *Bassington*.
[18] CP 2003/138 judgment delivered 14.5.04.

error of law or want of jurisdiction, irrationality or Wednesbury unreasonableness in the making of the decision, breach of the rules of natural justice which are applicable to the relevant decision making process (including bias), reliance on irrelevant material or considerations etc. It is not a means whereby the Court is willing to substitute its own decisions for those of the impugned decision maker and it is not suited or appropriate or intended for the wholesale resolution of disputed issues of fact."

13 That it is a review of how the decision is come to and not of the decision itself was emphasised in *In Re Malew Parish Commrs*,[19] where Deemster Kerruish said—

> "A petition of doleance is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties. The court is concerned with reviewing not the merits of the decision, but the decision-making process itself. It is no part of that purpose to substitute the opinion of the judiciary or an individual Deemster for that of the authority constituted by law to decide the matters in question. The duty of the court is to confine itself to the question of legality."

14 From this brief account it is clear that the Isle of Man has developed the petition of doleance as its particular form of judicial review, drawing heavily on the jurisprudence of England and Wales. If there is a measurable difference today it is that there is still more flexibility in the Manx remedy when it comes to the rigours of procedure.[20]

Doléance **in Guernsey**

15 Writing about the practice of the Privy Council in judicial matters in 1937, Norman De Mattos Bentwich considered appeals from the Channel Islands—

> "If leave to appeal is refused, the party may apply for redress to His Majesty in Council by doleance ... The law of doleance (ie a complaint or grievance) is a Petition peculiar to the Channel Islands, and is rather in the nature of a complaint against the judges or the Royal Court itself than an appeal."

[19] 2001–03 MLR 129 at 152.

[20] See *Hansard* for the proceedings of the Legislative Council, 2 November 1999 for the response of the Attorney General to a question about the availability of judicial review in the Isle of Man in which he said that the petition of doleance "provides for litigants in the Island all the necessary remedies by way of judicial review which are available to litigants in England but without the necessity to comply with a somewhat rigid procedure in so far as time limits and certain other matters are concerned which pertains in England". The Rules of the High Court of Justice 2009 have now introduced a 3 month time limit, but there is still no requirement to obtain leave as in England.

He further cites an example from Guernsey as authority as to when a doleance should be presented.[21]

16 In *Bassington Ltd v HM Procureur*, the Court of Appeal in Guernsey reviewed the position in that Island. Though acknowledging that there had been instances of *doléances* being addressed to Her Majesty in Council, there were, the court said, apparently no instances of such a remedy being addressed to the courts. This is seemingly unsurprising if the nature of the action were a complaint against the court itself.

17 The following passage from Thomas Le Marchant's *Remarques et Animadversions sur l'Approbation des Lois et Coustumier de Normandie usitées ès Jurisdictions de Guernezé*[22] was cited to the court—

> "*Et notez, selon le Coustumier, distinguant entre doléance et appel, qu'appel est prins communément pour appel sur une sentence definitive, et doléance pour appel sur une sentence interlocutoire, ès cas où il est permis l'interjecter*."

18 However, the court found that the distinction between appeals from final judgments and *doléances* from interlocutory judgments does not appear to have been maintained as a matter of practice. In view of the lack of use of the remedy in modern times the court stated—

> "Thus it may well be that this remedy no longer has any place in the jurisprudence of Guernsey. However our decision on other issues does not require us to reach a final conclusion on this aspect."

19 What this case did establish, however, is the jurisdiction of the court to hear appeals in administrative matters and, in particular, to review HM Procureur's decision to investigate under the Criminal Justice (Fraud Investigation) (Bailiwick of Guernsey) Law 1991.[23] In *The Laws of Guernsey*,[24] Advocate Dawes, having referred to Terrien's *Commentaires*, (1574) Livre XI[25] and the state of the law in Jersey, observed—

> "It seems unlikely that, given the customary origin of the *doléance*, it should not exist also in Guernsey law; albeit dormantly for many years. As the Court of Appeal impliedly noted in Bassington the point is now largely academic. It seems

[21] The text of Bentwich is available at www.ebooksread.com and cites *Re Tupper* (Guernsey 1834), 2 Knapp, 201. Guernsey *doléances* appear always to have been a matter for the Privy Council, the earliest record of one being in 1617. However, the following statement of the Royal Court of Guernsey was approved by the Council back in 1583: "*au lieu du Livre Onzième en cas de doleances et apeaulx, nous usons des ordonnances qu'il a pleu à Messeigneurs du Conseil établir pour cet effet*". The author is grateful to Dr Darryl Ogier of Guernsey Archives for supplying this information.

[22] 1826 ed, Vol 2 Livre XI at p 163.

[23] Coming in effect to the same decision as the Isle of Man court had done in *In re Frederiksen* under equivalent legislation. For the position in Jersey see now *Durant International Corp v Att Gen* 2006 JLR 112.

[24] Oxford, 2003.

[25] Procedures in Normandy are detailed in chapters 22 and 23 of the *Ancien Style* (1386 x 90).

> unlikely that *doléance* has any greater application than ordinary English principles of judicial review, although there is no reason why Guernsey should not, in the right circumstances, develop its own jurisprudence having regard also to other jurisdictions."

20 The position in Guernsey would thus seem to be that the remedy of judicial review is available, but *doléance* has fallen into abeyance, largely made redundant by the flourishing of the more general remedy.

***Doléance* in Jersey**

21 There are a number of examples of petitions of *doléance* from Jersey to the Privy Council where there was a complaint against the judge.[26] The practice was for the Judicial Committee of the Privy Council to order that the petition and *doléance*, together with the affidavit evidence in support, be referred to the Royal Court for its observations. An Order in Council of 27 July 1671 provided—

> "... doleances being of an odious nature, as intended principally against the judges whose honour is to be maintained for the sake of justice, in case the complainant shall not make good his doleance, His Majesty, by the advice of the Council, will lay such fine on the party failing as the cause shall require."

This provision was subsequently enshrined in the Code of 1771, of which provision Le Gros commented "*Le Code de 1771 n'encourage guère l'emploi de la doléance*."[27] However, in 1861 the *Report of the Civil Commrs* gave encouragement to the development of *doléance*—

> "... we therefore strongly recommend that this unquestionably constitutional remedy should be greatly facilitated; at all events until a strong and able court shall have been established in the Island. First it should be freed from its invidious character; and it will then no longer be difficult, with the present organisation of the Judicial Committee of the Privy Council to make ... a petition to review the propriety of an affirmative act of any kind nearly as easily as a motion for a *certiorari*, and one to review that of a refusal to act, as a motion for mandamus".

22 In *ex p. Nicolle*[28] in 1879 the Privy Council found the petition of *doléance* to be the least expensive and probably the most convenient mode of challenging an interdiction, observing that that the fact that no appeal lay as of right to Her Majesty "does not prevent

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[26] See Bentwich, *The Practice of the Privy Council in Judicial Matters*, footnote 21 *supra*. For example *In re Ames* (Jersey, 1841), 3 Moo. 409; *In re Whitfield* (Jersey, 1838), 2 Moo 269. See also Le Gros, *Droit Coutumier de Jersey* (1943) at p 156. Dr Ogier has drawn the author's attention to a *doléance* concerning the matter of *Bailhache v Lemprière* (1663) as being an early example from this Island.
[27] *Droit Coutumier de Jersey* (1943) at p 155.
[28] (1879) 5 App. Cas.346; 49 L.J.P.C. 51.

Her Majesty from granting by virtue of Her prerogative either special leave to appeal or the relief now sought by way of *doléance*."

23 In Jersey, *doléance* did develop a little further as a domestic remedy, the Royal Court observing in 2006—

> "There is ... a procedure available by way of petition of *doléance* which enables certain complaints against judicial decisions to be brought before the Superior Number of the Royal Court. The procedure is rarely used and the grounds available to a petitioner are narrow and somewhat obscure. They had once been thought to be limited to improper conduct on the part of the judge, generally bias, excess of jurisdiction or perverse disregard of the law. In modern times this principle has been developed to embrace any 'manifest judicial error'."[29]

24 In summary, *doléance* is a remedy where the court has refused to hear an appeal, despite a right of appeal existing, or where an order or judgment contains a manifest judicial error and there is no right to appeal. Before turning in detail to recent cases, it is worth considering what Jersey's commentators on the customary law had to say about it.[30] Le Gros, in his *Traité du Droit Coutumier de L'Isle de Jersey* (1943) at page 155 wrote—

> "[*La doléance*] *suppose que le juge a désobéi à la loi lorsqu'il a refusé appel sur une contestation susceptible d'appel; ou lorsque le jugement qui n'est pas sujet à appel constitue manifestement une erreur judiciaire. C'est le devoir du juge de veiller à la manutention des lois.*"

He also said at page 156—

> "*Heureusement de nos jours, la doléance est peu usitée. Elle était autrefois d'un usage fort commun. La justice est maintenant administrée suivant les lois, coutumes et usages 'tant aux riches qu'aux pauvres sans acception de personne.' Les luttes politiques d'autrefois, avec toutes les conséquences regrettables qu'elles engendraient, avaient leur répercussion sur le banc de Justice. Tout est changé. Il s'est produit un changement dans le caractère et le genie du peuple jersiais qui, d'abord peu marqué, se manifeste aujourd'hui par le désir du triomphe du droit.*"

25 Poingdestre, while also considering that the *doléance* was odious, accepted it was the only route where there was no right of appeal, noting that it was less commonly used only because rights of appeal were granted by legislation. He wrote in *Les Lois et Coutumes de Jersey* at 235–236—

[29] *Durant Intl Corp v Att Gen*, see footnote 23 *supra*.
[30] These references are cited by Tomes, Deputy Bailiff in *Re Harbours & Airport Cttee*, see below.

> "*Les doléances seruant de remede es causes ou il n'eschet point d'Appel, elles estoient anciennement fort ordinaires en Normandie; mais a present on les conuertist en Appeaux par les ordonnances ... Et est a noter qu'une cause ou il y a Doléance ne pourroit reguilierement choir en Appel; car s'il y eschoit appel la Doléance ne seroit de mise; par ce que c'est un remede extraordinaire & odieux; & par ainsy ne doibt estre pratiqué, tandis que partie a la voye ordinaire et fauorable ouuerte pour son remede ... ells ... sont un recours du droict permis aux parties greuuées par les Juges, lorsqu'il n'y a aucune voye d'appel, ny autre remede legitime*."

26 Finally, Le Geyt, in 3 *Manuscrits sur la Constitution, les Loix & les Usages de Jersey* (1847) at 340–343 wrote—

> "[*Q*]*u'aujhourd'huy l'on ne fait pas plus de difficulté d'en faire* [*des doléances*], *que si l'on interjetoit un appel. Aussi les juges regardent-ils ces doléances comme les suites naturelles de la non-admission d'un appel ... D'ordinaire les doléances de Jersey ne s'étendent que sur les erreurs en fait ou en droit, qui ne donnent pas d'attente à la probité*."

The jurisdiction therefore has its origins in the customary law and originated where the Royal Court declined to hear an appeal, giving rise to a "*doléance*" meaning a complaint or grievance, "*de veritable griefs contre le Juge.*"[31] The remedy had, as is still the case in Guernsey as we have seen, had fallen into disuse before it had its renaissance some 25 years ago. Even then, the circumstances in which it could be brought were held to be limited, due to the alternative remedy of an appeal. But very recently it has been held, that in certain types of case at least, its use is a very exceptional matter.

27 In *In Re Barker*[32] the ancient remedy was awakened from its slumber when a petition of *doléance* was brought to annul the Royal Court's refusal to order a *remise de biens* and instead order a *dégrèvement* of his property on the grounds that the court had exercised its discretion improperly. The Law provided that the decision of the court was final. The Superior Number, however, allowed the petition on the grounds that the court had exceeded its powers by creating a novel procedure in relation to *dégrèvement*. Moreover it had not exercised its discretion in accordance with established principles of common sense and justice, as well as giving insufficient weight to the value of the property. The court found it difficult to imagine a modern court refusing to hear an appeal where one exists but considered the second category of *doléance*, where the judgment contains a manifest judicial error. Frossard, Commr said—

> "Before allowing a *doléance*, the court has to be satisfied that there has been an excess of jurisdiction or a breach of natural justice which needs to be remedied, as

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[31] Le Gros, *ibid*.
[32] 1985–86 JLR 284.

> a *doléance* is a remedy 'in last resort' when all other doors are closed and a grave injustice will remain unless remedied."

28 In *Re Harbours & Airport Cttee*,[33] the Superior Number held that the Inferior Number's decision that the Petty Debts Court had an inherent jurisdiction to regulate its own procedure was *manifestemente une erreur judicaire* as the lower court, a creature of statute, had only the jurisdiction prescribed by its governing Rules. Tomes, Deputy Bailiff, gives a comprehensive account of *doléance*. Having cited Le Gros, the Deputy Bailiff observed—

> "We agree with Le Gros that, happily, *doléance* is now rarely used as an attack on the honour and integrity of a judge ... But that is not to say that where no right of appeal is accorded by statute and where there is an allegation of manifest judicial error the *doléance* procedure should not be used as a means of obtaining judicial review of the suspect judgment."

29 Citing the views of the Civil Commrs set out above he also said—

> "Whatever one's view of the reference to a 'strong and able Court,' it has to be accepted that *certiorari* and *mandamus* are the tools of judicial review and in cases in which there is no right of appeal, they are the only remedies open to an aggrieved litigant who seeks not to attack the character or integrity of the judge but merely the reversal of a manifestly erroneous judgment."

30 Tomes, Deputy Bailiff emphasised the similarity between the remedy of *doléance* and judicial review in England, in particular the writ of certiorari, though he went on effectively to classify it as an appeal because the court may substitute its own decision for that of the court in respect of which it is brought—

> "We agree that the *doléance* is analogous to the writ of *certiorari* but the analogy is not complete because the Queen's Bench does not substitute its own views for those of the inferior tribunal, as an appellate Court would do, but exercises its control by means of a power to quash the decision, leaving it to the inferior tribunal to hear the case again and in a proper case commanding it to do so. In the case of the *doléance*, the Privy Council or the Superior Number decides the issues between the parties. The *doléance* provides an appeal where there is none."

The conclusion of the court was that *doléance* "is a means of obtaining judicial review where no other means is available." However, as has been pointed out,[34] the classification of *doléance* as an appeal is somewhat inconsistent with the jurisdiction of the Court of Appeal under the Court of Appeal (Jersey) Law 1961, which gives that court exclusive

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[33] 1991 JLR 316.

[34] Hanson, *Civil Appeals to the Court of Appeal and All That Jazz*, (2003) 7 Jersey L Rev 169.

jurisdiction in appellate matters from the Royal Court and prescribes the circumstances in which a further appeal can be made.

31 *Doléance* lies where the judicial body with complete and final jurisdiction to determine a matter has done so in such a way that takes it outside the jurisdiction granted, enabling a court of a different composition finding that this has happened to exercise that jurisdiction itself. However where the case concerns the exercise of a discretion, the burden on the *doléant* will be heavier than in other cases. In *Att Gen v Michel*,[35] where the complaint was the refusal of the trial judge to grant an adjournment in criminal proceedings, Birt, Deputy Bailiff said—

> "A *doléance* is not an ordinary appeal. It is a review and the Superior Number may only intervene to overturn a decision where the petitioner satisfies the heavy burden of showing that a grave injustice will result whether it be from an excess of jurisdiction, a breach of natural justice, an error of law or some other manifest judicial error."

32 The burden is particularly heavy, the Superior Number said, if a petitioner seeks to challenge an interlocutory decision of a trial judge in the management of criminal proceedings. It will very rarely be appropriate for the Superior Number to interfere with such a decision on a petition of *doléance*. Even though there is usually no immediate right of appeal on interlocutory matters, the convicted person may raise the points on an appeal after such conviction. Case management decisions, such as whether or not to grant an adjournment were said to be matters for the trial judge and would rarely be overturned as they often depend on the trial judge's detailed knowledge of the case, which is denied to the Superior Number.

33 In *In re Lagadec*,[36] the Royal Court held that the judge's failure to follow the procedure of inviting submissions as to costs and giving reasons for his decision, unless there is evidence that his discretion was not properly exercised, is not such a failure of natural justice as to give rise to a petition of *doléance*. Recently, in *Metzner v Att Gen*,[37] a petition of *doléance* was brought against the Inferior Number's refusal to award certain costs to a successful defendant in criminal proceedings on the basis that he had misled the prosecution into thinking that its case was stronger than it actually was. There is no right of appeal against a costs order made following an acquittal or discharge. The Bailiff observed that even when there was a right of appeal against a costs order the threshold was very high, this being a matter for the judge's discretion. Where there is no right of appeal, he held, "the threshold must by definition be even higher as otherwise the Court will simply be conferring a right of appeal when none is conferred by law. This is reflected in the jurisprudence concerning *doléance*." The Bailiff then cited the passage from *In re Barker* set out above. The Superior Number, dismissing the petition, was unable to

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[35] 2006 JLR *N* [15]; [2006] JRC 089.
[36] 1996 JLR *N* [9c].
[37] [2010] JRC 106.

"categorise the Commissioner's decision as being so beyond the range of discretionary decisions open to him as to amount to manifest judicial error giving rise to a grave injustice, thereby entitling the applicant to the exceptional relief of *doléance*".

34 The most recent case on *doléance* was *De Figueiredo v Att Gen & Commonwealth of Australia*.[38] This concerned a review of a Commissioner's decision to refuse an adjournment of the applicant's appeal against a decision of the Attorney General to order his extradition to Australia. The Extradition (Jersey) Law 2004 provides an exclusive right of appeal to the Royal Court on grounds set out in the Law, and thence direct to the Privy Council with leave. Though art 54 of the 2004 Law states that "a decision of the Magistrate or Attorney General may be questioned in legal proceedings only by means of an appeal under this Part", Bailhache, Commr held that this did not oust the *doléance* jurisdiction because those decisions do not embrace an interlocutory decision of the judge of the Royal Court hearing the appeal. However, the broad purpose of the 2004 Law was a relevant matter in determining whether *doléance* should lie. Approving the decision in *Att Gen v Michel* the court observed—

> "*Doléance*, which involves convening the Superior Number of the Royal Court at short notice, is an extreme remedy of last resort. It is not to be employed to challenge any exercise of judicial discretion where the law allows of no appeal. To permit *doléance* to expand itself into a general remedy of judicial review, particularly in the context of criminal proceedings, would, in our judgment, be an abuse."

Bailhache, Commr then quoted from the 1671 Order in Council referred to above and the Privy Council's power to fine litigants who bring inappropriate *doléances*. The principle, it was said, holds good in this Court and reference was made to the power to fine those who wrongly raise the *clameur de Haro*—

> "We think that a similar practice ought in future to be adopted in relation to *doléance* in appropriate cases so as to deter all but serious and well founded complaints about the administration of justice. If an appeal does not lie against a particular decision, there is usually good reason for that rule. A petition of *doléance* should not be casually employed in circumstances where the law provides no right of appeal. It is a measure to which parties should resort only to prevent grave injustice. If inappropriately brought before the Superior Number, it should lay the petitioner open to a wasted costs order."

35 The court observed that it was for the trial judge to balance numerous issues during the hearing, including whether or not to adjourn it and that although there is no right of appeal against an interlocutory decision in a criminal case, if the decision leads to injustice it can be corrected on appeal at the end of the case. It thought it very rare for a decision of

[38] [2010] JRC 182.

a judge in a criminal case to be suitable for review by a petition of *doléance*[39] and this matter was inappropriately brought. Though no financial penalty was imposed on the applicant or his advisers, this was not to be taken as an indication of what the court might do in a future comparable case.

Conclusion: *doléance*—origins and diversifications

36 Before summarising the state of the law on *doléance* in the three Crown Dependencies, it must be asked why *doléance*, a customary law remedy, is present as a remedy in the Isle of Man, especially as it seems unknown to the law of England and Wales.[40] It seems likely that the link between the two was the Privy Council. *Doléances* may well have been imported into Privy Council practice from the medieval Norman law that applied to the Channel Islands and from there spread to the Isle of Man where the name took hold and became a domestic remedy.[41] Before the conquest there had been a right of appeal from the courts of the Channel Islands to the Duke of Normandy and his Council. This was the origin of the current right of appeal to Her Majesty in Council which was asserted as early as the reign of Edward III[42] and which was subsequently developed to encompass appeals from the Isle of Man and the various colonial jurisdictions, though in those jurisdictions the term "doleance" appears not to have survived. The Isle of Man[43] has had a series of rulers in its history, Norse, Scots, Irish and English, coming into the allegiance of the English Crown in the reign of Henry IV in 1399. Until the mid-eighteenth century, apart from an interval during Elizabethan times, it was held in fee of the Crown by various English nobles, namely the Earl of Northumberland, and more prominently the Earls of Derby and the Dukes of Atholl, in succession as Lords of Man. Its early customary law, unlike the Channel Islands, may have derived from a number of sources, including the Viking, giving rise to its ancient Parliament, the Tynwald, said to date from around 979. It seems probable though that the petition of doleance has come not from the common Norse ancestry it may share with Normandy, but from its English rulers of Norman descent. By the time of the revestment in 1765, since when the English monarchs have ruled the Isle directly, it would seem that doleance was established as a method of

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[39] This is quite different from the Manx approach, for example in 1890 in *Cringle v Cain* 1522–1920 MLR 235 doleance lay to quash a conviction when parties were excluded from court while some of the witnesses were giving evidence. A less extreme and more recent example is *In re Hill* 1996–98 MLR 383 where a petition was entertained, but not granted, in respect of a discretionary decision by the High Bailiff to try a case summarily rather than committing it to the Court of General Gaol Delivery. Doleance rather than an appeal is also the appropriate route on the question of misconduct by a magistrate: *Witchell v Oake* (1990) 15 MLB 42.

[40] There is the following reference in the Articles of Agreement between the City of London and the Ports dated 20 May 1575—"It is agreed that Mr. Serjeant Lovelace and Mr. Recorder proceed to end the matter of private 'doleances' of citizens by arbitrament." See www.nationalarchives.gov.uk/a2a/records.aspx?cat=179-rye_2&cid=1-3-12-2#1-3-12-2. However this would seem to refer merely to grievances between individuals.

[41] I am grateful to Dr Ogier for supporting this theory; it is perhaps weakened by a lack of evidence of the term "doleance" being used in relation to Manx Privy Council appeals.

[42] Bentwich, *ibid*.

[43] For a constitutional history of the Isle of Man see AW Moore, *A History of the Isle of Man, 1900;* Edge, Manx Public Law, Isle of Man Law Society 1997, chapters 2 and 6; Augur Pearce, *When is a Colony not a Colony? England and the Isle of Man*, 32 *Common Law World Review* 368 (2003).

petitioning that Lord.[44] We have seen that there are numerous examples of petitions to the King/Queen in Council by way of *doléance* in the Channel Islands. It would thus seem likely that that the right of petition in Jersey, Guernsey and the Isle of Man has a common Norman stem, albeit that the Manx courts, seemingly unaware of the Channel Island remedies, apparently offer no explanation as to why their ancient remedy comes from "an obsolete word from the French".

37 Once the doleance remedy had taken hold in the Isle of Man it developed according to the needs of that jurisdiction and did so ahead of the flourishing of the judicial review remedy in England. Jersey developed English-style judicial review as a separate remedy. The leading case is *Lesquende v Planning & Environment Cttee*[45] where Beloff, JA giving the judgment of the Court of Appeal said—

> "We, for our part endorse the existence of the remedy by way of judicial review in Jersey. The inherent jurisdiction of the Courts to control access or abuse of power by executive bodies seems to us to be intrinsic to the very judicial process, and vital to the rule of law. To confer upon an administrative authority limited powers only, but to provide no means for confining it within those limits would be paradoxical. There is nothing in the traditions of Norman French law, as developed in Jersey, which appears incompatible, and much appears consistent with our conclusion. It would be, in principle, regrettable to deny a citizen of Jersey a form of relief available to citizens in other parts of Her Majesty's Dominions."

38 The establishment of judicial review means that *doléance* remains a discrete remedy of limited utility, because there is no real gap in Jersey's jurisprudence in modern times into which it might have grown. The recent attempts to use it in the context of ancillary and discretionary matters, such as costs and adjournments, have been unsuccessful and have resulted in a shot across the bows from the Royal Court to any litigant or advocate who attempts to use *doléance* to challenge these peripheral matters. Guernsey, which also now has a system of judicial review, has not seen the need for it in modern times at all. Since the courts will generally, if at all possible, seek to find or develop a remedy to satisfy the merits of the case, the fact that doleance is so widely developed in the Isle of Man and remains a relative obscurity in the Channel Islands may be a matter of historical accident. By the time *doléance* was resurrected in Jersey, English style judicial review was already established in the Island. In other contexts the courts have shown a preference for

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[44] Doleance is mentioned as form of petition by the 1792 Commissioners of Inquiry. There is a reference to John Stevenson being imprisoned in 1759 presenting a petition of doleance to the Duke of Atholl, Lord of Man in the President's address to the Isle of Man Natural History and Antiquarian Society in 1937 accessible at www.isle-of-man.com/manxnotebook/iomnhas/ v042p251.htm. A note by Sir James Gell in vol 12 of the Manx Society volumes in respect of a petition by Edward Moore, Vicar of Kirk Patrick to the Lord of Man in 1627 against the Bishop claiming the whole tithes of the parish refers to "doleance", but as the term does not seem to appear in the case itself it is not clear that this is the earliest example. The author is grateful to Fiona Haywood (*née* McLean) of the Manx Bar for this information.

[45] [1998] JCA 1. For procedural matters see also Royal Court Rules 2004 Part 16.

drawing influence from the other side of the Channel, for example eschewing the English tort of nuisance in favour of the quasi-contractual doctrine of *voisinage*;[46] the same might have happened in the administrative law context. However, the English jurisprudence had already taken hold separately, removing the opportunity of its being grafted onto *doléance*, as has happened in the Isle of Man. It is understandable that the Bailiwicks have little need for dual remedies, though one might lament the fact that the name "*doléance*", so steeped in Norman heritage, is today largely the province of the Manx.

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[46] *Gale v Rockhampton Apts* 2007 JLR 332