



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

Charles Sydney Le Gros, *Traite du droit coutumier de l'île de Jersey*

Citation for published version:

Gretton, G 2009, 'Charles Sydney Le Gros, *Traite du droit coutumier de l'île de Jersey*', *Edinburgh Law Review*, vol. 13, no. 1, pp. 170-72. <https://doi.org/10.3366/E1364980908001224>

Digital Object Identifier (DOI):

[10.3366/E1364980908001224](https://doi.org/10.3366/E1364980908001224)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Publisher's PDF, also known as Version of record

Published In:

Edinburgh Law Review

Publisher Rights Statement:

©Gretton, G. (2009). Charles Sydney Le Gros, *Traite du droit coutumier de l'île de Jersey*. *Edinburgh Law Review*, 13, 170-72doi: 10.3366/E1364980908001224

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.



European systems, nor to cover all aspects of the subject. The book is a miscellany, and has both the advantages and drawbacks of that format.

I will mention four of the papers. From Steven Bartels comes a short but valuable discussion of the causal/abstract issue. Since today we tend to hear the voices of the centripetal enthusiasts more than the voices of the doubters, I was pleased to see some scepticism in his essay: “there is no demand (let alone a necessity) for a European rule that imposes on all jurisdictions/countries a unified system for the transfer of movables” adding that “a uniform rule . . . will not lead to uniformity” (59). He also suggests that if European legislation is going to choose between the abstract approach and the causal approach, then “the law which is applicable to the transfer of immovables must be taken into account” (59). I welcome the point about immovable property: to think about movables in isolation is not enough. Indeed, this book itself can perhaps be criticised on such grounds.

The second contribution to be mentioned is Salomons’ valuable study of *bona fide* acquisition, including its chart (142) showing different systems in a spectrum, with the rigorous title security of Roman law at one extreme (*ubi rem meam invenio ibi vindico*), the rigorous transactional security of the old German law at the other extreme (*Hand wahre Hand*), and the modern systems strung out between them. (Not all of them are included, but Scotland is.)

The other two contributions to be mentioned here are Martinson’s exposition of the Swedish approach, with Faber’s response to it. Martinson disavows the role of the missionary, but the disavowal is unconvincing: he seems to be saying that the Swedish approach is best. His section headings give the flavour. “A: To own or not to own: that is not the question! B: Go straight to the problem! Ownership is a detour D: Form the questions functionally! Ownership is not a real concern. F: Use ownership relationally!” And so on. His essay is fascinating. It would be a good assignment for an advanced Property class. It may or may not convince. It does not convince Faber, whose careful and to me convincing defence of traditional thinking is supported by what seems to be a detailed knowledge of the Swedish authorities. Whatever one thinks of the Swedish approach, it underlines the problems faced by those who wish to harmonise or unify European private law. Not all gaps are bridgeable.

George L Gretton
University of Edinburgh

EdinLR Vol 13 pp 170-172

DOI: 10.3366/E1364980908001224

Charles Sydney Le Gros, TRAITÉ DU DROIT COUTUMIER DE L’ÎLE DE JERSEY
St Helier, Jersey: Jersey & Guernsey Law Review (www.jerseylaw.je/Publications/JerseyLawReview), 2007. xii + 590 pp. ISBN 9780955761102. £21.

Inter arma silent leges may be true or false, but arms do not always silence legal scholarship. Here in Scotland the year 1942 saw Lewis Ockrent’s *Land Rights: An Enquiry into the History of Registration for Publication in Scotland*, while two years later we had Thomas Cooper’s *Select Scottish Cases of the Thirteenth Century*. Thus the light sometimes shines in the darkness. Darker than than Scotland was Jersey, yet even there not all was dark. As Ockrent’s book was being published, Charles Le Gros was finishing his *Traité du droit coutumier de l’île de Jersey*, and it was printed in St Helier in 1943. But the approval of the occupying authorities ended on sight of the title page: the author, they saw, was the *Vicomte du Roi*. The books stayed in the warehouse, until the authority of the *Roi* was re-established two years later.

The new edition is a facsimile, including a copy of the 1945 *Errata et Addenda* slip, plus much additional material. There is a short but informative introduction by the current Bailiff

of Jersey, Sir Philip Bailache. An appendix, running to about 70 pages, by Timothy Hanson, assisted by Jean-Marie Renouf, provides an updating service, chapter by chapter. Finally there is an index (which the original edition lacked) compiled by Oliver Mourant: this makes the work much more navigable. The appendix is in English, for in modern Jersey the French language has now been almost wholly replaced by its rival. One of the last trenches, the language of conveyancing deeds, fell in 2006.

The book deals almost exclusively with private law. The subject being the *droit coutumier*, statutory law is generally excluded, though there are some exceptions. (As to the exact meaning of “*droit coutumier*” nothing will be said here other than that it is a question by no means free of difficulty.) The author does not limit himself to the topics contained in the older customary law. For example, there is a chapter on negotiable instruments.

Following in the steps of earlier Jersey writers, and the pre-Revolutionary French commentators on the *coutumes*, the treatment is episodic, not systematic. There is no overall exposition of the law as a connected system. Thus chapter 1 is a topic in the law of succession (“Du bénéfice d’inventaire”), chapter 2 is about property boundaries (“Du bornage”) and so on. Even within a given topic, there is seldom a complete treatment: rather a series of notes. The gaps are large. For example, the book has nothing about the general law of contract, or of delict/tort. Whilst there is a good deal on property law, much of the groundwork of that subject is not discussed. A Scottish reader is put in mind of the “practicks” of the sixteenth and early seventeenth centuries. This impression is enhanced by the topics selected. Some indeed feel reasonably modern, such as the chapter on negotiable instruments (“De la lettre de change et du billet à ordre”) and the chapters on insolvency (“Du Désastre” and “De la cession des biens”). Many do not, or at least are topics which in a modern work one would not expect to see represented by an entire chapter. Some sample chapter headings: “Du bornage”, “Des trèves”, “Du douaire”, “Des fruits pendants sur l’héritage voisin”, “Du bref de nouvelle dessaisine”, “Des racines des arbres”, “Du champart”, “Du varech” and of course that old tourist favourite, “Du Clameur de Haro”.

As with the Scottish practicks, the incomplete nature of the *coutumes* and the commentaries on them is understandable. Such texts, presupposing a background of canon, civil and feudal law, represented an unsystematic and incomplete *jus proprium* supplemented by a systematic and complete *jus commune*. But what now is that supplementary law for Jersey? Gradually it has tended to become English. But the process was not complete in 1943 and is not complete today. Perhaps there are two *iura communia*. One sees something of that sort in the pages of Le Gros.

What are the sources cited? One finds, unsurprisingly, Jersey case law, Jersey legislation, the Jersey institutional writers (such as Le Geyt and Poingdestre, reprints of whose works would be desirable), the pre-Revolutionary law of Normandy and the commentators on it. Pothier – the obvious local supermarket for buying European legal wares – is cited quite often. References to post-Revolutionary French law are, by contrast, rare. English cases are often cited, at least for some topics. There are a few references to Roman law. Their paucity might lead a casual reader to underestimate the civilian influence. To find an example it is not necessary to go further than the first words of the first chapter: “Le bénéfice d’inventaire est un privilège que le droit coutumier accorde à un héritier . . .” The casual reader might suppose that the *bénéfice d’inventaire* was some speciality of the *droit coutumier*. That this is simply the *beneficium inventarii* of the Roman law, received into numerous European legal systems, is not mentioned. To say this is not to criticise. Le Gros was a practical lawyer writing for practical lawyers. Jersey being a micro-jurisdiction, legal literature is sparse, and even in 2008 the book remains the most up-to-date general text on the *droit coutumier*. This new edition thus owes its existence

to the needs of practitioners. It also has much to interest the comparatist, and indeed the legal historian.

George L Gretton
University of Edinburgh

EdinLR Vol 13 pp 172-173
DOI: 10.3366/E1364980908001236

Catherine M Donnelly, DELEGATION OF GOVERNMENTAL POWER TO PRIVATE PARTIES: A COMPARATIVE PERSPECTIVE

Oxford: Oxford University Press (www.oup.co.uk), 2007. lvi + 457 pp. ISBN 9780199298242. £60.

Asked for initial reflections on the title of this book and what it might have to offer, the jobbing public lawyer would probably confess to rather a low knowledge base. Within the framework of the law of the United Kingdom systems, he or she would bring a background understanding of the problems produced by administrative law rules on the power to delegate within and between public authorities but with uncertainty as to how these might apply to the “private parties” of the book’s title. There would also be the knowledge that the economic reforms of the 1980s and since had produced pressures in the direction of privatisation and contracting out, and the phenomena of compulsory competitive tendering, the private finance initiative, public-private partnerships, and the Deregulation and Contracting Out Act 1994. And, thirdly, there has been the difficult question of the applicability or not of the Human Rights Act 1998 and the standards it imposes on those organisations in the private sector which provide (delegated) care services – a debate which has culminated in *YL v Birmingham City Council* [2008] 1 AC 95 and, at the time of writing, the amendments proposed to the Health and Social Care Bill in the Westminster Parliament.

Such dispersed instances of public law knowledge and experience cry out, however, for the coherence that a comprehensive study of this sector could bring – a study which could provide the context within which legal intervention, with both its opportunities and limitations, could be understood. And it would be reasonable to assume that comparative treatment of related institutions and procedures of governmental powers in different constitutional and administrative circumstances would add to our understanding.

Dr Catherine Donnelly’s *Delegation of Governmental Power to Private Parties: A Comparative Perspective* goes a very long way to meeting these needs. It is a substantial study – comparative across the legal systems of the United States, England and the European Union – of the context of private delegation (ch 2); its benefits and challenges (ch 3); constitutional controls on delegation (ch 4); legislative and regulatory controls (ch 5); and human rights controls, administrative law controls and private law controls on private delegates (chs 6-8). The book concludes with a chapter on “Comparisons, Law and Delegation”. It is based on a doctoral dissertation undertaken at the University of Oxford.

The book has many strengths. It is systematic and comprehensive. It is rigorous in its chapter-by-chapter comparative treatment of the selected themes. There is a useful summary at the end of each chapter of the principal comparative conclusions to be drawn. The extended treatment of the “public authority” for the purposes of the Human Rights Act 1998 makes a valuable contribution, and the inclusion of rules less familiar to the British reader from the United States and the European Union (including, for instance, *Meroni v High Authority* (Case 9/56) on which Donnelly relies heavily) provides an excellent resource in itself