Return to Contents

The Jersey Law Review - February 2002

SHORTER ARTICLES AND NOTES

HAS *TERRY* LOST ITS LEGS?

Richard Falle

Entitlement to income arising during the administration of the moveable estate of a deceased person ought to be beyond debate. In a larger jurisdiction than Jersey the issue would have been decided long ago. It was however, not until 1963, that the question was considered by the Royal Court in *Re Terry, née Priston*.[1] The judgment settled an important point, the determination of which in practice has a very material effect on the administration of testate estates.

In that case, the testatrix had named the Midland Bank Executor and Trustee Company (Channel Islands) Ltd. to be executor of her will. A charging clause in the usual terms made provision for the company's remuneration. There were various specific legacies and finally, a gift of the residue to certain charities. The executor applied to the Royal Court in due course for directions as to the proper destination of the dividends arising during the administration on shares which had been specifically bequeathed. The question was argued as between the specific and the residuary legatees.

The Royal Court in *Terry* held that the right of an executor by ancient custom to take the *année de jouissance* (the income for a year and a day) derived from the status which he enjoyed as legal procurator of the principal heir. The heir's saisine or possession was given to him by virtue of a legal fiction embodied in the maxim "*le mort saisit le vif sans ministère de Justice*". Possession entitled the principal heir to the fruits until, in due course, his co-heirs called for a *partage*.

The "*clameur de partage*" implied a right or *propriété* in the co-heirs. The *partage* declared and defined a co-heir's *propriété* in a particular part or proportion of an estate. It did not transfer or create rights which had not existed before.[2] In a testate succession, the specific legatee, like the co-heir, also had a right of property in his gift dating from the death. In both cases, their enjoyment of that property was subject to the principal heir's prior right to possession. The legatee accordingly could not call for the fruits of possession (if any) until the time appointed by custom. If, as in *Terry*, the executor in right of the heir was expressly provided with remuneration in lieu of the *année de jouissance*, he was clearly not also entitled to the income. It followed that the heir, (or, as in *Terry*, the residuary legatee) must be preferred to the specific legatee. The Royal Court accordingly found that, in contrast to the position under English law, the specific legatees were not entitled to the dividends arising on their gifts from the date of death.

The position of the heir by custom was at the heart of all issues of succession. Legitimate inheritance was based on the principle of *conservation de bien entre les mains de la famille*. The principal heir's strength sprang from the *saisine* or possession which, as noted above, automatically and immediately passed to him on the death of the deceased. In such a climate, where a provision in a will became subject to challenge, the position of the heir would always be preferred to that of the legatee. There might have been a formal defect in the will, or perhaps the testator's wishes had been to prefer one member of the family against another or to benefit a stranger. The will, almost by definition, represented an attack on custom. It was, in a phrase often used by practitioners "a fraud on the heir" and in each case, therefore, vulnerable to attack at his instance.

Whatever the relative strengths of the heir and the legatee by custom, the executor was not to be equated with the legatee. The executor was not the competitor of the heir but rather his agent. This is the model described by Terrien, our principal commentator on the *Ancienne Coûtume*, -

"*Faut fuppleer icy ce qui eft omis à dire de l'office & pouuoir des executeurs. C'eft qu'ils sont saifis dedans l'an & iour du trefpas du teftateur, de biens meubles demourez par son decez, iufques à la valeur & accompliffement du teftament, & preferez aux heritiers en la poffefsion defdits biens meubles: comme le portent aucunes Coustumes de ce Royaume. Et peuuent dedans ledit an prendre & intenter procez pour raifon de ladite execution, & eftre connuenus comme executeurs, des chofes contenues au teftament. Et aussi peuuent & doyuent faire deliurance des lais aux legataires, quand ils ont accepté la charge de l'execution. Acceptans laquelle & eux entremettans aufaict d'icelle fans benefice d'inuentoire, font obligez aux dettes, lais teftamentaires, & funerailles du defunct. Et font appelez detteurs d'auanture par noftre Couftume, cy apres au titre De dettes & de detteurs. Et sont tenus à rendre conte de leur execution aux héritieres & en payer le reliqua. Or s'il n'y a executeurs es leus par le teftament, l'execution en appartient à l'heritier.*"[3]

According to Terrien, the executor in a testate succession stands in the shoes of the heir. Indeed, he is "*preferez aux héritiers en la possession desdits biens meubles ...*". In our legal fiction it is the dead man (*le mort*, not *la mort*) who gives *saisine* or possession to the living - "*le mort saisit le vif*". The maxim does not however, positively identify *le vif*. Terrien resolves the question; in a testate succession, possession passes to the executor if he elects to take the office and only in default to the heir. The appointment is effected by the will, not by *ministère de Justice*. Substituted for the heir, the executor's *saisine* carries with it the entitlement to the fruits of possession. Here, accordingly, is the *année de jouissance* of the executor, the reward given by the testator to the executor for assuming, in place of the heir, liability for the debts and obligations of the succession and otherwise the burden of its administration.

The formulation of the custom considered by the Royal Court in *Terry* is that contained in article 430 of the *Coûtume Reformée ("Des Testaments*"). All parties to those proceedings agreed that this correctly stated the law of Jersey -

"*Les executeurs testamentaires sont saisis durant l'an et jour du trépas du défunt des biens-meubles demeurez après le déces pour l'accomplissement du testament, jusqu'à la concurrence des legs et autres charges, en faisant au préalable inventaire, appelez les héritiers, et, en leur absence, les plus prochains parens; si mieux l'héritier ne veut saisir l'executeur testamentaire des legs et charges*

en argent ou en essence".

Of Article 430 of the *Coûtume Reformée*, Jean Poingdestre says -

> "*cet Article est emprunté presque mot pour mot du livre 6*

chapitre 7 de Terrien ....partant cet Article ..... est recevable en nos Isles".[4]

This same article (430) of the *Coûtume Reformée* was considered by the Privy Council in the case of *La Cloche v La Cloche*[5] -

"..... as importing that the executors are entitled to the possession of the whole of the moveable property of the testator for a year and a day after the decease, and that their possession will continue until they have received the amount of the moveable estate bequeathed by the will, and have also fulfilled the duties of administration ...."

In 1562 Royal Commissioners were sent to Jersey empowered to make new law. Among their ordinances was a new procedure borrowed from the English practice for the probate of wills -

"Also the Dean of the said Isle shall be bound to take and receive the probate of Wills and of Inventories by writing and Indenture to keep a register thereof and therein to register a true copy of the Testaments and Inventories acknowledged and approved before him to the end that he may give and deliver a copy or duplicate to those whom it shall concern at all times and whensoever he shall be requested so to do Acting in all points and having for his salary and for the probate of the said Testaments in such manner and as it is at present ordinarily used in the Realm of England (that is to say) etc."[6]

This new procedure, limited to testate succession, put in question the seamless transmission of possession from the deceased to the executor. It would no longer be *sans ministère de Justice*. Clearly the person named in the will had a right to that office but could only take possession following an application to the Dean.

It is not clear how or even whether the Dean exercised his new jurisdiction pursuant to the 1562 ordinance. In 1591, Commissioners Pyne and Napper made new ordinances apparently with the concurrence of the Governor, Bailiff and Jurats. Among them was one creating the office of *Récordateur des Testaments*.[7] No law-making authority was given in the commission and the ordinances, many of which were controversial, have not generally been followed. Philippe Le Geyt considered this ordinance as being relevant only in the event of a vacancy.

In 1619 James I promulgated his Canons and Constitutions Ecclesiastical for the Island of Jersey . Canons 26 to 28 inclusive conferred upon the Dean sitting in the Ecclesiastical Court a general jurisdiction to grant probate of wills and letters of administration (in translation):-

"26. The Dean shall have the Entry and Probate of wills which shall be approved under the Seal of his Office, and Re-registered; He shall have also the Registering of the Inventories of Goods Mobiliary belonging to Orphans, whereof he shall keep a faithful Register, that he may give Copies of them whenever he shall be required. Moreover, he shall give Letters of

Administration of the Goods of Intestates, dying without Heirs of their Body, to the next of Kindred.

27. They that have the Will in their Custody, whether they be Heirs, Executors or others shall be obliged to exhibit and bring the same to the Dean within one Month; in default whereof they shall be convened into Court by Mandate, paying double Charges for the Compulsory; and the said Dean shall have for the said Wills, Inventories, and Letters of Administration, such Fees as are specified in the Table made for that purpose.

28. All Legacies Mobiliary made to the Church, Ministers,

Schools, or Poor, shall be of the Cognizance of the Dean; But upon any Opposition made concerning the Validity of the Will the Civil Court shall determine it betwixt the Parties."[8]

The Canons conclude with the words ".... *mais que le tout soit rapporté et limité au contenu desdits Canons et Constitutions Ecclesiastiques. Comme aussi ne sera donné aucun empeschement par le Magistrat Civil de ladite Isle audit Doyen et ses successeurs en l'exécution paisible de ladite jurisdiction, au contenu d'iceux Canons, comme n'estans préjudiciables aux Privilèges, Loix, et Coutumes de ladite Isle, auxquelles n'est entendu déroger*".[9]

Some sixty years after the Canons were promulgated, Jean Poingdestre wrote his *Caesarea or a Discourse for the Island of Jersey*. The work is in English and clearly aimed at the English Court . Concerning these Canons Poingdestre had this to say in relation to the reservation in favour of the "*Loix et Coustumes*" -

"Which words are of such force, that whereas some things

have since been found therein inconsistent without our Lawes, not taken notice of before, & which could not be put in practice without breach of them, the sayd things remained unpractised to this day, as have crept into those Canons unawares; as namely the Canon concerning the granting Letters of Administration of Intestat's goods; which is agreeable to the Lawes of England, but destructive of that Grand Maxime in the Norman Lawe, *LE MORT SAISIT LE VIF*, by virtue whereof any successor, wither in a direct or collateral line is *ipso jure* seized of the whole estate of the party deceased, both Hereditary & Mobiliary to all intents & may perform all acts of a Proprietor, without intervention of the Magistrat: & soe that Canon comes null & superfluous.".[10]

Notwithstanding Poingdestre, the jurisdiction conferred on the Ecclesiastical Court by the Canon to grant letters of administration was thenceforth put into practice. As a firm Royalist Poingdestre should perhaps have considered monarchial succession as a precedent.

In 1953 a young princess on holiday in Africa suddenly became Queen Elizabeth II on the death of her father. *"Le Roi est mort, Vive la Reine!"* Already Queen regnant of the United Kingdom and of this Island, the Queen was thereafter crowned and took the coronation oath *inter alia* to observe the laws, customs and privileges of her kingdom. Coronation may not be a requisite of performing royal functions;[11] but royal succession is a classic instance of "*Le mort saisit le vif .....".* Like the sovereign, the heir in the 17th century did not require *ministère du Justice* to determine his right of

inheritance. Probate however, confirmed his identity, clothed him with authority and bound him to his duty.

The concern of Poingdestre was that no external authority, to wit, the Court, should have the power to intervene and interrupt the customary rights of succession. Custom did however, in any event, contemplate various situations where *saisine* could be interrupted, deferred, repudiated or lost. For example, the right of the co-heir to call for a *partage* presupposed deferred property. Another example is the *bénéfice d'inventaire*, a procedure which gave the heir a period during which to assess the value of the succession before electing between taking as heir or repudiating the succession altogether. Hence the maxim "*nul n'est légataire qui ne veut*". During that interval given by the *bénéfice d'inventaire*, *saisine* was in suspense. On repudiation the same rights would pass to the next heir and so on.

Saisine might also have been suspended or lost because of feudal relations between seigneur and tenant. The tenant might lose possession to his feudal lord, for example, on failure to perform services for so long as he remained in default. In other cases *saisine* might be lost to the heir altogether, *e.g.* by confiscation or escheat when *saisine* would pass absolutely to the seigneur.

A helpful characterisation of the transmission of right by inheritance is given by Flaust,[12] a late commentator on the Norman custom. According to Flaust, the *propriété* which gave the co-heir right to demand a *partage* was a *saisine de droit*. It became a *saisine de fait* on the *partage*. In this light, the creation of the Dean's probate jurisdiction in 1562 was perhaps not such a fracture of legal theory as that novelty might first have seemed. Following Flaust, the executor's *saisine de droit* conferred by the testator on death, would, by grant of probate, become *saisine de fait*.

The preamble to the Probate (Jersey) Law, 1949, states that it was a law "to provide for the transfer of probate jurisdiction from the Dean and the Ecclesiastical Court to the Royal Court (Probate Division) ....".

Interestingly, the 1949 Law addressed the concerns of Poingdestre. Under the heading "Saving of Rights of Principal Heir", article 33 provided:-

"For the avoidance of doubt, it is hereby declared that, save as otherwise expressly provided by this Law, nothing in this Law shall be construed as derogating from the rule of law expressed in the maxim "*le mort saisit le vif sans ministère de Justice*".

Despite this saving clause, the rights of the principal heir were, in fact, significantly diminished by the 1949 Law. Article 14, for example, provided that "where it appears to the Court to be necessary or convenient to appoint some person to be the executor dative of the will or to be the administrator of the personal estate of the deceased, or of any part of such personal estate, other than the person who, if this law had not been passed, would have been entitled to a grant of probate or administration, it shall not be obligatory upon the Court to make a grant to the person who, if this law had not been passed would have been entitled to the grant, but it shall be lawful for the Court, in its discretion, to appoint such person as the Court thinks fit to be such executor dative or such administrator ....".[13]

The unnamed "person" with now only a qualified right to demand a grant was of course the principal heir. The discretion conferred on the Court under article 14 was nothing if not a

manifestation of "*ministère de Justice*". Moreover, article 23 in practice negated the possession of the heir by imposing a penalty for intermeddling save in those very limited circumstances where justified for the conservation of the estate -

"If any person takes possession of and in any way administers any part of the personal estate and effects of a deceased person without obtaining a grant...he shall be liable... to a fine..."

What then was the force and meaning of the reservation in article 33?

This broadly was the law at the time of *Terry* in 1963.

Change was to follow.

The Trusts (Jersey) Law 1984 (as amended) stated the general guiding principle in relation to a trustee's remuneration at article 17 in these terms:

> "(4) Except -
>
> (a) with the approval of the Court; or
>
> (b) as permitted by this law or expressly provided

by the terms of the Trust;

a trustee shall not -

(i) directly or indirectly profit from his trusteeship;"

This Law defines "personal representative" as meaning "the executor or administrator for the time being of a deceased person and, in the context of a Jersey trust, includes the principal heir". It seems reasonable to construe these provisions as contemplating all situations which might arise where a person in a trustee relationship holds assets for another. There is however, in article 55 of the Law, a saving provision -

"(4) Nothing in this Law shall affect a personal representative where he is acting as such. "

The effect of this was, it is submitted, to save the rights of the executor to the *année de jouissance* and any right in the principal heir arising from his *saisine* on an intestacy.

Radical changes to the customary law position were brought about by the Wills and Successions (Jersey) Law, 1993. The preamble describes it as a law *inter alia* -

> "to abolish certain rules of customary law".

Article 12 expressly abolished the "*année de jouissance*"; and, under the heading "Right of Principal Heir to demand possession of moveable estate", article 14 provides -

"The right under customary law of the principal heir to interpose and demand possession of the moveable estate from the executor of a deceased person's will on depositing with the

executor the full amount of the bequests made under the will, together with the debts and other charges of the administration, is hereby abolished."

The Probate (Jersey) Law 1949 was replaced by the Probate (Jersey) Law, 1998.

It is noteworthy that:-

(a) the 1998 Law abolished article 33 of the 1949 Law and thus made no saving provision for the rights of the heir;

(b) article 19, under the heading "Necessity for production of grant" provides, subject to minor exceptions, that -

".... the production of a grant shall be necessary to establish the right to recover or receive any part of the movable estate situated in the Island of any deceased person."

(c) article 23, forbidding intermeddling, repeats the earlier statute.

It is now clear that the executor can no longer claim to be the legal procurator of the principal heir but simply the particular person appointed in virtue of the will or by the Court. The heir too has no right to possession of an estate except as a grantee and the Court has a discretion to decide whether to make such a grant in his favour or in favour of another more suitable person. What then is the *saisine* of the heir? Certainly the principal heir, as originally determined by customary law, has no prior claim to possession of the estate. The estate, in accordance with the Wills and Successions (Jersey) Law, 1993 devolves upon all the heirs equally. The *saisine* of the heir and the specific legatee, is now identical.

The executor is dependent for his remuneration entirely on such provision as may be made by the testator by way of legacy or, more commonly, by way of a charging clause for the professional executor. If no such provision is made, he is not entitled to remuneration.

Where does this leave the Court's decision in *re Terry*?

The customary law principles which provided the whole foundation for that judgment have, it is submitted, been swept away. The property in a testate succession is in the persons named as beneficiaries and neither the executor nor the heir now has any prior claim to the income arising during the period of administration. It should accordingly follow that a specific legatee is entitled to the income arising on his legacy during the administration unless the will otherwise provides.

Return to Contents

Richard Falle is an advocate of the Royal Court and senior partner at Bois & Bois, Bond Street Chambers, 1 & 2 Bond Street, St. Helier, Jersey, JE4 5QR

[1] 1963 JJ 335

[2] *"Le partage est un acte declaratif et non translatif de propriété"* per Charles Dumoulin, *Le Grand Coutumier du Royaume de France et des Gaules,* 1567

[3] Guillaume Terrien *Commentaires Du Droit Civil*, 1574, *Livre* vi at p. 217

[4] Jean Poingdestre, *Remarques et Animadversions sur la Coustume Reformée* (unpublished m.s.)

[5] 1870 vi Moore N.S. at p. 400

[6] Transcription of the Ordinances of the Royal Commissioners 27th June 1562 , published in *Jersey Prison Board* case, Crown appendix part II No. 97

[7] Le Geyt, *Manuscrits*, Tome IV p. 458

[8] The Canons are translated in the appendix to Falle's *Caesarea* , London 1734, p. 384

[9] *Ibid* at page 428 (translated) "….. that the whole shall be deemed limited to the extent of the Canons and Constitutions Ecclesiastical. Moreover, no obstacle shall be put by the Civil Magistrate of the said Isle in the way of the Dean and his successors in the peaceful exercise of these Canons as being prejudicial to the privileges, laws and customs of the said isle which it is not intended to derogate."

[10] Poingdestre, *Caesarea or a Discourse for the Island of Jersey*, at p. 32, published by *La Société Jersiaise*, 1889

[11] Walker, *The Oxford Companion to Law*, Clarendon Press, Oxford , 1980, at p. 291

[12] Flaust, *Explication de la Coutûme de Normandie*, 1781

[13] It is of interest that the draftsman of the Probate (Jersey) Law 1949 employed for the first time the English terminology "personal estate" rather than translating the word "*meubles*" as "movable property"; a potentially confusing step, because *"meubles"* and "personal estate" are not interchangeable. The Probate (Jersey) Law 1998, which abolished the 1949 Law, now refers to "movable estate" which is defined in article 1 as "personal or movable property".

Return to Contents