

Jersey & Guernsey Law Review – October 2011

LETTER TO THE EDITOR

Dear Sir,

Doléance: a juridical pieuvre?

1 I was much taken with Lucy Marsh-Smith's article concerning *doléances* in the Crown Dependencies, published in the *Jersey and Guernsey Law Review* 15(2), June 2011. As the author generously makes clear in her footnotes, she and I were in communication before publication, and she refers to our shared suspicion that "*Doléances* may well have been imported into Privy Council practice from the medieval Norman law" (p. 224 and note 41). I think there can be little doubt about this.

2 Robert Besnier suggested that actions of *doléance* in mainland Norman law dated from the year 1318 or a little before, in circumstances where the *Charte aux Normands* (1315) had brought about a situation where complaints about the exercise of justice might not otherwise proceed expeditiously. Such actions, which were exclusive in France to Normandy, were treated in the *Ancien Style* (1386 x 90), and were written about by the commentator on the old Norman law, Guillaume Terrien (1574), although of the commentators on the *Coutume Reformée* (1583), only the first, Jacques Le Bathelier, sieur d'Aviron (1599), mentions them in any traditional sense. The remedy was falling out of use by the early sixteenth century, as pleaders resorted to other means of interlocutory appeal, and particularly under the influence of procedures introduced by royal measures, so much so that by 1648 Josias Bérault reported the Norman *doléance* to be disused completely.¹

3 As far as concerns Jersey, Le Geyt noted records of security being given for the pursuit of *doléances* on 18 December 1545 and 25 November 1553, also referring to a "*doléance sur une interlocatoire*" of 9 June 1563, with security being given three days later.² It may still

¹ R Besnier, "La *Doléance*, voie de recours Normande", in G Le Bras *et al.* (ed.), *Études Historiques à la mémoire de Noël Didier* (Paris, 1960), 11–21.

² P Le Geyt, *Les Manuscrits de Philippe Le Geyt, Ecuyer, Lieutenant-Bailli de l'Ile de Jersey, sur la constitution, les lois, et les usages de cette île* (4

be possible to see these records in full in the island and I would invite colleagues to seek them out. Poingdestre gives the text of an act of the Governor, Royal Court and States, dated 6 October 1554, which asserts that save in matters of *lèse majesté* no causes are to be sent out of the Island other than to the Privy Council “whether by appeal or *doléance* formally made after sentence given and delivered by the judge”.³

4 It seems that no references to the cases alluded to by Le Geyt, or any others of the sixteenth century, are to be found in English documentation. The earliest known Jersey *doléance* surviving in Privy Council records is referred to in a letter of the Council to the Governor, Bailiff and Jurats of Jersey, dated 30 July 1618, referring to a complaint by Philip de Carteret, Seigneur de Vinchelez, of his dispossession “of a certeyne place upon the seashore” belonging to the Fief de Morville.⁴ Two years later, Thomas Poindexter [*sic*] of Jersey petitioned the Council to receive a complaint of *doléance* (according to custom, the record states) seeking to have the Royal Court hear an action against one Aaron Messervy over a matter of inheritance.⁵

5 The statement of the Guernsey authorities leading to the *Approbation des Loix* (1583) affirmed that that Island used not the *doleances et apeaulx* referred to in Terrien’s eleventh book, but rather was subject to orders laid down by the Privy Council: “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 principal of these *ordonnances* was an Order in Council dated 9 October 1580, which although treating appeals at length does not mention *doléances*.

6 In fact it does not seem to have been before the year 1617 that a *doléance* from Guernsey was considered by the Council, when on 31

vols, Jersey, 1846–47), vol. 3, pp. 339, 344. ‘Security’ as I have used it here refers to Le Geyt’s use of the word ‘*plège*’, in the sense of the giving of a ‘*caution suffisante de tous cousts, dommages et intérêts*’.

³ J Poingdestre, *Caesarea or a Discourse of the Island of Jersey* (Jersey, 1889) p. 64. I translate the quotation from the French “... *si non par appel ou doleance formellement faicte apres sentence donnee et proferee par le juge ...*”.

⁴ JV Lyle (ed.), *Acts of the Privy Council of England*, vol. 36 (London, 1929) p. 237.

⁵ MAE Green (ed.), *Calendar of State Papers, domestic series, of the reigns of Elizabeth and James I, Addenda 1580–1625* (London, 1872), p. 620.

March of that year the Council wrote to Lord Carew, the Governor, concerning a complaint of one Jean Briard of being debarred from an appeal, stating "... forasmuch as this matter commeth not before us by way of appeale from which the [complainant] was debarred ... Wee have been contented to take notice of it as a Doleance".

7 Thereafter such actions became quite common, often in connection with refusals of the Royal Court to give leave to appeal in civil cases, so much so that in or about 1627 the inhabitants of Guernsey brought a petition before the Council complaining that the rules concerning appeals (such as were set out in the Order of 1580) were being avoided by litigious persons bringing suits of *doléance* instead. The Council duly directed by Order of 27 June 1627 that "... parties appellants by way of doleance enter into bond, as is accustomed in other appeales". *Doléances* continued to be entertained for many years, and the Royal Court's *Ordonnance sur la Procédure en cas d'Appel*, 1853, referred to their transmission to the Council, suggesting that the remedy was still perceived to be available at that time.⁶

8 To turn to the early history of doleance in the Isle of Man, a petition of one Edward Moore to the Lord Strange, Lord of Man, of the year 1627, was referred to as a doleance in the editor's notes to J Parr's *Abstract of the Laws, Customs, and Ordinances of the Isle of Man*, vol. 1.⁷ The petition certainly suggests the form that a doleance action would be expected to take in later years but, tellingly, the manuscript record of the petition and Strange's response contains no use of the word "doleance", but rather uses terms such as "appeal" and "complaint".⁸

9 We conclude that the earliest use of the word so far encountered in the records of the Isle of Man is that to which Marsh-Smith refers, namely in the "petition of doleance" submitted by John Stevenson to the Duke of Atholl, Lord of Man, in 1759. A report of a Royal Commission of 1792 refers to the governors and other chief officers of the Island, saying of them that, "... probably, they are considered,

⁶ References to the Guernsey documentation will be given in the forthcoming second edition of my *Government and Law of Guernsey*.

⁷ Ed. J Gell, Douglas, 1867, p. 77.

⁸ Manx Museum: deposit ref MS 10071. I am very grateful to Wendy Thirkettle, Manx National Heritage archivist, for sending me a copy of this. I have also learned from communications with Roger Sims and Tim Thornton, to both of whom I am similarly grateful. For an argument of the influence of Jersey on American colonial constitutions, see Thornton's "The Palatinate of Durham and the Maryland Charter", *The American Journal of Legal History* 45, (2001) 235–55, pp. 249–55.

when denominated by a term which was anciently, and is at present frequently, applied to them, ‘The Staff of Government,’ ... they were and are yet resorted to by a petition of doleance, in cases where adequate relief cannot be otherwise obtained”.⁹

10 We see something very much like a doleance, called something otherwise, in the Isle of Man in 1627; in 1759 the reception of a “petition of doleance”, apparently not then remarked as being of any novelty; and an inference of a perceived antiquity of the action in 1792. It appears then that we might seek the coming into use of the term “doleance” in that Island at a point after the first quarter of the seventeenth or in the first half of the eighteenth century. This was a period in which Channel Island *doléances* came frequently before the Privy Council, and it is not unreasonable to suppose that similar actions concerning the administration of justice in the Isle of Man, even if brought before the Staff of Government and not the Council itself, at that time attracted the name on Council precedent; a name for a remedy itself transmitted via the Channel Islands from medieval Norman practice. Certainly the Manx authorities must have been aware of Privy Council usages by our mid-eighteenth-century *terminus ante quem*, the Council having had a settled jurisdiction to hear appeals from their Island since the early decades of that century,¹⁰ notwithstanding the overlordship of the Earls of Derby and Dukes of Atholl until 1765.

11 Since publication of Lucy Marsh-Smith’s article, I have been able not only to locate the early references cited above, but also a copy of JH Smith’s *Appeals to the Privy Council from the American Plantations*.¹¹ The author describes (pp. 63–65) how appeals from the Channel Islands and Plantations were the responsibility of a single Privy Council body, particularly so after 1679: in January 1661 a Jersey appeal had been referred to an *ad hoc* committee of the Council, and a Guernsey committee was created the following year, an order of 5 February 1662 setting out rules regarding such things as the quorum, amounts and times for appeal.¹² By order of February 1668, standing committees of the Council were created, with that for trade also being responsible for Island affairs. In practice, some *ad hoc* committees continued to be formed, and when in 1670 select councils for trade and

⁹ <http://www.isle-of-man.com/manxnotebook/history/1792/p066.htm>, accessed 13 July 2011.

¹⁰ JH Smith, *Appeals to the Privy Council from the American Plantations* (New York, 1950, repr. New York, 1965), pp. 171–74.

¹¹ See note 10, above.

¹² Island Archives: *Historical Documents* vol. 16, ff. 96–97.

the Plantations were created, the Islands probably were separately provided for. By order of 7 May 1679,¹³ the Council again decreed that the Committee for Trade and Plantations should likewise be a Committee for the Affairs of Jersey and Guernsey, upon such terms as were to be repeated by an order of 26 February 1689. In December 1696, the jurisdiction of the Committee for Trade and Plantations was extinguished, and an Appeals Committee, with a quorum of three, established. This remained in place until the introduction of the Judicial Committee, in 1833.¹⁴

12 JH Smith did not hesitate to conclude of the later seventeenth century, from his “survey of the regulations imposed upon colonial appeals by commissions and instructions, [that] it is apparent that several features of the existing Channel Islands regulations were adopted” for the Plantations, citing regulations touching matters that might be appealed, security appellants should offer, and times for appeal.¹⁵ This is hardly surprising, given that after 1679 the same committees of the Council handled Island and Plantation cases alike. Procedures similarly followed Island precedents, and petitions from the Plantations imitating those that had long been brought from the Channel Islands under the heading of *doléance*, came to be referred to by the same name, seemingly in the 1750s.¹⁶

13 Finally, to the *pieuvre* of my title. This word *pieuvre*, which means “octopus” (from the Latin, *polypus*), is said to be the only word that Channel Islands’ Norman French has contributed to the modern French language. The word and its variants were also used in mainland Normandy, but not beyond, until it appeared in Victor Hugo’s *Travailleurs de la Mer* (1866), which is set in Guernsey. The word is part of the common inheritance of Normandy and her islands, and one that came to be taken up internationally. We find a fanciful but irresistible analogy between the histories of this word *pieuvre* and the *doléance* remedy: both have their roots in ancient Norman usages and

¹³ Island Archives: *Historical Documents* vol. 18, f. 265.

¹⁴ PA Howell, *The Judicial Committee of the Privy Council 1833–1876* (Cambridge, 1979), p. 7.

¹⁵ Smith, *Appeals to the Privy Council*, p. 87.

¹⁶ Smith, *Appeals to the Privy Council*, pp. 98; 279 n. 51. Again, I would invite colleagues to look at the originals of the sources cited in the latter note; the first would seem to be recorded in WL Grant *et al.* (ed.) *Acts of the Privy Council of England: Colonial series*, vol. 4 (London, 1911), p. 92, the others are amongst the Hardwicke Papers in the British Library’s Department of Manuscripts.

both in more recent times spread to be employed, on the example of the Channel Islands, far from the region whence they derived.

Yours faithfully

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