

Names and Arms clauses and the Law of Arms in the common law courts

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It was once quite common for a testator to bequeath his estate to his heir on condition that the heir adopt the surname of the benefactor, and assume their coat of arms. A clause was sometimes inserted in a settlement by a living donor similarly directing a person to assume the name and arms of the settlor, or forfeit the benefits that would otherwise be conferred on him.¹

Whilst the assumption of names and arms required a royal licence or other legal mechanism to be effective,² they also presented some difficulties of a more technical sort, which caused the courts some problems in the middle of the twentieth century. They also represent a partial exception to the truism that Her Majesty's courts at Westminster administer the common law and equity, but not the Law of Arms.³

The common law courts have been called upon to interpret and apply names and arms clauses, and in so doing they have pronounced their views of certain aspects of the Law of Arms.⁴

To the common law real property comprises both corporeal and incorporeal hereditaments,⁵ the term hereditament simply meaning property which at common law descended to the heir on intestacy; real property as opposed to personal property. Although the terms real property and hereditaments may for most practical purposes be treated as meaning the same thing, they are not exactly so.⁶ While armorial bearings are not real property, they descend at law as if they were.⁷

Armorial bearings are incorporeal and immoveable hereditaments,⁸ inalienable, and descendable according to the Law of Arms.⁹ Generally speaking, this means they are inherited by the male issue of the grantee, though they can be inherited by the sons of an heraldic heiress, where there is no surviving male heir.

The mere assumption of arms cannot itself establish a legally defensible title according to the laws of England.¹⁰ Arms can only be validly borne if acquired by right of birth (from a grant, or user from before the time of legal memory¹¹), or grant from the Crown.¹²

The acquisition of arms through a conditional legacy of the sort we are considering is not acquisition by right of birth. Unless fortified by royal licence, it seems that a name and arms clause, though not illegal as contrary to public policy, would itself be ineffective in transferring armorial bearings.

The old books of precedents gave the standard forms for names and arms clauses. Typically, they required that the beneficiary “shall within the space of one year next after the periods hereinbefore prescribed” apply for and endeavour to obtain a proper licence from the Crown or take such other means as may be requisite to enable him or her “to take use and bear the surname of *Neeld* [as the case may be] only and the arms of *Neeld*”.¹³

In interpreting and applying these clauses, the common law courts have been aware that according to the Law of Arms a person cannot obtain a grant of or bear the arms of another person to which he is not entitled by descent unless so authorised by a private Act of Parliament or by a royal licence. As Lord Diplock observed, by constitutional practice these royal licences are granted upon the advice of the Home Secretary, the arms being required to be exemplified and recorded in the College of Arms.¹⁴ This is always a matter for the discretion of the Crown.

In the laws governing the disposition of property, a devise (or gift) “to A for life on condition that he assumes the name and arms of the testator within twelve months”,¹⁵ or any similar gift on condition, is technically known as a condition subsequent. A condition subsequent is one to be performed after the gift has taken effect, and, if the condition is unfulfilled, will put an end to the gift.¹⁶ That is, there is a divesting of the gift, in this case, upon the expiry of twelve months from the death of the testator.

In *Austen v Collins*,¹⁷ the plaintiff forfeited the interest by their failure, notwithstanding the attempt he had made, to obtain the necessary authority for the use of certain arms.

If, on the other hand, a condition is void for some legal deficiency, the initial gift will still be good, and the donee takes an absolute interest free from the invalid condition,¹⁸ for both personalty and realty.¹⁹

Conditions which are contrary to public policy will be held void. A condition will be void if there is a tendency to conflict with the general interest of the community, even though it will not necessarily do so.²⁰ Names and arms clauses were traditionally held to be good, and for several centuries conveyancers drew up wills and settlements in conformity with this belief.

However, for a time after 1945, names and arms clauses were held to be contrary to public policy.²¹ This was generally on the ground that in the case of a married woman being the beneficiary, the taking by her of another persons surname might lead to dissension between husband and wife. There was also some difficulty with the requisite degree of certainty.²² Little seems to have said however about the propriety of imposing conditions which require the beneficiary to obtain a grant or concession from the Crown.

In 1962 the Court of Appeal overruled many previous decisions and held that such conditions were not, after all, contrary to public policy.²³ It was no longer seen as conducive of marital dissension to require a beneficiary to take the name and arms of a testator.²⁴

It has also long been held that a condition which required the beneficiary to acquire a peerage was contrary to public policy, though only after great conflict of opinion in the House of Lords.²⁵ The decision turned upon the legislative rights and duties of peers, so baronetcies, which have no such duties, were distinguished.²⁶

Why had this uncertainty over names and arms clauses arisen? It is submitted that it was, at least in part, because the matters were decided in the common law and equity courts, and not the Court of Chivalry.

It was in the civil jurisdiction of the Court of Chivalry²⁷ that the Law of Arms relating to armorial bearings was administered. The Court sat as a court of honour, and its jurisdiction consisted in redressing injuries of honour and correcting encroachments in matters of coat armour, precedence, and other distinctions of families.²⁸ These and kindred matters of honour were not within the jurisdiction of the ordinary courts of law,²⁹ but were within the jurisdiction of the Court of Chivalry by statute and by prescription.³⁰

The Court of Chivalry also exercised jurisdiction in respect of contracts connected with war out of the realm, and this respect gradually infringed on the jurisdiction of the ordinary courts, until such infringement was restrained, and the powers of the court were defined, by two Acts passed in the reign of Richard II.³¹

The first statute was held to confine the Court of Chivalry to matters of dignity and arms³² and to prevent it from entertaining matters cognisable by ordinary courts. As the right to bear arms was not a matter cognisable at common law, the Court of Chivalry retained its jurisdiction.³³ The first Act stated:

that all pleas and suits touching the common law of the land, and which ought to be examined and discussed by the common law, shall not hereafter be by any means drawn or holden before the Constable and Marshal, but that the court of the said Constable and Marshal shall have that which belongeth to the said court.

The position was not however clarified by the second statute, which said that the Court of Chivalry had jurisdiction in relation to armorial bearings only when they were carried to war outside the realm, or displayed at a tournament within the realm, or, possibly, in a civil war.³⁴ It declared the jurisdiction of the court to consist in the:

cognisance of contracts touching deeds of arms, and of war out of the realm, and also of things that touch arms or war within the realm which cannot be determined nor discussed by the common law, with other usages and customs to the same matters pertaining.

The Court of Chivalry has been largely inactive for several centuries. The 1954 case of *Manchester Corporation v Manchester Palace of Varieties Ltd*³⁵ has made the continued existence of the High Court of Chivalry a matter beyond question. But it has done little to clarify the modern jurisdiction of the court.³⁶ However, it is clear that the jurisdiction of the Court of Chivalry must be exercised by that Court or none at all, unless Parliament enacts otherwise.³⁷

In the *Neeld*³⁸ case, and the others in which the common law courts have considered names and arms clauses, the court was considering a question of

succession, and not of the Law of Arms *per se*. But the laws of succession, though part of the common law, owe their origins to the ecclesiastical courts, which, before the nineteenth century, followed civil law procedures, as the Court of Chivalry alone still does.³⁹

The courts have not had to decide the rights to armorial bearings, which would be a matter for the Court of Chivalry. But they have treated the Law of Arms in much the same way that the common law courts in England have treated the ecclesiastical law, and have in practice given their own interpretation of it.

The question whether a name and arms clause is void as contrary to public policy, or void for uncertainty, may be answered without knowledge of, or recourse to, the Law of Arms, but the courts have made clear their view of the law, notwithstanding their lack of jurisdiction. It would be desirable for the Law of Arms to be brought within the jurisdiction of the common law courts, so that they might exercise a full measure of control over their inheritance and control.

¹For a discussion of the wider Law of Arms, and particularly questions of extraterritorial application, see an article by the author, “The Law of Arms in New Zealand” (1998) 18 New Zealand Universities Law Review 225-256.

²Everyone is free to change one’s name, and a royal licence, deed poll, or other legal instrument is not required to evidence any such change; *Re Neeld* [1962] Ch 643, 679 per Upjohn LJ. Clearly, for the adoption of the armorial bearings of another person, however named, something further would be required than a mere deed poll.

³However, the Law of Arms is regarded as a part of the laws of England, and the common law courts will take judicial notice of it as such; *Paston v Ledham* (1459) YB 37 Hen VI, Pasch. p 18, per Nedham J.

⁴They have taken judicial notice of the Law of Arms, and not regarded it as a matter requiring proof, which they might have done.

⁵See for example, the Settled Land Act 1925 (15 & 16 Geo V c 18) s 67; replacing Settled Land Act 1882 (45 & 46 Vict c 38) s 37. Land includes manor, advowson, rent, and other incorporeal hereditaments – real property which, on an intestacy might, before 1 January 1926, have devolved on an heir – Law Reform Act 1925 s 3 (8).

⁶Sir Robert Megarry & Sir Henry Wade, *The Law of Real Property* ed MP Thompson (1975) 788, n 6.

⁷*Re Rivett-Carnac’s Will* (1885) 30 ChD 136.

⁸For a discussion of corporeal and incorporeal property see an article by the author in (1997) 17 New Zealand Universities Law Review 379-401.

⁹Arms descend with due and proper differencing, to male descendants of the grantee in the first instance, and through females as heraldic heiresses in the event of the failure of the male line, as quarterings – *Wiltes Peerage Case* (1869) LR 4 HL, 126, 153 per Lord Chelmsford.

¹⁰User since time immemorial also gives a good title, under civil law as under the common law. It has been suggested that it follows that prescription gives a right to arms; W Paley Baildon, “Herald’ College and Prescription” (1904) 8 The Ancestor 113; Anon, “The Prescriptive Usage of Arms” (1902) 2 The Ancestor 40, 47. Squibb has pointed to the flaws in these views. Use of arms never gave right, and was only ever evidence of immemorial use; George Squibb, *The High Court of Chivalry* (1959) 179-85.

¹¹For the Law of Arms this was from 1066, rather than 1189, as for the common law; George Squibb, *The High Court of Chivalry* (1959) 180-1 fn 3. The Court was prepared however to accept that evidence of user from before the time of living memory raised a presumption that the user had continued for the necessary period; George Squibb, *The High Court of Chivalry* (1959) 183; cf *Angus v Dalton* (1877) 3 QBD 85, 89-90 per Lusk J.

¹²It has always been assumed that this is the prerogative of the English Crown; *Strathmore Peerage Case* (1821) 6 Pat 645, 655 (HL). This was argued by Dr William Oldys, King’s Advocate, in pleadings before the Court of Chivalry from 1687; George Squibb, *The High Court of Chivalry* (1959) 183-4.

¹³*Re Neeld* [1962] Ch 643, 663-4 per Lord Evershed, MR.

¹⁴*Re Neeld* [1962] Ch 643, 683 per Diplock LJ.

¹⁵*Re Evans’s Contract* [1920] 2 Ch 469.

¹⁶*Egerton v Brownlow (Earl)* (1853) 4 HL Cas 1; 10 ER 359.

¹⁷[1886] WN 91.

¹⁸*Re Croxon* [1904] 1 Ch 176; *Re Lockie* [1945] NZLR 230; *Re Hayes’ Will Trusts* [1954] 1 WLR 22.

¹⁹*Poor v Mial* (1821) 6 Madd 32; 56 ER 1001.

²⁰*Egerton v Brownlow (Earl)* (1853) 4 HL Cas 1; 10 ER 359.

²¹*Re Fry* [1945] 1 Ch 348.

²²Different tests for certainty of conditions precedent and conditions subsequent were approved by the House of Lords in *Blathwayt v Cawley (Lord)* [1976] AC 397 on the basis that a greater degree of certainty is required for conditions subsequent.

²³*Re Neeld* [1962] Ch 643 (CA).

²⁴A condition requiring a woman, whether single or married to bear the testator’s surname was contrary to public policy as coercive and quasi-punitive; *Re Fry* [1945] 1 Ch 348. The rationale for this rule would appear suspect in light of the change of judicial attitude towards names and arms clauses. It would appear not to be good law now in light of the observations of Upjohn J in *Re Neeld* [1962] Ch 643 (CA).

²⁵*Egerton v Brownlow (Earl)* (1853) 4 HL Cas 1; 10 ER 359.

²⁶*Re Wallace* [1920] 2 Ch 274.

²⁷In *Manchester Corporation v Manchester Palace of Varieties Ltd* [1955] P 133 it was stated that the Court could be held before the Earl Marshal alone – *Anon* (1732) 2 Barn KB 169; 94 ER 427. The authority of the Earl Marshal’s Court, as the Court of Chivalry was often called, derives from the authority of the Earl Marshal, not from any jurisdiction which the Kings of Arms might possess. Indeed, in the *Manchester Corporation Case*, Garter Principal King of Arms was absent from the hearing.

²⁸In *Manchester Corporation v Manchester Palace of Varieties Ltd* [1955] P 133, the long dormant High Court of Chivalry awoke. The case was heard on 21 December 1954 before the Earl Marshal and his Surrogate, Lord Goddard, Lord Chief Justice of England. Proceedings began with the style of the Earl Marshal being rehearsed and proclaimed.

The letters patent of James I regulating conduct of the Court of Chivalry (1 August 1622), and the letters patent of Charles II creating the office of Earl Marshal in His Grace’s family (19 October 1672) were read. The warrant of the Earl Marshal appointing Lord Goddard Lieutenant, Assessor and Surrogate to the Earl Marshal was then read. The warrant of the Earl Marshal appointing joint registrars of the Court of Chivalry was also read. The Earl Marshal, Surrogate and joint registrars then made their declarations of office. The judgement was given by the Earl Marshal’s Surrogate.

²⁹*Buckingham’s (Duke of) Case* (1514) Keil 170; 72 ER 346.

³⁰*Sturla v Freccia* (1880) 5 App Cas 623, 628. Pleas of arms were heard by the Court of Chivalry from at least as early as the fourteenth century, the first known case being a dispute between Nicholas Lord Burnell and Robert Lord Morley in 1348; See also *Scroop v Grosvenor* (1389) Calendar of Close Rolls, Ric II, vol 3, 586.

³¹The Jurisdiction of Constable and Marshal Act 1384 (8 Rich II c 5); and the Jurisdiction of the Constable and Marshal Act 1389 (13 Rich II stat I c 2). This was confirmed in *Paston v Ledham* (1459) YB 37 Hen VI Pasch pl 8. Both of these Acts have since been repealed; in England by the Statute Law Revision and Civil Procedure Act 1881 (44 & 45 Vict c 59).

³²Questions of the right to arms, precedence, descent and other kindred matters of honour which are not within the jurisdiction of the ordinary courts of law, but belong to the Court of Chivalry by statute and by prescription, as was observed in *Comyns’ Digest*, tit. Courts (1764) E 2, 485. This claim was accepted without comment by Lord Blackburn in *Sturla v Freccia* (1880) 5 App Cas 623, 628. Sir William Blackstone also held this view, although he regarded the court as obsolete – *Commentaries on the Laws of England* (1765-70) book III c 5, 7.

³³This important fact has misled some. The statement that “grants in Scotland and England have no effect whatsoever in Canada” is strictly true, so far as the common law is concerned; *R v Sovereign Seat Cover Manufacturing Ltd* (unreported) Provincial Court, Criminal Division, Cornwall, Ontario, 26 July 1977 p 7.

³⁴13 Ric II stat 1 c 2 (1389-90):

To the constable it pertaineth to have cognisance of contracts touching deeds of arms and of war out of the realm, and also of things that touch was within the realm, which cannot be determined nor discussed by the common law, with other usages and customs to the same matters pertaining, which other constable heretofore have duly and reasonably used in their time.

³⁵[1955] P 133.

³⁶This was not helped by the fact that Lord Goddard, the Lieutenant, Assessor and Surrogate to the Earl Marshal, was avowedly ignorant of the Law of Arms; *A Verbatim Report of the Case in the High Court of Chivalry of the Lord Mayor, Aldermen and Citizens of Manchester versus the Manchester Palace of Varieties Limited on Tuesday, 21st December, 1954* (1955) 61.

³⁷Thus in Canada the legal protection of coats of arms is as weak as it is in England and New Zealand, because the Canadian Heraldic Authority was established by letters patent in an exercise of the royal prerogative.

³⁸*Re Neeld* [1962] Ch 643 (CA).

³⁹*Manchester Corporation v Manchester Palace of Varieties Ltd* [1955] P 133 per Lord Goddard.