

INDIVIDUAL OPINION OF JUDGE BASDEVANT

[*Translation*]

While concurring in the operative part of the Judgment, I am bound to say that the reasons for which I do so are to a great extent different from those stated by the Court. I therefore think that I should indicate in outline, but without exhaustive consideration of each separate point, the means by which I arrive at agreement with the operative part. I do not propose, in doing this, to embark upon a criticism of the reasoning adopted by the Court, nor to express my views on all the points dealt with in the at times over-complete arguments of the Parties ; to do either would be to go beyond the bounds within which an individual opinion ought, in my view, to be kept. I shall not indeed indicate the particular points on which I am in agreement with the reasons given by the Court.

In my view the present proceedings are essentially concerned with the interpretation, in so far as it affects the Ecrehos and the Minquiers, of the division of the Duchy of Normandy in the Middle Ages between the King of England and the King of France, the United Kingdom being now the successor to the rights of the King of England while the French Republic is the successor to the rights of the King of France. The problem was posed in this form by Sir Lionel Heald at the hearing on September 17th. Reference to this idea of division is made on a number of occasions in the course of the arguments of Professor Wade and of Professor Gros.

Sir Lionel Heald placed this division, the effect of which has to be determined, in the thirteenth century. In reality the facts constituting the division were spread over a longer period. The division was indeed effected as a result of a series of acts of war, acts of possession and treaties in the course of the thirteenth and fourteenth centuries. Both Parties go back to all these factors to find the historic titles upon which they seek to rely.

At the very beginning of the thirteenth century, immediately before the division of Normandy, the Ecrehos and the Minquiers formed a part of this Duchy and were subject to its Duke. The King of England, as such, did not then possess any rights there : the Duke of Normandy's conquest of England in 1066 and his acquisition of the title of King of that country cannot have conferred upon the King of England, as such, any title to the possessions of the Duke of Normandy. The two crowns, one royal, the other ducal, were vested in the same person, but legally they remained distinct. This situation was in complete consonance with the law of the feudal period, which was to subsist in the time of the conception of the princely State only to give way with the growth of the conception of a national State, leaving traces even in modern

times and indeed until the present day. For the King of England to have any place in the status of Normandy it is necessary for him to be substituted for the Duke of Normandy : such a novation was to take place in the course of the events by which the division which has to be interpreted was effected.

Immediately before the division of Normandy the King of France was the suzerain of the Duke of Normandy. The title which he thus possessed to the Duchy and to the islands which formed a part of it was not merely a nominal title. The Judgment of 1202, the forfeiture which resulted from it, certain provisions of the Treaty of Troyes of 1420 and indeed the terminology of the Treaty of Paris of 1259, which uses the word "give" to indicate what was done by the suzerain, the King of France, when, in respect of certain territories, he released the King of England from the effects of the forfeiture, all these factors go to show that this was so. Suzerainty, however, is not sovereignty. For the French Republic to be able now successfully to rely upon the ancient title of the King of France, it is necessary to show that this ancient title became augmented as a result of the disappearance, from beneath the King of France and in respect of the disputed islets, of the vassal, the Duke of Normandy. A transformation of this sort occurred in the case of Continental Normandy in the course of the events which brought about the division. What has to be determined is whether such a transformation enured to the benefit of the King of France in respect of the Ecrehos and the Minquiers, or whether the birth of some new and independent right over these islets, a right vested in the King of England, prevented such a result. This is the real question, and it is unnecessary to go into the contention that the suzerainty of the King of France lapsed as a result of the disappearance of the feudal system towards the end of the fifteenth century, a contention which makes light of the fact that up to the end of the seventeenth century the policy followed by the French Kings in regard to boundaries was linked to feudal principles, and of the fact that survivals of these principles remained until a much later date than this.

The Judgment of 1202, with regard to which there has been controversy between the Parties, is not in itself relevant to the present case, for given as it was, against the Duke of Normandy, it did not affect the King of England. It did not deprive him of any right since the rights over Normandy belonged to the Duke and not to the King of England, and clearly it did not confer any right upon the King of England. It is therefore unnecessary to linger upon the doubts and criticisms to which this Judgment has given rise. The Judgment deserves to be mentioned here only because it is at the origin of the events marking, on the one hand, the beginning of the substitution of the King of England for the Duke of Normandy in regard to domination over Jersey, Guernsey and other islands, and, on the other hand, the beginning of the substitution of the sovereignty of the King of France for his suzerainty over Continental Normandy.

King John, as Duke of Normandy, treated the Judgment of 1202 and the forfeiture which ensued as a result of it with defiance; he resisted the forfeiture, having recourse, for this purpose, to force which was available to him in his capacity as King of England. While the King of France eliminated his vassal from Continental Normandy, the King of England, after various vicissitudes, gained possession of the islands or of some of them. This marked the breaking up of Normandy, the division of what had been united under the authority of the Duke and the suzerainty of the King of France.

In the course of these events, the King of England acquired *jure belli* and on his own behalf a title to the islands within his power, a title which was later to be confirmed by certain treaties. He thus became substituted for the Duke of Normandy in these islands. There was a novation of his title as a result of which "some alternative administration had to be framed by the English Crown to replace that of the Duke of former years", as is said in the Memorial (para. 26). The title thus acquired by the King of England may properly be invoked by the United Kingdom at the present day.

Did this title of the King of England extend to the Ecrehos and the Minquiers?

The Treaty of Paris of 1259, which provided for the effects of the forfeiture, partly doing away with these and confirming the remainder, seems to me to refer, in Article 4, to the Channel Islands *inter alia*. It would seem to me to be difficult to hold that it had overlooked them, and when it speaks of land on this side of the sea of England and immediately afterwards mentions the islands, I am of opinion that it refers to the Channel Islands rather than to any other islands; if it adds that the King of England shall hold these islands "as peer of France and Duke of Aquitaine", this is because it was not possible to say in this Treaty that the King should hold them as Duke of Normandy. From Article 4 of this Treaty, and from the reference it contains to the liege homage of the King of England to the King of France in respect of all that the King of France "gives" to the King of England, it seems to me to emerge that the King of England received the Channel Islands which he held at the time of the Treaty, that he was to have them as vassal of the King of France who remained their suzerain as in the past.

The Treaty of Calais or Brétigny of October 24th, 1360, went a step farther with regard to the right of the King of England. It indicated an agreement according to which the King of England should have and hold all the islands which he "now holds". His title to them was thus to be a complete one—he would no longer hold them as a vassal of the King of France. The rights of the King of France over these islands disappeared. This Treaty renders unnecessary further reference to the Treaty of 1259. It confirms the right which the King of England had acquired *jure belli*.

To determine whether this right of the King of England, which supplanted that of the King of France, extended to the Ecrehos and the Minquiers, it is necessary to ascertain whether the King of England held these islets at the time of the Treaty of 1360. The Treaty imposes this condition, but it contains no clear indication as to whether the Ecrehos and the Minquiers are to be considered as forming part of the portion enuring to the King of England. This lack of precision is common in the treaties of the period; these are not concerned with precise definitions of boundaries but are based rather on feudal concepts of dependence; the history of the French monarchy up to the end of the seventeenth century is filled with a mass of disputes relating to the interpretation and application of instruments of this kind. From the fact that the Ecrehos and the Minquiers are not expressly mentioned here and from the fact that in other instruments they do not appear in one or another of the enumerations of islands, or that after the indication of certain islands there is or is not a reference to their dependencies, no conclusion can be drawn as to the sovereignty over the islets. It is necessary to have recourse to other elements for a decision.

If it were a question of interpreting the Treaty of 1259, it would be necessary to have regard to the fact that the King of France by this Treaty "gives" the islands, on condition of liege homage, to the King of England who, until then and in that capacity, enjoyed no rights there save those which he had acquired by force of arms. In case of doubt, therefore, this Treaty should be interpreted in favour of the grantor, in the sense of restricting the gift. But what is in fact involved is the interpretation and application of the Treaty of 1360. This Treaty, however, does not make any reference to a gift by the King of France. It contains a statement of an agreement to the effect that the King of England should have the islands which he "now holds". This provision must be interpreted, not in a way *a priori* favourable to one Party rather than the other, but in a spirit of equality appropriate to the interpretation of the division effected in a century of confused strife.

Were the Ecrehos and the Minquiers held by the King of England in 1360? No direct and positive evidence to this effect has been adduced. Moreover, I do not think that the Charter of January 14th, 1200, in favour of Piers des Préaux, or the Charter which the latter granted in 1203 for the establishment of a Priory on the island of Ecrehos can provide proof that in 1259, and still less in 1360, the King of England held this island and the islets and rocks within this group; these charters provide us with information as to the feudal dependence of the island of Ecrehos in 1200 and 1203, but they furnish no information as to the factual position existing in 1360.

Holding the islands—this is an expression which is used in the Treaty of 1360 in the military sense; it refers to the situation created by the military strength of the King of England. So far

as inhabited islands are concerned, this idea involves the establishment of English military authority in these islands, the possibility of action taken by the King's agents in respect of the inhabitants and, by the same token, the prevention of foreign action in the islands thus occupied. But none of these elements are to be looked for in the case of the Ecrehos and the Minquiers, islets and rocks which are practically uninhabited and most of which are uninhabitable. From a military point of view, for the King of England to hold them, it is not necessary that he should maintain a garrison there; it is sufficient that by reason of his military and naval power he should be in a position to intervene there when he considers it appropriate without being prevented from doing so by the forces of the King of France and that, by the same token, he should be in a position to prevent intervention by these forces. It would seem probable that the King of England, who had established himself on the principal Channel Islands and who remained there by virtue of the naval power available to him, was thus in a position to take such action in respect of the Ecrehos and the Minquiers. Without here introducing the concept of an archipelago, which is not in consonance with the geographical situation, the propinquity of these islets in relation to Jersey tends to confirm this probability. It would therefore seem that within the meaning of the Treaty of 1360, the disputed islets were then held by the King of England and that the condition imposed by the Treaty for their being assigned to him as part of the division was satisfied.

It would be of very great assistance if it were possible to find confirmation of this probability in certain contemporary facts. The *Quo Warranto* proceedings of 1309, which can be considered relevant only with regard to a question of the *advocatio* raised therein, did not result in any expressed decision on this point and the arguments relied on before the Judges and accepted by them—the arguments relating to the poverty of the Priory—were quite unconnected with that part of the proceedings; the desired confirmation is not therefore to be found here. As to the actual relations with Jersey arising from the gifts made to the Priory by the inhabitants of that island or the occasional visits of the Prior to Jersey, these are at least counterbalanced by the relations and the ecclesiastical discipline then existing between the Priory of the Ecrehos and the Abbey of Val-Richer which was on French soil. Neither here nor in any similar facts is it possible to find anything which confirms or invalidates the hypothesis according to which the disputed islets would appear to have formed a part of the islands held by the King of England in 1360.

The period which followed was one of strife in the course of which the advantage often lay with English arms. During a great part of this period Continental Normandy itself was in the hands of the King of England. The Treaty of Troyes of 1420, which made

the King of England heir to the Crown of France—an inheritance of which subsequent events did not permit him to reap the fruits—expressly re-attached the Duchy of Normandy to the Crown of France, and it preserved the distinction between the two Kingdoms under the authority of one and the same “King and sovereign lord”. Finally, this prolonged strife resulted in the maintenance of French domination in Continental Normandy and English domination in Jersey, Guernsey and other islands: the division was preserved by the later Treaties without its terms being clearly defined by them.

Those which have been referred to in the arguments do not appear to me to assist the solution of the dispute. The Fishery Convention of 1839 is irrelevant on the question of sovereignty. It cannot, however, be completely disregarded. This Convention, indeed, by its provisions on common fishery, either directly or as the result of a traditional liberal interpretation dictated by the character of the places in question, furnished sufficient justification for fishery acts and even for acts of user of the islets in connection with fishing requirements; facts of this sort cannot thus be taken into consideration as providing any helpful indication on the question of sovereignty.

All these elements provide no more than an interpretation which is probable but not backed by decisive proof, that the disputed islets were held by the King of England in 1360 and that they must therefore be regarded as having been acknowledged his by the Treaty of that year. Some doubt must still linger, however, since this interpretation would lead to the acceptance of the view that there was an increase in the rights of the King of England on these islets and a corresponding abandonment of his rights by the King of France in relation to what had been decided in the Treaty of 1259.

This uncertain situation continued for a long period without any attempt being made to clarify it. On both sides a lack of interest was displayed in these islets, and when the disappearance of the Priory brought about the disappearance of the light which it had maintained on the island of Écrehos for the guidance of fishermen, neither Jersey nor Val-Richer, it seems, was concerned to maintain the only public service which for centuries existed on these islets. When, in the nineteenth century, an interest was taken not in the islets themselves but in this area, this was concerned in the first place with the regulation of fisheries by the Convention of 1839, but the question of sovereignty over the islets was not raised. This question arose only in the last quarter of the nineteenth century.

A great many facts have been relied upon in support of the rival claims of the two Governments to sovereignty over the disputed islets, particularly facts which occurred in the nineteenth and twentieth centuries. In considering such facts one must not

lose sight of the fact that the dispute relates not to rival claims to have acquired sovereignty over territory which was *nullius*, but to the interpretation of the division which was effected in the Middle Ages. The fact that one State exercised its authority on the disputed islets or on some of them constitutes no more than the expression of that State's convictions with regard to its own sovereignty over the islets, if it be not merely a reflection of its desire, a desire without ulterior motives, to provide for the protection of its nationals in the absence of any established authority in the region: a unilateral expression of such convictions is not sufficient to invalidate a claim of the other State any more than a protest by one has this effect as against the other. There was at least a latent conflict between the two States as to the interpretation of the division, a conflict which it was not open to one of them to settle in its favour by a unilateral act. What must be ascertained in order to arrive at an interpretation of this ancient division which is now legally valid is, in the first place, whether the facts invoked reveal that either Government renounced its own claim or acknowledged that of the other Party. The discovery of such a fact or of such an admission would be sufficient to settle the issue. In the absence of a finding of this sort it is necessary to ascertain whether the facts invoked are consistent or inconsistent with the interpretation that the Treaty of 1360 placed the disputed islets within the portion assigned to the King of England, an interpretation so far based on the hypothesis, which is merely one of probability, that the King of England, who held the principal islands in 1360, also held the disputed islets.

On the first point, it is necessary to determine the effect of the letter of September 14th, 1819, from the French Minister of Marine, of which a copy, together with a chart, was transmitted to the Foreign Office on June 12th, 1820, by the French Ambassador; this contained a reference to the "islands of ... the Minquiers which are in the possession of England". If it is to be taken literally, this reference would resolve the matter in respect of the Minquiers, but it seems to me that one cannot attribute such authority to it. This letter was forwarded only to provide certain clarification, in the course of negotiations relating to the protection of oyster fisheries and not to sovereignty; it emanated from a Minister without authority to make decisions pertaining to questions of territorial sovereignty and indeed it reveals certain serious lapses of memory on the part of its author; in London it was considered of so little weight that Canning, when drafting his instructions for the purpose of the ensuing negotiations, based himself on the ground of the State's exclusive fishery rights in its territorial waters and on that of reciprocity and, while admitting the existence of a belt of reserved fishery around the Chausey Islands—which he described as "uninhabited"—made no provision for either the Minquiers or the Ecrehos. The words of the Minister

of Marine would not therefore appear to amount to an admission upon which reliance can be placed at the present day. It would be equally wrong to construe Canning's silence upon this point as implying an acknowledgment by him that these islets were outside British sovereignty. For neither of the responsible statesmen did this question arise at that time.

Though in terms less explicit, the attitude of the two Governments with regard to a fishery incident in 1869 seems to me to be of greater significance so far as the substance is concerned. Some Jersey fishermen had then complained of certain depredations committed on the Minquiers for which they blamed French fishermen. But these facts did not give rise to any police acts or any exercise of jurisdiction on the part of the Jersey authorities such as might normally have followed from the British possession of sovereignty over these islets. These complaints were dealt with, at the request of the Jersey authorities, on a governmental level, that is to say, on a level where those who had to deal with them had authority to decide questions of territorial sovereignty. The complaints were the subject of a *démarche* by the British Embassy which requested the French Government to take appropriate measures; the latter Government undertook an enquiry the results of which it communicated to the Embassy. It can thus be seen that on this occasion the Government in London adopted an attitude which would seem to imply that it did not consider itself entitled to regard the Minquiers as a British possession. Such an interpretation can be avoided only if it be considered that that Government was then acting in a spirit of moderation desiring not to aggravate a trifling incident with regard to which the most important point was to ascertain whether the charge that had been made had any basis in fact.

There was a similar incident in 1929, again in connection with the Minquiers, when one Le Roux started building there after a lease had been granted to him by the French Administration. Again the British authorities did not attempt to prevent him by the exercise of the police or jurisdictional powers which they claimed to possess on the Minquiers by virtue of territorial sovereignty. The British Government addressed itself to the French Government, requesting it to prevent Le Roux from carrying on with the building he had started, and this was done. In this case neither of the two Governments went as far as its contentions in relation to sovereignty over the Minquiers. The spirit of moderation which they both displayed can prejudice neither the one nor the other.

It does not seem to me that one would be entitled to conclude from these facts, or from other facts of a similar nature, that there was any renunciation by either State of its claim to sovereignty over the disputed islets, or any acknowledgment of the rival claim.

It thus becomes necessary to enquire whether the facts invoked on either side are such as to confirm or invalidate the interpretation according to which the medieval division resulted in the disputed islets being included in the portion of the King of England. We are not here concerned to seek the birth of any new title enuring to him, but rather confirmation of the correctness of a probable, though uncertain, interpretation of this division.

As I have indicated, when I referred to the 1839 Convention and to the liberal construction which in practice was given to it, no conclusion can be drawn in this connection from the fishery acts or from acts connected with fishing.

There are numerous facts, the existence of which has not been challenged—although there is disagreement as to the conclusions to be drawn therefrom—which show that the Jersey authorities have for a long time, on repeated occasions and in a consistent manner, concerned themselves with what was happening on the Ecrehos and the Minquiers and have acted accordingly. They have done so by the assumption of jurisdiction and by police and administrative acts. I have some hesitation in regarding the assumption of jurisdiction as the assumption of territorial jurisdiction. The facts to which the jurisdiction related occurred on islets which are not much more than emerged rocks on which there was no established authority, and they could thus easily furnish the occasion for an extension of jurisdiction just as if the wrong had been committed or the wreckage had been gathered on the high seas. Lord Finlay, in his opinion in Judgment No. 9, referred to this extension of jurisdiction in maritime cases (P.C.I.J., Series A, No. 10, p. 51). Jurisdiction was exercised with regard to Jersey men; at the time of the incident of 1869 and in the case of Le Roux, instead of applying jurisdiction, recourse was had by the British Government to action by the French authorities. Such recourse is inconsistent with the essential characteristic of territorial jurisdiction which is its exercise in respect of all persons. Census operations extending to persons on the islets or to acts carried out there do not imply the exercise of a territorial competence; the same is true of rates imposed upon Jersey men, in Jersey, in respect of property belonging to them on the islets; there is nothing to prevent a State's taxation of its nationals in respect of property abroad or its compilation of statistics of facts occurring abroad. The setting up of a custom-house on the islets by the Jersey authorities would seem to be more significant; but, in the first place, no information relating to operations carried on there has been submitted and, secondly, we read in a document of 1886 produced by the United Kingdom that "[French] customs cutters go once a week to the Ecrehos". Finally, it must not be forgotten that international practice recognizes or tolerates customs control carried out by a State outside its territorial waters.

If, moreover, Jersey men prepared their instruments of purchase or conveyance of property on the islets in Jersey and in the forms usual there, this is to be regarded less as an exercise of public authority over these islets than as an adoption of the only practical means available to those concerned.

At least the facts briefly mentioned above and other similar facts show that for a long time and in a consistent manner the Jersey authorities have taken an interest in what was happening on the Ecrehos and the Minquiers and that they took action in this connection to an extent and in a way appropriate to the character of these islets and the use which was made of them. They did this without encountering any competing action, still less any exclusive action, on the part of the French authorities. The latter displayed a far greater reserve. The French Government cannot be reproached for having sometimes sought a settlement of the dispute by means of compromise, but it is impossible not to have regard to the hesitation it showed for a long time to press its contentions and to the at least relative abstention of the French authorities from taking action with regard to what was happening on the Ecrehos and the Minquiers.

From the facts thus alleged and, in particular, from the action of the Jersey authorities, unimpeded by competing action on the part of the French authorities, it is possible to deduce some *ex post facto* confirmation of the reasonableness of the hypothesis previously stated, according to which the King of England, who held the principal islands in 1360, was in a position to exercise power over the Ecrehos and the Minquiers and that he held these islets within the meaning of the Treaty.

From these same facts it appears that, in the absence of the establishment of a separate local authority on the disputed islets, there was, to the extent permitted by the character of these islets, greater and more continuous activity on the part of the Jersey authorities than on the part of the French authorities and that in this way a tradition of the attachment of the islets to Jersey has grown up. This reveals the interpretation which in practice has been given to the division of 1360. An interpretation already manifested before the birth of controversy between the two Governments as to sovereignty which has subsisted in practice throughout the course of this controversy. This interpretation confirms the interpretation previously advanced.

Thus the United Kingdom has, in modern times and at the present day, held the disputed islets so that the hypothesis that the King of England formerly held them appears to be reasonable. At the same time the medieval division has been interpreted in practice in the sense of an attribution of the islets to the King of England. All this, however, was done not in absolute terms but in a somewhat flexible manner; the British authorities have acted with moderation, hesitating to exercise the full rights which

the United Kingdom now claims, addressing themselves to the French authorities in preference to taking action against Frenchmen. In order to maintain what has been established by practice on the basis of ancient instruments and of a liberal interpretation, this flexibility should likewise be maintained. But the Court has not been asked either in the Special Agreement or in the written proceedings or in the course of the arguments to prescribe such a maintenance.

This being so, and in the light of the facts referred to above, the decision set forth in the Judgment appears to me to be justified.

(Signed) BASDEVANT.