Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of La Cloche and another v. *La Cloche, from Jersey: delivered 5th March*, 1870.

Present:

LORD WESTBURY.
SIR JAMES W. COLVILE.
SIR JOSEPH NAPIER.

THE Appellants are the executors of the will of Dr. Thomas la Cloche, who, at the time of his death, was domiciled in the island of Jersey.

The Respondent claims to be the lawful son and only child of the testator.

The construction and effect of the testator's will, and the succession to his moveable estate, must be determined by the law of Jersey, being the law of the domicile.

By that law a testator who dies leaving a widow and a lawful child, cannot dispose by his last will of more than one-third part of his personal estate, and if the will professes to dispose of the entirety or more than one-third part of the moveables, it is liable to be reduced *ad legitimum modum*.

The testator died on the 13th October, 1864. His will was duly registered, that is to say proved by the Appellants as executors on the 20th October, 1864.

The personal estate of the testator consisted chiefly of shares in foreign funds and railway companies, the certificates and coupons of which were at the time of his death, and still are, in the hands of his bankers, MM. Mallet, Freres and Co., bankers at Paris.

The Appellants demanded from MM. Mallet the delivery of those securities to themselves as executors

The Respondent as heir-at-law intervened and entered a caveat against such delivery.

The Imperial Court of Paris, on appeal, decided that as the dispute related to a foreign succession, and concerned foreigners only, it was itself incompetent, and that the property must remain in the hands of the bankers until the right of possession had been decided by the tribunals of the domicile.

Pending these proceedings in France, a Suit was instituted in Jersey by the Respondent against the Appellants for the purpose of annulling the will, and the Appellants in their defence impeached the legitimacy of the Respondent. In these Suits it seems that the Court in Jersey of the first instance refused to set aside the will, but made a decree reducing it *ad legitimum modum*, and also declared that the Respondent had made out his title as lawful heir to the Testator. From these Judgments both parties appealed, but at this stage of the proceedings it seems to have occurred to them that the property could never be obtained from the bankers at Paris until the right to the saisine or possession of the moveable estate had been finally determined, and a final decision given on the question whether the executors were entitled to take possession of or recover the whole of the moveables for the purposes of administration, or whether the heir was entitled to take possession of two-thirds directly, excluding any possession thereof by the executors.

Accordingly, the executors commenced an action in the Royal Court of Jersey, and by their plaint prayed a declaration that they as executors have by virtue of the oath that had been administered to them, and by virtue of the law and customs of the country, the saisine or possession of the entirety of the moveable succession of the deceased testator.

In answer to this action the present Respondent pleaded that as sole heir-at-law and only child of the deceased testator, he had right by law to the possession and ownership of two-thirds at least of the moveable succession of the deceased, and that by the rule of law, *le mort saisit le vif*, he was seized thereof from the moment of the death of the testator.

The Judgment of the inferior number of the Royal Court of Jersey was given to this effect, viz. :

"considering that, according to the custom constantly followed in this Bailiwick, the testamentary executors are seized of the moveable property of the testator, that the seisin of the executors is not granted them for their own personal benefit, but rather in trust to serve the administration of the will; that the seisin of executors is by the very nature of their duties indivisible, and that they ought to have possession of the entirety of the moveable property of the deceased, the more because, from the time of their entry into charge of it, they are bound to furnish an inventory of the entirety of the succession, and are bound to answer the demands of all who have any claims against the succession. Therefore the Court dismisses the plea of the defender, and determines that the plaintiffs as executors of the will of the deceased are entitled to the seisin of the entirety of the moveable succession of the deceased, and ought to be preferred to the heir in the possession of the moveables, documents, and evidences of the succession."

From this judgment the present Respondent appealed to the superior number of the Royal Court.

Before stating the decree of the Appellate Tribunal it is material to observe that the judgment of the inferior number included the decision of the Bailly, who is the principal legal authority in Jersey.

Their Lordships think, therefore, that great weight is to be ascribed to the Bailly's statement of the law and custom of the Island. The Court of Appeal, or Court of the greater number were greatly divided in opinion, three of the Jurats or Judges were in favour of affirming the decision of the Court below. Two of the Jurats were of opinion with the Respondent that the maxim *le mort saisit le vif* gave to the heir the saisine or possession of two-third parts, and to the executors the seisin of one-third part only, of the moveable succession of the testator.

Another Jurat appears to have decided against the right of the executors, because in this particular case one of them was residuary legatee.

The two remaining Jurats appear to have also decided against the executors, on the ground that the will had been reduced *ad legitimum modum*, and the parties sent before the Greffier to prove the portions which belonged to each party; and that

this had deprived the executors of the right of claiming seisin of the whole of the moveable property. Upon the whole, a majority of five Jurats out of eight, pronounced for the reversal of the decision of the Court of inferior number. Their Lordships have stated shortly the grounds of the Judgments, because they wish it to be observed that the statement of the law or custom of Jersey, contained in the judgment of the Court of inferior number is not in terms denied or qualified by the majority of the Judges of the Court of Appeal.

In determining the abstract question raised by this Appeal, their Lordships have felt anxious to form their decision entirely upon the proper evidence of the law and custom of Jersey, without being influenced by considerations of convenience, or by analogies derived from the laws or customs of other countries.

Their Lordships have, however, much difficulty in ascertaining what are the recognized authorities on the law of Jersey.

The book called "Le Grand Coustumier de Normandie," which is probably the earliest admitted authority, does not appear to contain anything on the subject of testamentary executors or succession of moveables, and was not cited or referred to in the argument. The commentary of M. Terrien on the civil law, as well public as private, observed in the country and Duchy of Normandy, was cited by the Counsel both for the Appellant and Respondent, and the Attorney-General for the Island of Jersey, seemed to admit it to be a book of authority in the Courts of Jersey. These commentaries were published at Paris in the year 1574, a considerable time after the final separation of the Duchy of Normandy from the Crown of England, but apparently several years before the formation of "La Coutume Réformée" of the Duchy, which appears to have been prepared under the authority of letters patent granted by Henry III of France, and dated the 14th October, 1585.

The commentary of Terrien, therefore, may be reasonably regarded as the best evidence of the old custom of Normandy, and also of the Channel Islands before the separation of Normandy from the English Crown. In this Commentary, in the 7th Chapter of the Sixth Book, which is entitled "Des

Testaments," after stating the law, that if a testator be married and have a child *in potestate patris,* he cannot make a will of more than one-third of his moveable property, under the heading "Des Exécuteurs," is the following passage:—

"Faut suppleer icy ce qui est omis à dire de l'office & pouuoir des exécuteurs: C'est qu'ils sont saisis dedans l'an & iour du trespas du testateur, des biens meubles demourez par son decez, iusques à la valeur & accomplissement du testament, & preferez aux héritiers en la possession desdits biens meubles: comme le portent aucunes Coustumes de ce Royaume. Et peuuent dedans ledit an prendre & intenter procez pour raison de la dite exécution, & estre conuenus comme exécuteurs, des choses contenues au testament. Et aussi peuuent & doyuent faire deliurance des lais aux legataires, quand ils ont accepté la charge de l'exécution. Acceptans laquelle & eux entremettans au faict d'icelle sans benefice d'inuentoire, sont obligez aux dettes, lais testamentaires, & funerailles du défunct. Et sont appelez detteurs d'auanture par nostre Coustume, ... Et sont tenus à rendre conte de leur exécution aux héritiers & en payer le reliqua."

We construe this passage 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 the "Coutume Réformée," according to the commentary of Godefroi, which was published in 1626, and the Commentary of Basnage, which was published in 1694, the passage which we have cited from Terrien's Commentary appears to form the text of the 430th Article of the Coutume itself, in the Chapter "Des Testaments," and which is thus expressed:—

"Les exécuteurs testamentaires sont saisis durant l'an et iour du trespas du deffunct des biens meubles demeurez apres le décèds pour l'accomplissement du Testament iusques à la concurrence des lais et autres charges, en faisant au préalable inventaire appellez les heritiers et en leur absence les plus prochains parens: si mieux l'héritier ne veut saisir l'exécuteur testamentaire des laiz et charges en argent ou en essence."

These words are nearly identical with those of Terrien, except that for the words "jusques à la valeur," are substituted the words "jusques à la concurrence des laiz et autres charges," which are explanatory of the words "jusques à la valeur."

The law and course of procedure are plainly indicated by this Article. Immediately on the death of a testator, the executors are to take possession of the whole of his personal estate, and to continue in such possession until they have collected or received sufficient property to answer the bequests validly made by the will, the testator's debts and all the expenses of administration; but at the beginning of their office the executors are bound to make an inventory of the whole of the moveables, and to cite the heirs for the purpose of seeing this done, unless the heir elect to pay or secure to the executor the full amount of the bequests, debts and expenses, in which case it would seem that the heir becomes entitled to the possession.

The "Coutume d'Orléans" and the "Coutume de Paris" (although they differed in this, that the "Coutume d'Orleans" included heritable property, and did not confine the rule to moveables), appear to have contained the same law or custom with respect to the "saisine" of executors as that stated in the passage cited from Terrien, and embodied in the Article of the "Coutume Réformée" as cited from Godefroi and Basnage. These "coutumes" may be legitimately referred to for the purpose of testing the interpretation we have put on the custom as stated by Terrien, and also for the purpose of explaining the force and effect of particular expressions. Pothier, in his treatise on the "Coutumes des Duché, Bailliage, et Prévoté d'Orléans," under the 16th title, "Des Testaments," Article 290 (10th Vol. of Dupin's Ed. 621), after referring to the 163rd Article of the "Ancienne Coutume" and to the 297th Article of the "Coutume de Paris," states the "Coutume d'Orléans" in the following words, which are nearly identical with the passage in Terrien:

"Les exécuteurs des testamens sont saisis des biens meubles et héritages du testateur jusques à la valeur et accomplissement du testament:"

At the word "saisis" is the following note:—

"C'est-à-dire, qu'ils peuvent d'eux-mêmes se mettre en possession des biens du testateur, en faisant faire un inventaire desdits biens, et sans qu'ils soient tenus d'en demander aucune délivrance à l'héritier; ce qui n'empêche pas que l'héritier ne demeure vrai possesseur de tous les biens de la succession, dont il a été saisi par le défunt dès l'instant de sa mort, suivant

l'article 301 : car ces exécuteurs ne sont en possession que comme procureurs légaux de l'héritier, pour exécuter à sa décharge les dispositions testamentaires ; de manière que l'héritier est censé continuer de posséder par eux."

And again, in his "Traité du Droit Français," under the head "Traité des Testaments," 2nd Article entitled "De la Saisine des Executeurs Testamentaires" (7th Vol. of Dupin's Ed. 343), is this explanatory passage :—

"Le pouvoir des exécuteurs testamentaires consiste principalement dans la saisine, que les Coutumes accordent à l'exécuteur testamentaire, pour l'accomplissement du testament. Cette saisine est compatible avec celle de l'héritier ; car cette saisine, qui est accordée à l'exécuteur, n'est pas une vraie possession ; l'exécuteur, par cette saisine, est constitué séquestre ; il n'est en possession qu'au nom de l'héritier ; c'est l'héritier qui est le vrai possesseur de tous les biens de la succession, suivant la règle, *le mort saisit le vif ;* c'est la doctrine de Dumoulin, qui, sur l'art. 95 de Paris, dit : Hæc consuetudo non facit quin hæres sit saisitus ut dominus, sed operatur quod executor potest ipse manum ponere et apprehendere . . . . et etiam executor non est verus possessor, et nisi ut procurator tantùm."

These passages appear to their Lordships to be very applicable to the case before them, and to reconcile the arguments of the Appellants and Respondents. It is true, according to this interpretation, that under the maxim *le mort saisit le vif*, the children of a testator are from the moment of the death the true owners of that part of the moveable estate which belongs to them, but it is equally true that the law makes the executors *les procureurs légaux* of the heir, which procuration is irrevocable until *l'accomplissement du testament*, and in this character the law gives the executors full right and title, *d'eux-memes*, that is, in their own names, to take possession of, and recover and receive the whole of the moveables for the purposes of administration. In the same article, Pothier remarks : "Observez, que l'accomplissement du testament comprend non seulement l'acquittement des legs, mais aussi celui des dettes mobilières de la succession ; car l'acquittement de ces dettes fait partie de l'exécution testamentaire." In the argument before us it was admitted by the Respondent's Counsel that it was the right and duty of the executors to pay the debts of their testator, and that they were liable accordingly to the creditors,

but if an obligation thus indefinite be thrown upon them it seems to follow of necessity, first, that the right to possess and retain the whole of the personal estate must remain with them "jusqu'à l'accomplissement du testament;" secondly, that the portion that belongs to the heir cannot be ascertained until the amount of this indefinite prior charge has been discovered and liquidated. This, however, must be subject to the right of the heir to interpose and demand possession from the executors by depositing with them the full amount of the debts and other charges of administration, and of the bequests made by the will, if at least there be such a custom in the Island of Jersey, as there seems to be in the Coutume Reformée of Normandy, and in the Coutumes of Orléans and Paris.

The cases which have been collected and given in evidence by the Appellants, although obscure, and as to some of them of little application, yet so far as they go distinctly confirm the conclusion which has been stated.

Thus, in No. 12, the Court directs the executor to deliver over a third of the net residue, *i.e.*, of the clear residue, to the legatees; and in the case cited, No. 14, the Judgment of the Court is thus prefaced:—

"Considering that the execution of a will cannot be regarded as ended until the executor has recovered all that may be due to the succession of the testator, and out of it has paid his debts,—and more particularly in the case No. 16, which was decided on the 24th March, 1860, the Court in the record of its judgment lays down the following principles:—

"1. That a testamentary executor is seised in full right of the moveables of a succession, for a year and a day from the date of the death of the testator.

2. That these moveables during the year and the day are in the custody and under the personal responsibility of the executor.

3. That after possession for a year and a day the executor must carry the will into effect, and deliver good and faithful accounts to the person entitled.

No case or other authority has been cited by the Respondent in support of the Judgment appealed from.

By way of confirmation of the conclusion which

their Lordships are disposed to draw from the authorities they have cited, may be added the illustrative fact, that shortly after the Norman invasion of this country the present law or custom of Jersey appears to have prevailed in England, and was most probably, therefore, brought in by William the Conqueror. It is stated by Glanville to have been the common law of the land in the reign of Henry II with respect to moveable successions; and accordingly the wife and the children were entitled to recover from the executors their proportionate parts of the personalty of the testator, and the writ entitled *De rationabili parte* was framed for their relief, which plainly shows that the executors were regarded as entitled, in the first instance, to the seisin or possession of the whole of the personal estate. Without dwelling, therefore, on the great inconvenience that would result from such a rule as is contended for by the Respondent, their Lordships are clearly of opinion that the Judgment appealed from is erroneous, and contrary to the established law and custom of Jersey, and they will therefore humbly advise Her Majesty to reverse the Judgment appealed from, to affirm the Judgment of the Court of the inferior number, and to direct the Respondent to pay to the Appellants their costs of the proceedings in the Court of the superior number, and also their costs of this Appeal.

PRINTED AT THE FOREIGN OFFICE BY T. HARRISON.—8/3/70.