

## Sovereign/Lord? The enduring legal importance of Revestment

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Law has an extremely complicated relationship with history. In particular, claims to legal legitimacy often base themselves on an argument that a particular legal position can be found in earlier sources, in a sense sanctified by the passing of time. This is particularly the case in areas of legal uncertainty, or areas lacking a statutory basis, where the occasionally Delphic utterances of judges are particularly important. Where an act of the legislature explicitly repeals an earlier act on a topic, and replaces it with new legal rules, the fact of the change is pretty clear. Where a range of judges over – at times – a number of centuries have contributed to a body of law, it is much less easy to establish whether a particular moment is one of change, clarification, or reassertion of the law.

I want to take this as a starting point for my discussion of Revestment. History recognises, and some critics would claim overemphasises, the possibility of change over time. Law has strong drivers for emphasising continuity, even at the cost of retrofitting historically specific legal moments to match a contemporary understanding of law. In relation to law, the historic present tense is often in play.

An example of this, which is not only directly relevant to our understanding of Revestment, but also ties in with a major commemoration of another legal landmark in the Atlantic Archipelago, is Magna Carta. Magna Carta had a surprisingly significant role in the early constitutional thinking of the rebel colonists in the American Revolution.<sup>1</sup> Initially, the conflict between the colonies and Great Britain was phrased as the colonists vindicating their legal rights within the Imperial system. Only after constitutional arguments went against the colonists did they switch to a more assertive defence of their right to independence. Two banknotes issued by the Massachusetts Bay Colony exemplify this. The first was issued in December 1775. The note was designed by Paul Revere, a leading figure in the Revolution, and issued after the first military casualties in the Revolution, the creation of a Continental Army, and a declaration by the Crown that the colonies were in a state of ‘open and avowed rebellion’; but before the Declaration of Independence in July 1776. The note is ‘issued in defence of American liberty’, and depicts a colonial soldier holding a sword in one hand, and the Magna Carta in the other. The motto translates as ‘By the sword we seek peace, but peace only under liberty’. Even at this point, a

significant strand in revolutionary thinking was that they were legally in the right, as a matter of **British** law. A reissue of the banknote, after the Declaration of Independence, replaced ‘Magna Carta’ with ‘Independence’.

The principal constitutional debate was one of direct relevance to the context of Revestment. The Revolution can, with considerable fairness, be seen as a conflict as to the authority of Parliament in possessions of the Crown beyond Great Britain. The revolutionaries argued that Parliament had no authority, particularly in relation to taxation; the British government argued that Parliament had the power to make law for possessions, even those with representative legislatures of their own, for all matters. Both parties used legal documents and commentary dating back as far as Magna Carta, frequently the **same** documents and commentary, to support their understanding of the current law in the late eighteenth century. Flaherty has convincingly argued that the key constitutional moment in the evolution of the doctrine of the authority of Parliament in all realms was in the early eighteenth century, when between 1717 and 1720 the Irish and British House of Lords clashed over appellate jurisdiction.<sup>2</sup> The balance of academic opinion is, perhaps, that British law **was** against the colonists and in favour of the ultimate sovereignty of Parliament throughout the dominions of the Crown; but that the novelty of the doctrines upon which this finding depended strengthened the Revolutionary case to be vindicating ancient rights.<sup>3</sup>

So, lawyers use history in interesting ways; and around the time of Revestment the legal authority of Parliament over non-British territory of the Crown was the subject of intense constitutional disagreement. Let me bring the focus back on Revestment, and in particular the legal transfer of the regalities. There are four ways of understanding this legal moment, and these different understandings are of more than theoretical importance.

- (1) The UK Crown usurped constitutional authority over the Isle of Man. It had not previously exercised statutory authority in any meaningful way over the Island, and the Revestment Act was beyond the authority of Parliament, and of no legal effect. Unlike the

<sup>2</sup> Martin Stephen Flaherty, ‘Note: The Empire Strikes Back: *Annesley v Sherlock and the Triumph of Imperial Parliamentary Sovereignty*’, *Columbia Law Review* 87 (1987), p. 593.

<sup>3</sup> See further Mary Sarah Bilder, *The Transatlantic Constitution* (Cambridge, 2008).

<sup>1</sup> See Harold Hazeltine, ‘The influence of Magna Carta on American Constitutional Development’, *Columbia Law Review* 17(1) (1917), p.1.

- American colonists, there was no realistic chance of successfully resisting this usurpation. The legal change was acquiesced to, but lacked legitimacy, and legitimacy was not to be gained by the simple passage of time. On this view, no Act of Parliament has any effect in the Manx legal order.
- (2) The UK Crown usurped constitutional authority in this way, but the acceptance of the usurpation in the Isle of Man over a prolonged period, marks a change in the fundamental legal order of Mann – what Kelsen called a *grundnorm* change.<sup>4</sup> Claiming that the legal system should recognise the pre-Revestment status quo as the legitimate law is as useful in contemporary terms as holding to Franz, Duke of Bavaria, the descendant of James II, as United Kingdom Sovereign in preference to the more conventional line established by the Glorious Revolution of 1688. On this view, although the origins are dubious, Acts of Parliament have legal authority in the Island. The dubious way in which the authority was required, however, is relevant to the negotiation of constitutional authority between Manx and British organs of government.

Sybil Sharpe argues for the illegitimacy of Revestment, with an element of both of these understandings in her work.<sup>5</sup> A difficulty with her argument is that we must discard a considerable volume of legal authority as illegitimate, rather than as evidence that Parliament had, and was understood to have, constitutional authority over the Isle of Man. It is fair to say that the affairs of the Isle of Man were of limited interest to England until the eighteenth century; but on areas that were of interest, we can find legislation and state action. My personal favourite is the decisive role of the English state in determining the identity of the Lord of Mann,<sup>6</sup> but another commentator has preferred a 1541 Act of Parliament dealing with ecclesiastical matters of Chester and Man – both coming within what Gumbley categorised as that body of legislation dealing with ‘matters of state.’<sup>7</sup>

- (3) The UK Crown exercised its legitimate authority as Sovereign to extinguish the Lordship of Mann. From 1399 the Isle of Man was a conquered territory of the English Crown, which gave Parliament unfettered lawmaking power. For a number of centuries government, and so also law-making, was granted to the Lord of Mann. Revestment consisted of the surrender of the estate of the royal Lord of Mann, and the extinguishment of the Lordship as a bundle of rights against the Crown. The Crown chose to continue the former Lords’ concessions to Tynwald, on policy rather than constitutional grounds. The view is argued for by Augur Pearce.<sup>8</sup> Augur’s important contribution to this debate gives much less emphasis to how Revestment has been seen, and much more to what he describes as ‘basic rules of feudal tenure’, in particular seeing Revestment as surrender of the Lord’s estate, and ‘the result of a surrender is merger’, so that ‘the superior lord cannot be said to “hold his vassal’s [subordinate] estate”. What he holds is *his own* estate ... freed from an encumbrance.’ His view is, however, incompatible with a considerable volume of statute, case-law, and constitutional practice. He contends that this is simply mistaken.
- (4) The UK Crown exercised its legitimate authority in 1765 to take over the regalities of the Lord of Man, adding them to its authority as Sovereign, or overlord. After Revestment, we can see a pattern of Parliament being much more active in legislation for the Isle of Man, but this was not the exercise of a new power. Rather it was a result of the UK having a direct interest in the governance of the Isle of Man, and no interest in respecting the interests of a feudal estate holder to exercise their own regalities. When the UK Crown exercised powers, and used mechanisms, formerly used by the Lord, however, they acted as Lord of Man. This is my position, which falls somewhat between that of Sharpe and Pearce, but I think is more compatible with the legal sources and constitutional practice.

This is obviously interesting, but is it important? I think it is, and I can demonstrate this by a landmark case in the development of the Manx constitution: *Re C.B. Radio*.<sup>9</sup>

<sup>4</sup> Hans Kelsen, *General theory of Law and State* (Cambridge, 1949).

<sup>5</sup> Sybil Sharpe, ‘The Isle of Man – In the British Isles but not ruled by Britain: A modern peculiarity from ancient occurrences’ in Peter Davey and David Finlayson (eds), *Mannin Revisited: Twelve essays on Manx culture and environment* (Douglas, 2002), pp.161-72.

<sup>6</sup> Peter W. Edge, *Manx Public Law* (Preston, 1997), p. 41.

<sup>7</sup> Ken Gumbley, ‘Extension of Acts of Parliament to the Isle of Man’, *Manx Law Bulletin* 8 (1987), p. 78.

<sup>8</sup> Augur Pearce, ‘When is a colony not a colony? England and the Isle of Man’, *Common Law World Review* 32 (2003), p. 383.

<sup>9</sup> *Re C.B. Radio* [1981-3] Manx L.R. 399.

*Re C.B. Radio* is, on its facts, a prosaic enough case. The Attorney General sought to condemn goods seized by customs officials. The import prohibition was made by a Manx authority, under an Act of Tynwald, and the owners argued that this Act was void due to conflict with an Act of Parliament, and an Order made under such an Act. The Attorney General took a conservative approach to winning the case, arguing that the Manx legislation was not in conflict with either the Act or the Order. Hytner JA resolved the case rather more radically, building on an earlier decision where he had suggested that Parliamentary authority was based on 'delegation' from the sovereign as Lord of Mann.<sup>10</sup> He said:

[the appellant's advocate] postulated the difficulties which would arise if neither legislature were supreme and there was a clear conflict between an Act of Parliament and an Act of Tynwald. We can, however, see no difficulty at all as long as the Lord of Man remains the same person as the United Kingdom Sovereign. Since her consent is required before Acts of either legislature become law, it must follow that the later Act (whether of Tynwald or of Parliament) must prevail ... Nor can we accept that any conflict exists between the legislation passed at Westminster and that passed in the Island.

Hytner JA in *Re C.B. Radio* claims, in the common judicial manner, to simply be stating the law as it always was. It is, however, unthinkable that his view of the co-ordinate jurisdiction of Tynwald and Parliament would have been enunciated before the Second World War. As well as a wealth of cases and constitutional examples in the nineteenth century, in *Re Robinson*, decided in 1936, Deemster Farrant observed that if an Act of Parliament did extend to the Isle of Man, Tynwald could not effect any limitation or alteration of the application of the Act to the Island.

In that sense, then, *Re C.B. Radio* is a decision of its time, embedded in a context of increasing constitutional autonomy for the Isle of Man, and decreasing interest and activity by Parliament and UK government. I have argued elsewhere that its theory of Parliamentary sovereignty, and its understanding of Royal authority within both the UK and Manx constitutions, is seriously flawed.<sup>11</sup> It is, however, striking that since this decision Tynwald has legislated in such a way as to clearly

repeal or amend Acts of Parliament as they apply to the Island. A later case has accepted the theory in *Re C.B. Radio* without adding to it.<sup>12</sup> The coordinate jurisdiction of Tynwald and Mann, based by Hytner JA on the continued existence of Sovereign and Lord in the same person is a constitutional fact, albeit one subject to a further resolution by the courts or some other constitutional process. It is a fact that depends upon a particular understanding of Revestment.

I will add a final, perhaps provocative, note on the significance of how we see Revestment. The Succession to the Crown Act 2013, an Act of Parliament, changes the rules for succession to the Crown, most notably in providing that in the future, the eldest child, rather than the eldest son, will inherit the Crown. As noted during the preparation of the Act, the Act will by necessary implication extend to the Isle of Man. Tynwald recognised this, with the decision to amend the Criminal Code 1872 to recognise female heirs' apparent to the Crown being made on the basis of the 2013 Act changing succession.<sup>13</sup> If the Revestment was an extinction of the Lordship of Mann, then the Act resolves the future Head of State for the Isle of Man. There is no Lordship to be inherited, and the Act changes succession to the Crown. If, on the other hand, the Lordship survives in the same natural person as the Crown, as *Re C.B. Radio* indicates, we could quite easily have the situation where, apart from the 2013 Act, a younger son would inherit in preference to his elder sister. In relation to the Crown, the 2013 Act makes it clear the daughter would inherit. But would the son be entitled to become Lord of Mann? Jersey tackled this head on, with their 2013 Law beginning 'Whereas Her Majesty is Sovereign of the Bailiwick of Jersey, such Realm being anciently part of the Duchy of Normandy', and ensuring that succession matches UK law.<sup>14</sup> The Council of Ministers decided not to introduce similar Manx legislation.<sup>15</sup> If our current understanding of Revestment requires us to take the idea of a surviving Lordship seriously, then separate inheritance of the two would seem to follow. A more likely outcome, perhaps, is that our understanding of what happened in 1765 will - again - change to match current constitutional realities.

<sup>12</sup> *In Re Tucker* (1988) 11 Manx L.B. 33.

<sup>13</sup>

<http://www.tynwald.org.im/business/hansard/20002020/c150324.pdf> accessed 5<sup>th</sup> September 2016. Given effect by Legislation Act 2015 s.99(1) amending Criminal Code 1872 s.2.

<sup>14</sup> Succession to the Crown (Jersey) Law 2013 art.2.

<sup>15</sup> <https://www.gov.im/media/627389/cominmarch2012.pdf> accessed 5<sup>th</sup> September 2016.

<sup>10</sup> *Crookall v Isle of Man Harbour Board* [1981-3] Manx L.R. 381.

<sup>11</sup> Peter W Edge, 'David, Goliath and Supremacy: The Isle of Man and the Sovereignty of the United Kingdom Parliament', *Anglo-American Law Review* 24(1) (1995), p.22.