MISCELLANY

Blood red robes and Norman custom[1]

1 On 26 August 1558 the *Parlement de Normandie* issued a judgment which came to be known as the *arrêt du sang damné* [judgment of the condemned blood]. For the delivery of judgment, the judges dramatically donned robes which were blood red in colour, marking the solemnity of the occasion. The case turned on the question whether the children of a condemned man were entitled to inherit. The *Grand Coutumier* appeared to answer the question categorically in the negative.[2]

2 The facts were straightforward. Guillot Laurens had been condemned to death by decapitation in 1549. All his goods were confiscated in accordance with custom but in 1552 his father, Guillaume Laurens, died. The question then arose whether his grandchildren, children of Guillot, were entitled to a share of their grandfather's estate. Guillot's sister, Marion, argued that they were not entitled, because they were procreated from contaminated blood. She relied upon the *Grand Coutumier*. The Bailiff of Rouen agreed with her, and awarded her the entire estate.

3 The *tuteur* of the children, Marin Baudoyn, appealed to the *Parlement de Normandie*. The case aroused considerable interest. The judges referred it to the Full Court of all the chambers,[3] a very unusual occurrence and evidence, perhaps, that it was regarded as *une matière épineuse* [a thorny question]. The *tuteur* argued that the children had been born before the crime for which their father had been condemned, and that their blood was therefore innocent; at the time of their births, they were perfectly capable of inheriting from their grandfather. They inherited *de leur chef*—on their own behalf, and not by *représentation* though their father. The custom in its Latin text (*ex sanguine damnato procreatus*) left open the question, he argued, whether the prohibition

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[1] The Editorial Board gratefully acknowledges the assistance obtained from a note written by Gwenaëlle Callemein published at www.conde.hypotheses. org

[2] Terrien, *Commentaires du Droict Civil* (Rouen, 1654) *Livre VI, De succession & partage d'heritage*, at 214, "*De forfaiture advient que succession est perduë. Car nul des enfans à celuy qui à forfait sa terre, ne peut succeder en l'heritage* . . ."

[3] *C.f.* the sitting of all the available 11 justices of the Supreme Court in *R (Miller) v Prime Minister* [2019] UKSC 41.

applied if they had been born before the crime in question had been committed. Children should not be punished for the sins of their father.

4 Marion Guillot responded that no case could be found where the *Grand Coutumier* in all its rigour had not been applied. Even if the custom was "*dure et inhumaine*" it was founded upon principles of deterrence.

5 The Attorney General intervened and argued that the custom of prohibiting inheritance from "contaminated blood" was regarded with horror by the Normans "*tellement que peu à peu ils cessèrent d'en user; de manière qu'elle a été abrogée par le tacite consentement de non-usants*" [to such an extent that little by little they ceased to have regard to it; with the result that, by tacit agreement, it has been repealed by non-user]. It had not been invoked, he said, for more than a hundred years. Custom was none other than unwritten law, brought into being over a long period by the tacit consent of Sovereign and the people.[4] Just as it could be made, it could be unmade. The Attorney General's arguments were accepted by the *Parlement*, which found that the custom by which the children of the condemned could not inherit had been repealed by non-user. The judgment was reflected in the reformed *Coutume* of 1583. Article 277 provides that "*les enfants des condamnés et confisqués ne laisseront de succéder à leurs parents, tant en ligne directe que collatérale, pourvue qu'ils soient conçus lors de la succession échue* [children of those who have been condemned and whose goods have been forfeit may succeed to the their parents' estates, both in the direct and the collateral line, provided that they have been conceived at the time when the estate opens].

6 It seems unlikely, however, that the *arrêt du sang damné* of the Norman *Parlement* is the genesis of the red robes customarily worn by the Jersey judiciary. Le Geyt[5] tells us that Bailiff Herault[6] was the first

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[4] "*La Coutume n'est autre chose qu'un droit non écrit, qui s'est introduit par un tacite consentement du Souverain & du Peuple, pour avoir été observée pendant un tems considérable*"—Routier, *Principes Généraux du Droit Civile et Coutumier de la Province de Normandie* (Rouen, 1748) at 1.

[5] *Les manuscrits sur la constitution, les lois, et les usages de cette Ile*, Tome IV, at 55

[6] Bailiff of Jersey 1615–26. It was Herault who, in 1616, procured from the Privy Council a pivotal constitutional ruling. "We hold it convenient that the charge of the military forces be wholly in the Governor and the care of Justice and Civil affairs in the Bailiff." Syvret and Stevens, *Balleine's History of Jersey* (Phillimore & Co, 1981), at 100.

to wear a robe in court, but his robe was crimson, in imitation of senior judges in England. Syvret and Stevens claim that Herault wore a red robe,[7] but the authority they quote is Le Geyt who used the word "*pourpre*" [crimson]. *The History of Court Dress*, published on the website of the UK Judiciary,[8] states that until 1635 the colours of judges' robes were violet for winter and green in summer, with scarlet for best. In 1635 a definitive guide was published in the Judges' Rules which decreed a black robe in winter and violet or scarlet robes in summer. Perhaps the colours are close enough to generate confusion. Interestingly, however, the robes worn today by the Guernsey judiciary might more aptly be described as violet or scarlet. Herault's successor, Sir Philippe de Carteret,[9] wore the black robe of a Chancellor. It is clear that by the middle of the 19th century the red robe was customarily worn by Bailiffs and indeed all Crown Officers and Jurats in Jersey.[10] Exactly when that first became the custom is unclear.

Legislative Drafting Office and qualification in Jersey law

7 In 1936 Francis de Lisle Bois was appointed as Jersey's first Law Draftsman, a role he undertook while still in practice with Bois and Bois. In 1946 he became Greffier of the States, still holding the position as Law Draftsman, these posts remaining combined until 1992. Following Advocate Bois's appointment as Deputy Bailiff in 1962, Jersey's Law Draftsman Office was without a Jersey advocate amongst its numbers until December 2019, when trainee legislative drafter and *écrivain* Jackie Harris was sworn in as an advocate.

8 Writing a few years ago,[11] a former Bailiff referred to the fact that since 1963 Jersey's law draftsmen have not been Jersey qualified, observing that a number of statutes enacted since that time "jar with the customary law" and that "some of the thinking behind certain statutes reveals the mind of a

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[7] *Ibid*, at 99.

[8] https://www.judiciary.uk/about-the-judiciary/the-justice-system/history/

[9] Bailiff of Jersey 1627–43.

[10] A portrait of Jean Hammond, Bailiff 1858–80, wearing a red robe, hangs in the Royal Court. The portrait by JS Ward CBE of Sir Peter Crill, KBE, Bailiff of Jersey 1986–95, reveals not only the *toque* that he introduced for ceremonial occasions, but also the red robe of the Bailiff embellished by a row of heraldic ermine.

[11] Bailhache, "Jersey: Avoiding the Fate of the Dodo" in Farran, Ocuru & Donland (eds) *A Study of Mixed Legal Systems: Endangered, Entrenched, Blended*, Routledge, 2014.

common lawyer unschooled in the principles of the civil law". He expressed the hope that Jersey's draftsmen would now gain some knowledge of the principles of Jersey law, especially since the establishment of the Institute of Law.[12]

9 All of Jersey's Legislative Drafters (as they are now called) are lawyers qualified in a Commonwealth jurisdiction, and the current team includes an Australian and a New Zealand lawyer as well as those qualified in the UK. A minimum of 5 years' drafting experience is required for a person to be appointed as a Legislative Drafter in Jersey. The Legislative Drafting Office was from 2005 till 2017 part of the Chief Minister's Office but is now once again part of the States Greffe. The Principal Legislative Drafter (formally known as the Law Draftsman) however now reports to the Greffier of the States rather than sharing the post. Because the drafters fall under the States Greffe rather than the Judicial Greffe or the Law Officers' Department, they cannot, from their current posts, meet the requirements under the Advocates and Solicitors (Jersey) Law 1997 to have worked for the requisite time in a "relevant office". They are thus unable to qualify locally even after passing the qualifying examination without having accrued time elsewhere or moving from their current posts.[13]

10 Perhaps the greater significance of the recent appointment of an advocate as a Legislative Drafter is that the Legislative Drafting Office is, for the first time, training its own local drafters rather than relying wholly on those who have trained elsewhere. The Legislative Drafting Office now encourages its drafters to study for the Jersey exams and hopes to continue to train locally qualified lawyers in future. The value of understanding Jersey law in the context of drafting legislation for Jersey is now well recognised.

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[12] See also L Marsh-Smith "Reform of Jersey Contract Law: Practical Perspectives" (2017) 3 J&GLR 276, fn 135, at 315.

[13] See also L Marsh-Smith "Preserving and Reviving Old Bones: Statute Law and Draftsmen as Champions of Customary Law?" (2017) 3 J&GLR, 393. The current Principal Legislative Drafter, Lucy Marsh-Smith, completed the qualifying exam in 2011 and has converted the qualification into an LL.M in Jersey law. Advocate Harris, the recent appointee, accrued time in a "relevant office" prior to joining the Legislative Drafting Office.