ON THE

LAW OF REAL PROPERTY

IN GUERNSEY.

BY PETER JEREMIE,

QUEEN'S COUNSELLOR IN THE ROYAL COURT.

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PREFACE.

In 1840, the law of real property underwent a material change, from the owners having been invested with the power of devising it. By the Order in Council of July, 1840, owners of real property inherited (as contradistinguished from that which they had acquired either by deed of gift or purchase) were still precluded from willing it when they left relations within the degree of second cousins, and real property purchased could only be devised when the owner left no descent. By a subsequent Order in Council, passed on the 22nd of July, 1847, the power of willing real property was absolutely vested in the owner, when he left no issue, without any regard as to its title, whether held by descent, gift, or purchase. The restriction which fettered the owner of real property from willing any portion of it, when he left issue, remains untouched; so that an owner who leaves issue cannot even now bequeath any portion of it, and this constitutes the only prohibition to the absolute willing of real property.

By the Order of 1847, the form of wills of personal property was much simplified; and by a subsequent Order, passed on the 26th of June, 1852, the form of wills of real property underwent a material modification and improvement, by bestowing on its absent owner from Guernsey the power of willing it in the

place of his residence—a power of which he was virtually deprived by the sixteenth article of the law passed in 1840, from the impossibility of getting his will attested in the form required by that law—that is, by two jurats or magistrates of the Royal Court of Guernsey, to replace whose signature an attestation by a notary and two witnesses was substituted. The same facilities for willing real property situated in Guernsey were provided for absentee owners resident in Alderney and Sark, who, for the purpose, may now get their wills of real property attested by the local magistracy of the place of their residence.

From the enumeration of the above changes, and those flowing from the *retrait foncier*, or mode of redemption introduced with a view of relieving the land from the oppressive effects of irredeemable rents, and from a number of decisions bearing on the various dispositions of the reformed law, since its enactment in 1840, it may be hoped that a clear and distinct view of its present state may be obtained. Added to these, a short introductory notice of the life and labours of the most eminent jurists—to whom law as a science will ever stand pre-eminently indebted for its development, and property itself for the noblest of her claims to the respect and justice of man—may not be without its advantages, in drawing the attention of those who may be induced to give more than a cursory glance at the text and enactments of those dispositions, which more immediately affect the rights of property in their own jurisdictions.

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TENDENCY OF THE MODERN LAW OF REAL PROPERTY TO INVEST THE OWNER WITH AN ABSOLUTE CONTROL OVER IT, AND THE AUTHORS TO WHOM IT IS CHIEFLY INDEBTED FOR ITS IMPROVEMENT.—THE GUERNSEY LAW AND CONSTITUTION UNDER DEEP OBLIGATIONS TO MR. WILLIAM LE MARCHANT.—HOW BEST STUDIED.

SUMMARY.

Nature of the reforms introduced into the modern law of different states.—Analogous to those adopted by the local legislature, and sanctioned by the Orders in Council of August, 1840, and July, 1847.—Those reforms enumerated.—Domat, D'Aguesseau, and Pothier, the authors to whom the modern law of real property is most deeply indebted.—Character of Domat and his works, as given by D'Aguesseau, in his instructions to his son.—D'Aguesseau as a legislator; his reforms enumerated.—Maritime law indebted to Valin and Emerigon.—Transcendent character of their works.—Pothier also eminent as an authority on maritime law.—The relative merits of Domat and Pothier drawn by Professor Story.—Different manner in which law as a science is treated and studied by English and foreign jurists, adduced by Dr. Strahan, the translator of Domat's works.—Character of Pothier's works—originally given as lectures to his pupils at the law university of Orleans.—Lord Mansfield described by Justice Story.—Emerigon's tribute to him, and to the manner in which judges in England deliver their decisions.—Sir James Mackintosh's sketch of Lord Mansfield as

A STATESMAN, ORATOR, AND JUDGE.—ASCRIBES THE SOURCES OF THE UNWRITTEN LAW OF ENGLAND TO THE INSENSIBLE LEGISLATIVE POWER OF THE JUDGE.—MR. WILLIAM LE MARCHANT'S SERVICES AS CHIEF MAGISTRATE.—HIS CHARACTER AS A PUBLIC ADMINISTRATOR. — SIR JOHN JEREMIE SEEMS TO HAVE TAKEN HIM AS HIS MODEL IN REFORMING THE LAWS AND INSTITUTIONS OF ST. LUCIA, WITH A VIEW OF IMPROVING THE LAW OF REAL PROPERTY, PUBLIC CREDIT, AND THE ADMINISTRATION OF JUSTICE.—MR. HILARY CARRÉ, THE ELDER, AN EMINENT JURAT.—NATURE OF THE STUDIES TO BE PURSUED BY THOSE WHO ARE DESTINED FOR THE BAR IN GUERNSEY.—THEIR PROSPECTS.

A GENERAL tendency to simplify the law of real property, and make it the more desirable as an investment, by rendering its acquisition at once safe and easy,—to diminish the expense attending purchases and sales, and, at the same time, render its resources the more available for public and private credit, by a system of mortgage and hypothecation inexpensive and secure,—to abridge the number of forms and costs attending the expropriation of insolvent owners, and the foreclosure of mortgages,—seems of late to have attracted very general attention from the legislature, more particularly in England, France, Prussia, and the United States. That the executive should have been thus impelled by the force of public opinion, and, as it were, simultaneously to direct their attention to the matter, shows how much its importance is felt; and, from the reforms effected by the abolition of feudal tenures,—by real property having become subject to testamentary bequests,—by its more equal partition being provided for in intestate successions, the tendency is no less significant, as the following reforms, which have actually taken place in those countries, and which, with very little modification, will apply to them all, will show. These reforms, moreover, bear a striking analogy to those effected on petition of the local legislature by the Order in Council of the 4th August, 1840, and of subsequent orders under the administration of Sir P. Stafford Carey, all having the same

tendency to bestow on the owners of property a more absolute control over it. The nature of these reforms, as far as they apply to our own institutions, may be thus enumerated: 1st, making both the real and personal property of intestates descend to the same person; 2nd, enabling parents to become heirs to their children; 3rd, abolition of primogeniture and of preference of males in descents; 4th, making all estates descend in the same course, whether acquired by purchase or by descent from paternal or maternal relations; 5th, abolishing the preference of male stocks in descents; 6th, enabling half-blood relations to inherit; 7th, making husband and wife heir to each other, in case of failure of blood relations; 8th, making absolute property in land pass by the mere delivery of the deed; 9th, the general registration of deeds; 10th, making the absolute right in property pass without the word "heirs" or any equivalent, when a less estate is not expressed; 11th, enabling married women to convey their estates and bar their dower without a fine; 12th, change of joint tenancies into tenancies in common; 13th, placing lands mortgaged, as well as the debt, at the disposal of the mortgagee's executors; 14th, making real estates liable to execution and sale for debt; 15th, rendering real estate assets liable to pay debts without any preferences; 16th, shortening the time of limitation and prescription.

Fortunately, our own system of hypothecations and mortgages being at once simple, safe, and inexpensive, and suits for the expropriation of owners of real property having also, of late years, been rendered less dilatory, no very great changes were needed in these departments, so immediately affecting both the value and security of real property.

To give a brief outline of the reforms, how they were brought about, and the character of their authors, who have not only materially influenced the destinies of their own country, but every other where the rights of property shall be held sacred and the principles they have inculcated will obtain, may not be without its use, in begetting a more intimate knowledge of our own laws and institutions. The light in which their services have been held by eminent

foreigners is not the least interesting point from which they may be viewed. Nor should the work of humbler labourers in the same vineyard, operating in a more circumscribed sphere, be altogether overlooked. D'Aguesseau, Domat, Pothier, are the minds that have been most deeply impressed on the legislation of their country. The nature of that impress may be learned from the opinions entertained of them by their contemporaries, and from what has passed since they have become its lawgivers.

D'Aguesseau.

In his instructions to his son,* D'Aguesseau earnestly impresses on him the necessity of studying, above all other works, Domat's immortal "Treatise on the Civil Laws, arranged in their natural order." "No person has more profoundly ascertained the true principles of civil laws than Domat, nor explained them in a manner more worthy of a philosopher, of a jurisconsult, and a Christian. After having traced their origin, he descends to their remotest ramifications, and explaining them with an almost geometrical precision, he points out the peculiar characteristics appertaining to each. This treatise presents the best plan of civil society that was ever devised; and I always looked upon it as an invaluable work, which I observed, as it were, spring up under my eyes, from the intimacy which existed between its author and myself. You should therefore, my dear son, consider yourself fortunate in possessing such a work, on your commencing the study of the law; and in reading it with the attention it deserves, your mind will become stored with doctrines not only worthy of a jurist, but of a legislator. You will, moreover, by the principles with which it abounds, be enabled to discern, in those laws which may come under your observation, what belongs to natural and immutable justice from that which only originates in the positive and fluctuating changes dependent on the will of man, and be thus prevented from being misled by the subtilties which are often scattered throughout the works of Roman jurists, by enabling you to dive with security into that vast repository of human wisdom

* Written in 1716, when he was attorney-general of the Parliament of Paris, and not the least remarkable of his works.

and common sense contained in the digest, as I shall more particularly point out when you begin to study it." No surer guide was ever presented to the profession than is laid down in these instructions; no one who has ever read has had to regret the time devoted to their study; whilst many have had cause to deplore that they had not become acquainted with them at an earlier period of life.

D'Aguesseau's opinion of him as a civilian is thus laconically expressed: "Domat may be styled the jurisconsult of judges; and whoever was thoroughly acquainted with his works, though he might not be the profoundest of jurists, would be the soundest and safest of judges." *

It is pleasing to record such an offering from the pupil to the master by whom he was formed, conveyed in such a genuine and heartfelt strain. Written in 1716, when D'Aguesseau was attorney-general, he had not achieved that eminence as a judge, a legislator, and literary character he afterwards attained. "Domat et Lamoignon," observes Mr. Lerminier, "avaient guidé dans ses études un jeune homme qui s'initiait dans leur commerce aux traditions de la jurisprudence, D'Aguesseau, qui à vingt-deux ans était avocat-général. D'Aguesseau est le dernier jurisconsulte français qui ait montré des connaissances étendues en tout genre, et qui ait su embrasser le système entier de la jurisprudence. On trouve en lui l'avocat-général, le littérateur, le théoricien et le législateur. Il fut avocat-général pendant dix ans, et ne donna jamais à la grand'chambre que des conclusions approfondies qui nous restent, et le mirent à côté de Denys Talon."

As a legislator it is that D'Aguesseau has raised the most enduring monument to his fame, and in his decrees may again be traced that cautious spirit for which both his judgments and works are so remarkable. The reason why no codification of the laws was attempted by him, of which the foundations had been laid by the celebrated ordonnances passed in the preceding reign, is assigned in the preamble to his Ordonnance on Donations *inter vivos*, dated 1731, wherein

* "On peut appeller Domat le jurisconsulte des magistrats; et quiconque possèderait bien son ouvrage, ne serait peut-être pas le plus profond des jurisconsultes, il serait le plus solide et le plus sûr de tous les juges."

Louis XV., acting as his mouthpiece, is made to say: "We might with greater renown and satisfaction to ourselves have caused all diversity of legislation to cease, had we deferred publishing the compilation of laws that will be enacted for that purpose until all the component parts of so important a project had also been completed; but the advantages to be derived from such an undertaking being incompatible with the dispatch it was desirable should accompany it, the affection for our people, whose best interests have been our first consideration, induced us no longer to delay the promulgation of ordonnances under separate heads." In that view were successively passed:

In 1729, the Ordonnance which allowed parents to inherit from their children.

In 1731, the Ordonnance on Donations *inter vivos.*

In 1735, the Ordonnance on Wills.

In 1737, the Ordonnance on Forgery and uttering false instruments.

In 1738, the Ordonnance regulating the jurisdiction of the different Courts and of their Officers.

In 1747, the Ordonnance on Entails.

In 1748, the Ordonnance on Mortmain.

No man ever rose more rapidly, attained such eminence in his profession, and devoted it to nobler ends than D'Aguesseau. At twenty-one he was created solicitor-general, an additional accession having been made to the office that he might hold the appointment. At that early age, he achieved such a reputation that Denys Talon said that he only wished his own career might close in the way that young man's commenced. Ten years afterwards he became attorney-general, and at the death of Louis XIV., being then only forty-six, he was appointed chancellor by the Regent Orleans. It was not, however, reserved for him, any more than for Lord Eldon, whom in many respects he resembles, that his career should be a bed of roses, as was evinced by the numerous trials to which he was exposed through his firm determination to uphold the liberties of the Gallican Church against the pretensions of Clement XI., in the famous bull Unigenitus;

and the sagacity of his counsels in aid of the public credit, in his determined but ineffectual resistance to the schemes and bubbles of John Law, that famous projector who, by attempting to make every man's fortune by giving him worthless paper and visionary expectations in exchange for his money, reduced the country to bankruptcy. The services rendered by D'Aguesseau on these trying occasions, the wise laws he enacted, his decisions as a magistrate, the independence with which he resisted the pretensions of an arbitrary monarch and a corrupt court, his unbounded knowledge, fervent piety, and unrivalled eloquence have, by universal assent, placed him at the head of the French magistracy, whose highest office he held more frequently and for a longer term than any of his predecessors, and which he might have retained throughout an unusually prolonged life had he been content to forego or modify those unswerving convictions to which he sacrificed every consideration, even to his keenest affections, as was shown on his resuming his functions so soon after the death of his wife, the greatest comfort and ornament of his own successful life, when he declared that his services were due to the public, who should not be allowed to suffer through his domestic affliction. With D'Aguesseau the responsibilities of office seem to have considerably outweighed its attractions, forming in this respect a striking contrast to his prototype Lord Eldon, with whom the possession and allurements of office seem to have outweighed the burthen of those heavy responsibilities and cares of which, ever and anon, he so bitterly complained of. And when at the age of eighty-two he voluntarily resigned that office, which for so long and so much more than any of his predecessors he had adorned, it was only after that the frail and helpless body had given unmistakable warning of its inability any longer adequately to fulfil the behests of the spirit which within it lingered. The resignation he outlived but a few months, dying in February, 1751.

Domat.

Such was the pupil formed by DOMAT, who himself was no less remarkable as a judge than as a civilian. His treatises on the civil laws are of the highest authority, notwith-

standing the comparatively early period at which they appeared; and for luminous exposition of principle, profound doctrine, drawn from the deepest and purest sources of immutable justice, methodical arrangement, and clearness of diction, have not been surpassed. His works are remarkable, as containing neither precedent nor quotations from other authors, and are entirely based upon those unerring rules which, brought up from the very fountains of justice and placed before the reader in the clearest light and attractive form, at once enable him to test the value of any opinion he may have conceived, remove his doubts, and strengthen his own well-founded convictions. Hence was Domat surnamed by D'Aguesseau the jurisconsult of judges. Nowhere are the requirements of science contained in so brief a compass, or set forth in such luminous order.

Thus, with the works of Domat, the ordonnances of Louis XIV. and of Louis XV., and the labours of those eminent commentators Valin, Pothier, and Emerigon on them, their transcription into the French codes by the jurisconsults of the Revolution was no difficult undertaking, and followed almost as a matter of course.

Their indefatigable and successful labours, and the services they have rendered science, have met with a recognition, as gracious as it has been universal, from statesmen, judges, and writers on maritime law of every country; and no greater fame can rest on Valin than his having been so generally recognised as the foremost authority on an ordonnance—his frequent references to which Lord Tenterden justifies as constituting the "maritime code of a great commercial nation, which has attributed much of its national prosperity to it—a code composed in the reign of a politic prince, under the auspices of a wise and enlightened minister, by laborious and learned persons,* who selected the most

Valin.

* Who, singular to say, are utterly unknown. "Il n'y avait assurément," says Valin, "que des génies nés pour la législation qui pussent en pareilles circonstances produire cet admirable corps de doctrine. Combien ne serait-il pas à souhaiter que nous pussions payer à la mémoire des rédacteurs de cette précieuse collection le tribut de louanges, d'estime et de respect qu'ils ont mérité à si juste titre! Mais, par une fatalité inconcevable, les noms de ces grands hommes ne sont pas parvenus jusqu'à nous."

valuable principles of all the maritime laws then existing; and which in matter, method, and style, is one of the most finished acts of legislation ever promulgated." * No doubt, because, from the rules laid down, as many abridged treatises may be said to have been formed as there are subjects provided for, constituting an inexhaustible source of doctrines and principles, whereby the decision of the greater number of private cases has become comparatively safe and easy, thus answering much the same purpose as a guide for the settlement of disputes among merchants and sea-faring people as the compass for navigation. Among the continental jurists, to whom it is said Lord Mansfield was indebted for that transcendent excellence and comprehensiveness of principle so characteristic of his decisions on maritime law, to none was he more so than to Valin; and no authority ranked higher in his own estimation than the French ordinance, that marvel of legislation which, however suddenly sprung up in the infancy of maritime commerce, still continues, through a fecundity of principle and an inexhaustible supply of sound doctrine, adequate to meet the demands and exigencies which the prodigious extension of commerce in the present day incessantly creates.

Pothier.

It is no mean accession to the fame of Pothier that, in addition to his title as the lawgiver of his country, he should have been selected by Valin and Emerigon as their umpire to settle the points on which they differed. Yet his works are so transcendent that his treatises on maritime contracts, invaluable as they are, have added little to his reputation, though translated into so many living languages. In the course of his works, Emerigon as frequently refers to them as to Valin's, and equal deference is paid to his dicta.

Emerigon.

Emerigon, who survived his rivals, has not been surpassed by either; and Marseilles, whose commerce dates from the remotest antiquity, and whose name has ever ranked foremost among mercantile ports, had at last a befitting representative in the jurist who could generously bestow half his fame on a great rival, without having been eclipsed by him. If ever laws were illustrated by history, and the

* Preface to his "Treatise on Shipping."

history of commerce revealed through the progress of its laws, it was by Emerigon, in his treatises on Insurance and Bottomry. There, the legislation of countries, some lost in the night of time, with the works of their commentators, are laid under contribution, and subjected to an analysis which nothing short of his own admirably-trained mind, added to that great practical experience in one of the first mercantile ports of the world, where his advice was constantly called into requisition, could so powerfully illustrate. His noblest tribute will ever be that of his own rival, Valin, with whom he shares the honour of having laid the foundation of the maritime law of his country. Not only is the extent of Valin's obligation most generously acknowledged by a graceful allusion to the advantages he derived, but the disinterested spirit in which the offering was vouchsafed, by Emerigon's representing that the collection had been merely got up for his own private use, is not its least edifying feature. Certain it is that Emerigon's consultations or written opinions on different questions of maritime law, which are nowhere to be found excepting dispersed through Valin's works, being omitted in their author's own, form a very striking addenda to the most celebrated work that in modern times has appeared on maritime law. How Valin came into possession he thus informs us: "M. Emerigon, avocat au Parlement d'Aix, et conseiller à l'Amirauté de Marseille; ce savant généreux, que le hasard m'a fait connaître, ne fut pas plutôt instruit que je travaillais à un commentaire sur notre ordonnance, qu'il m'offrit avec une cordialité et un désintéressement peut-être sans exemple, tout ce que, par une étude assidue et réfléchie, il avait recueilli de décisions et d'autorités convenables à cet objet. On conçoit que j'ai du balancer longtemps à accepter des offres de cette nature. Je ne m'y suis enfin déterminé que parce qu'il a eu le secret de me persuader que ce n'était que pour son usage particulier qu'il avait fait cette riche collection. Il m'en a donc fait passer une copie, dont j'ai fait un tel usage que presque tout ce que l'on trouvera de bon dans ce commentaire, quant à la partie de la jurisprudence, est en quelque sorte autant son ouvrage que le mien.

Je lui devais ce témoignage public de ma reconnaissance, après la lui avoir tant de fois marquée en particulier, toujours avec un nouveau regret de ne pouvoir répondre par mes expressions à la vivacité des sentimens que m'a inspirés pour jamais un bienfait aussi noble et aussi gratuit."

Thus maritime law became, in his hands, as much the law of nations as of his own country; and his work, fraught with enlightened and comprehensive principles, forms a collection of doctrines for the guidance of jurists and merchants of unrivalled excellence and universal application; nor is the felicitous language, so totally devoid of technicality, in which these doctrines are conveyed, the least attractive of its merits.

Fortunate the courts of judicature who avail themselves of such an authority as the sheet-anchor of their own decisions; and the following valedictory addenda, by the able commentator of Emerigon's works, might not inappropriately be affixed to the commentaries that have hitherto appeared on Valin and Pothier: "Ici se termine la tâche importante que je m'étais imposée. Je ne sais que trop combien je suis au-dessous de mon modèle. Que de faiblesse auprès de tant de lumière et de talens! Mais j'ai du moins réuni tous mes efforts pour que mon travail soit utile, et je laisse à de plus érudits le soin de mieux faire"*—and who, one might add, is yet to appear.

The relative merits of Pothier and Domat have been thus drawn by an eminent American jurist: "Sir William Jones," says Professor Story,† "if not the first, was at any rate among the first to call the attention of English lawyers to the extraordinary merit of the treatises of Pothier upon the principal branches of commercial law. Nor is his eulogy upon this great man, warm and vigorous as it is, too strongly coloured. Few works have ever appeared in the jurisprudence of any country, in which the qualities of luminous method, apposite examples, and a clear manly style are more perfectly exhibited, than they are in the writings of Pothier.

* P. S. Boulay-Paty, judge in the Appeal Court of Rennes, and author of several works on maritime and commercial law.

† In the preface of his "Commentaries on the Law of Bailments."

"But while a just commendation is given to this eminent jurist, it should not be forgotten that an equally high tribute is due to his predecessor and real master, Monsieur Domat, whose work, entitled 'The Civil Law in its Natural Order,' considering the age and the circumstances in which it was written, is a truly wonderful performance. His method is excellent, and his matter clear, exact, and comprehensive. Pothier (as well as other continental jurists) has drawn largely upon him to assist his own labours."

The learned American reverts to Domat's peculiar excellencies in the following terms: "'Doctor Strahan, in the preface to his translation of Domat, has spoken on this subject in language of such freedom and force, as entitle it to respect. I know not whether one ought to be most struck with the calmness of its rebuke, or with the mortifying severity of its truth. 'I was surprised,' says he, 'to find in a country (England) where all arts and sciences do flourish and meet with the greatest encouragement, that one of the noblest of the human sciences, and which contributes most to cultivate the mind and improve the reason of man, as that of the civil law does, should be so much disregarded, and meet with so little encouragement. And I observed, that the little regard which has of late years been shown in this kingdom to the study thereof has been, in a great measure, owing to the want of a due knowledge of it, and to the being altogether unacquainted with the beauties and excellencies thereof, which are only known to a few gentlemen, who have devoted themselves to that profession; others, who are perfect strangers to that law, being under a false persuasion that it contains nothing but what is foreign to our laws and customs. Whereas, when they come to know that the body of the civil law, besides the laws peculiar to the Commonwealth of Rome, which are there collected, contains likewise the general principles of natural reason and equity, which are the fundamental rules of justice in all engagements and transactions between man and man, and which are to be found nowhere else in such a large extent as in the body of the

civil law, they will soon be sensible of the infinite value of so great a treasure. Such is the language used by an English civilian more than a century ago. It is lamentable to say that it may be applied, with but little mitigation, to the general state of the profession of the common law in our day.'

"There is a remarkable difference, in the manner of treating juridical subjects, between the foreign and the English jurists. The former almost universally discuss every subject with an elaborate theoretical fulness and accuracy, and ascend to the elementary principles of each particular branch of the science. The latter, with few exceptions, write what they are pleased to call practical treatises, which contain little more than a collection of the principles laid down in the adjudged cases, with scarcely an attempt to illustrate them by any general reasoning, or even to follow them out into collateral consequences. In short, these treatises are but little more than full indexes to the reports, arranged under appropriate heads; and the materials are often tied together by very slender threads of connexion. They are better adapted for those to whom the science is familiar, than to instruct others in its elements. It appears to me that the union of the two plans would be a great improvement in our law treatises, and would afford no inconsiderable assistance to students in mastering the higher branches of their profession."

These views of Justice Story, respecting the difference adopted by English and foreign jurists in treating judicial subjects, are strikingly illustrated in the eulogium of Pothier by M. Le Trosne, a cotemporary magistrate at the Court of Orleans, where he draws the contrast between the jurist who, in treating a question, confines himself to the comparatively narrow circle within which the law is circumscribed, and him who raises himself above it, by calling in science to illustrate its principles and consequences.

"Puisqu'il a plu aux hommes d'ajouter aux lois positives, si simples en même temps et si fécondes, tant et tant de lois arbitraires, il devient indispensable de partir de ces lois

données pour régler les intérêts divers et les actions qui en naissent. Mais quelle différence lorsque ces matières, quoiqu'étrangères par leurs principes au véritable droit, sont traitées par un homme, qui, n'ayant étudié qu'elles, rampe et se traîne servilement dans le cercle étroit de cette législation d'institution humaine, ou par un jurisconsulte qui sait s'élever au-dessus de cette législation, qui la respecte parce qu'elle existe, mais qui se sert de l'esprit de décision et des vues qui lui fournit la science du droit pour démêler, discuter et interpréter ces lois positives. Tel a été le talent de M. Pothier, et c'est ce qui donne un si grand mérite à ses travaux."

If in the above passage is revealed the cause of Pothier's success as a jurist, in the following will be traced the source of the enduring character of his works:

"Ses traités sur les contrats ont cet avantage, qu'ils renferment non-seulement la connaissance du droit civil et l'application de ces principes aux actions qui se présentent dans les tribunaux, mais encore des décisions sûres pour la conscience. Les matières y sont traitées dans le for intérieur et dans le for extérieur; et en apprenant aux hommes les actions qui naissent de leurs conventions, et les droits qu'ils peuvent poursuivre en jugement, il leur enseigne à être justes, à n'exiger rien au-delà de la justice, quand même ils pourraient l'obtenir; à ne blesser jamais les droits d'autrui, quand même ils pourraient le faire avec succès: partie du droit bien précieuse, qui constitue l'essence de la morale, et qui a bien plus d'étendue et d'exactitude que les tribunaux ne peuvent en mettre dans leurs décisions. Ce n'est qu'aux jurisconsultes qu'il appartient de tenir cette balance de la justice immuable dont la justice humaine ne nous offre qu'une ombre imparfaite et une ressemblance en quelque sorte inanimée. Ce n'est qu'à eux qu'il appartient de monter sur un tribunal supérieur à ceux que l'autorité civile peut ériger, et d'y régler avec une précision rigoureuse les droits et les devoirs des hommes."

The distinguishing feature of Pothier's fame is, that so shortly after his death he should have become the lawgiver

of his country, after having from an early age been looked up to as its light and ornament,—to have achieved a still greater renown abroad than he ever attained in his own country. His works, circumscribed by no locality, have acquired the world as their jurisdiction. Wherever law as a science will be studied and cultivated,—wherever the Roman law, of which he is admitted to have been the ablest expounder, will be appreciated as written reason, and the most lasting monument of the greatness of a once mighty people,—wherever engagements will be formed between man and man, and that recourse will be had to the immutable principles of justice to settle the questions to which their engagements will give rise,—the name and works of Pothier will be looked upon rather as law than authority, based as they are upon immutable justice, which so forcibly contrasts with that justice which is derived from the ever-changing, fleeting, and arbitrary decrees which legislatures deem fit to enact as laws. Not the least singular fate of his treatises, long since become the handbook of lawgivers and jurists, is that they should have been originally designed for the instruction of the students of the Law University at Orleans. Nor was it without great difficulty that their author could be persuaded to publish them, he modestly assigning as a reason that they had been written for his pupils.*

D'Aguesseau has been reproached with not having availed himself of the counsels and labours of such a master, with whom he was moreover personally acquainted, to reform the laws of his country, as no safer guide for such a task could have been selected; as was shown when the French codes were under discussion, and that his treatises on contracts, constituting by far the most important and valuable portions both of the Code Civil and Code de Commerce, were, with few modifications, transposed in them, and these not always improvements. We have it from the Fabius of chancellors, that he was deterred from this reform by a wholesome dread

* A somewhat similar fate seems to have attended the lectures of Sir James Mackintosh, at Haileybury, previous to their becoming the History of England of Lardner's Encyclopædia.

of ruining the lawyers,* a feeling which seems to have haunted Lord Eldon when, on the passing of the Reform Bill in 1832, he declared that England's sun had set for ever. How groundless the anticipations of these eminent lawyers (at once so remarkable for the success they achieved during a long and prosperous life, and the conspicuous position they will ever hold in the history of their country) eventually turned out, Time, the great innovator, has abundantly shown. Notwithstanding a revolution and changes effected in the laws and constitution of his country, far greater than D'Aguesseau could contemplate, the lawyers in their generation managed to hold their own. The prediction of the Fabius of English chancellors proved a still greater failure, for England's sun never rose so pre-eminently as after the passing of the bill for the reform of her constitution—unless, indeed, it was after passing that for the reform of her tariff. Nor is it the least remarkable feature attending these memorable reforms, that they should have been brought about without convulsion or sacrifice. In his life of Bacon, Lord Campbell says: "I do not undervalue great judicial reputation, but I would rather have written Hyde's character of Falkland than have pronounced the most celebrated judgments of Lord Hardwicke or Lord Eldon." It would be worth knowing, whether the learned lord formed any higher estimate of the treatises of lawyers than he seems to have entertained of their judgments. We believe that the lives of the chancellors, the very woolsack itself may have passed, and it may be in the beneficence of Providence to make way for a better order of things; that the treatises of the jurisconsult of Orleans will still stand, as the gospel truths they inculcate, even in that better order they may have served to bring about; and are strengthened in this belief from the circumstance that, however, a century has passed since their author's death, time, so far from impairing, has only enhanced their value, without its being

* But let the chancellor speak for himself: "J'ai souvent pensé à reformer la justice elle-même et les institutions judiciaires; j'avais même commencé un réglement là-dessus; mais j'ai été arrêté en considérant la quantité d'avocats, de procureurs et d'huissiers que j'allais ruiner."

given even now to the wisest of living judges to calculate either the sum or duration of the advantages they have conferred. As a magistrate, Pothier was revered by his cotemporaries for that spotless integrity and dispatch of judicial business which formed the most salient traits of his character; and among great jurists, though many have worked themselves into higher offices, none have left behind a more splendid name.

Without any disparagement to the literary eminence attained by English lawyers as authors, one cannot help thinking but that Erskine, by his defence of Stockdale and of the Dean of St. Asaph, whereby he vindicated the liberty of the press and upheld the trial by jury, laid his country under deeper obligations than any author of biographical sketches, however transcendent his merits. May not the same be said of the treatise of Beccaria on crimes and punishment,—of the address of Servan to the Parliament of Grenoble in 1766, on criminal law reform,—and, more recently, of the speeches in parliament of Sir Samuel Romilly, Sir James Mackintosh, and Sir Robert Peel, on the same subject; all advocating the like views and merciful tendency, whose labours in this great cause are only not sufficiently appreciated, it may be, in consequence of the more dazzling and conspicuous triumphs which closed their eventful life.

Lord Mansfield.

Among the men to whom law, as a science, is most deeply indebted, and who, from his commanding position and incomparable powers, is unconsciously, yet ever, thrust upon you, in reviewing the history of law and of the magistrates who have shed most lustre on it, stands at the very summit Lord Mansfield. Of him it were better first to let strangers and foreigners record their impression, were it only to show how far justice can disarm envy, and exalted station itself become subservient to the magistrate by whom it is administered. "There is a great name," says Mr. Justice Story, "respecting whom it is difficult to speak in terms of moderate praise, and still more difficult to preserve silence. England and America, and the whole civilized world, lie under the deepest obligations to him.

The maxims of maritime jurisprudence which he engrafted into the stock of the common law are not the exclusive property of a single age or nation, but the common property of all times and all countries. They are built upon the most comprehensive principles and the most enlightened experience of mankind. He designed them to be of universal application, considering, as he himself has declared, the maritime law to be not the law of a particular country, but the general law of nations. And such, under his administration, it became, as his prophetical spirit, in citing a passage from the most eloquent and polished orator of antiquity, seems gently to insinuate: 'Non erit alia lex Romæ, alia Athenis; alia nunc, alia posthac; sed, et apud omnes gentes et omni tempore, una eademque lex obtinebit.' Lord Mansfield was ambitious of this noble fame, and studied deeply, and diligently, and honestly, to acquire it. He surveyed the commercial law of the continent, drawing thence what was most just, useful, and rational; and left to the world, as the fruit of his researches, a collection of general principles, unexampled in extent, and unequalled in excellence. The law of insurance was almost created by him; and it would be difficult to find a single leading principle, in the beautiful system that surrounds and protects the commerce of our times, which may not be traced to the judgments of this surprising man. Of him it cannot be said, 'Stat magni nominis umbra.' His character as a statesman and an orator, as the rival and the equal of Chatham and Camden, would immortalize him. But the proudest monument of his fame is in the volumes of Burrows, and Cowper and Douglas, which, we may fondly hope, will endure as long as the language in which they are written shall continue to instruct mankind."*

In a less lofty but equally admiring spirit is the tribute paid to him by Emerigon, who represents Lord Mansfield as the magistrate not to be affected by the din of war or the passions of men, and whose judgments are ever based upon the immutable rules of equity—"dont les décisions sont

* Address delivered by Mr. Justice Story to the Suffolk bar at Boston.

toujours dictées par les règles immuables de l'équité." Alluding to the judgment in the affair of Lavabre v. Walter (Douglas rep. 284), Emerigon appears to have been particularly struck with the English magistrate's allocution to the French merchants, Berard frères, against whom that judgment was given, when, at its close, he represented to the assured the moral certainty of their not bettering their case by any further appeal; that the court had most anxiously considered their case, and that as they were strangers, he was the more desirous that they should not be exposed to any further expense by fruitless litigation, which must end in disappointment. "Who can help admiring such a course of proceeding, however opposed to our own usages; the impression," says Emerigon, "it leaves on the mind is such that we cannot refrain from admiring virtue even in an enemy*—'tanta vis probitatis est, ut eam in hoste etiam diligamus.' In England the judges do not consider it sufficient to decide aright: they assign the reasons of their judgment, to show that they are guided by the law rather than by the will of man." In this case some of the interested parties consulted Emerigon, who gave his opinion in conformity with the decision of the English judges.†

The following sketch of Lord Mansfield by Sir James Mackintosh, who from his position was so much better enabled to appreciate him, is not only valuable as describing the varied merits of its subject, as from the information it conveys of the manner in which the common law of England has been formed; and will also in a measure account for the difference existing between English and continental writers in their mode of treating law as a science. It also affords another instance of that happy and discriminating

* At the time this was spoken, England and France were at war.

† "Consulté," says Emerigon, "par Lavabre, Doerner, and the lenders on bottomry to Berard brothers, je répondis: 1, Que Berard frères ayant rompu le fil des engagements respectifs, il était juste qu'ils supportassent la peine de leur contravention; 2, Que, par le changement de voyage, les donneurs, tout comme les assureurs, sont déchargés des risques maritimes; que, par conséquent, les sieurs Lavabre, Doerner et compagnie étaient fondés à réclamer des sieurs Bérard frères les £180,000 données à la grosse, le change maritime et l'intérêt de terre."

excellence, so full yet so brief, and so peculiarly characteristic of the author: "Lord Mansfield was one of the most illustrious orators, statesmen, and magistrates of the eighteenth century. His mind was calm, luminous, and orderly; his temper was mild; his character had a composed dignity; his understanding was acute; his taste was purely elegant; and the vigorous reason which he exercised, rather exclusively on his own profession, was adorned by all the graces of polite literature. As an orator, he was clear, methodical, dispassionate, elegant, and argumentative. Those who heard him were disposed for a moment to think that the office of eloquence was only to interpret and adorn reason, and to compose rather than to inflame the passions; and if the highest power of an orator had not been to move the feelings of man, Lord Mansfield might have been placed in the first class of orators."

As a magistrate, he is very memorable. The law of England has been chiefly formed out of the simple principles of natural justice, by a long series of judicial decisions. The statutes are, especially in the most ancient times, only occasional interpositions of parliament. The unwritten law, which lawyers in their fictions represent as the remains of an original system, has, in truth, arisen out of the insensible legislative power of the judge. A man, therefore, of the powers of Lord Mansfield, who presided for thirty years in the most important court of the kingdom, had naturally a great influence on the progress of the law. In maritime and commercial affairs he was almost a lawgiver; he flourished during the most rapidly progressive period of our commerce; and he adopted, from the continental jurists, those principles of general reason which they had established on these subjects. It was the general tendency of his mind to enlarge and liberalize the ancient law, that it might be better adapted to the circumstances of a refined society. Perhaps no judicial magistrate, in any state, ever diffused so much legal reason over a long series of decisions. Some want of firmness must be allowed in his character. His reason was equal to that of any opponent, but his timid elegance shrunk

from the impetuous eloquence and commanding genius of Lord Chatham. He was charged with enlarging judicial discretion at the expense of legal rules, under specious pretexts of convenience; and he was still more violently accused of undue inclination towards the court in all political questions. All lawyers are inclined either to rules or to convenience. The liberal inclination of Lord Mansfield, if it should even be allowed to be somewhat excessive, was the excess most natural to a great mind. A dispassionate survey of his magistracy will acquit him of the intentional subserviency to the court. An habitual and almost unconscious bias to the cause of government might, indeed, have been produced by the constitution of his understanding and temper, by the nature of his mild virtues, by his long exercise of judicial authority, and probably by his early education and connections. To consider such a bias as the subject of moral blame, would be to treat human nature with too much severity; but we may be allowed to lament that Lord Mansfield had only those virtues which an excellent magistrate might possess under an absolute monarchy, without any portion of that spirit which would have more peculiarly characterized an English judge.

To lawyers and magistrates well acquainted with the works and character of these eminent jurists, these remarks may appear supererogatory; but to the student who may hereafter be called to the bar or occupy a seat on the bench, he may rest assured that if he only apply himself to the study of their works and character,—to which may be profitably added those of his own countrymen, such as may be gathered from the decisions of Mr. William Le Marchant,* formerly bailiff of the Royal Court, and the writings of Mr. Lawrence Carey,† a jurat,—he will have no cause, in after life, to regret the hours he will have spent in forming their acquaintance. His labours, as an enlightened, independent judge and adminis-

Mr. W. Le Marchant.

* Mr. Le Marchant was elected jurat in 1754, became bailiff in 1771, and died in 1800. He was succeeded by his son Robert Porret Le Marchant, who resigned in 1810. Sir Peter De Havilland was his successor.

† Mr. Lawrence Carey was elected jurat in 1765, and is the author of an excellent treatise on the constitution and laws of Guernsey, which has not been printed.

trator, shed a lustre over the latter years of the eighteenth century, when he held the office of chief magistrate from 1771 to its close. By them we find the rigour of the feudal law abated,—the mercantile law enlarged and improved,—the independence of the island judicature upheld, and the rights of the inhabitants secured in having justice administered to them at their own doors, instead of being drawn before the courts in England to answer to suits and summonses, of which they were as ignorant of the import as of the consequences,—the liberty of the subject assured against press-warrants, and against those arbitrary and violent measures which the executive in England had deemed necessary to meet the emergency arising from the disturbed and distracted state which so soon followed in the wake of the French Revolution, and which so sadly disappointed so many of its admirers, and estranged not a few of those who, at the onset, were most disposed to give it a hearty welcome. That system of taxation which requires of all inhabitants that each, according to his means, shall contribute towards the public burthens upon all his property, wherever situate, as Mr. Le Marchant received so he transmitted it entire to his successors, warning them against the consequences of indirect taxation, which then began to be spoken of, and pointing out that however plausible the arguments that may be urged on its behalf, or the pretext that may call it forth, if once established it would prove a bane to the freedom of their trade and sorely try their independence; that if once suffered to make its appearance it would never be shaken off, and by doing so they would surrender their most important privilege in the loss of all direct control over the public expenditure. How true this warning has proved, all now living have but too many and convincing proofs.

As a judge, Mr. Le Marchant's career was no less remarkable, as is proved by that series of decisions whereby the rights of married persons over the real property acquired during coverture was fixed in a manner not only to preserve the rights of the issue of the marriage, but those of the surviving parents; a matter of far greater import, at a time

when real property could not be devised, than it would be in the present day, when wills of real property are allowed when the owner leaves no descent. These decisions illustrate how, in the absence of all law, justice tempered by principle may be applied to those unforeseen cases which are constantly arising, as it were, to deride the shortsightedness of man, powerless by positive enactment to regulate, or even foresee, every emergency,—nulla lex satis commoda omnibus est,—which, nevertheless, it behoves him to meet and provide for, as one of the conditions of an improved state, brought about in this instance by the rapid extension of commerce and agriculture, which marks the close of the eighteenth century. In this position,—when the duty of a legislator is thrust upon the judge, by which he becomes rather the absolute umpire than the mere arbiter of the case before him,—it was that Mr. Le Marchant's services shone pre-eminent. Great as were these services, their value is enhanced if the period at which they occurred be considered, when England, convulsed by the horrors of the French Revolution,—her army abroad defeated by the French Republican forces,—rebellion in Ireland,—her fleets in full mutiny at Spithead and at the Nore,—to have, at such a crisis, preserved his country, of all others the most exposed to the revolutionary blast, free from all taint of sedition, is not his least claim to her gratitude; and to have thus endowed her, when all around was distracted by war, treason, bankruptcy, and bloodshed, his countrymen might well look up to him as the presiding spirit which preserved them from impending calamities. When some of the services of this eminent man, on a recent occasion, incidentally came before the royal commissioners in 1860,* they drew from Sir John Awdry, the chairman, the remark that Mr. Le Marchant's services bore a resemblance to those of Lord Mansfield. Of course the magistrate, whose name will never be known beyond the precincts of the jurisdiction where he officiated, can bear no comparison with as illustrious a judge as ever sat upon a human tribunal; but

* Appointed to enquire into the laws and constitution of Jersey. The commissioners were Sir John Awdry, the Earl of Devon, and Mr. Jebb.

in one respect, and that not an unimportant one, the Guernsey magistrate will not shrink from a comparison,—he never despaired of liberty, never distrusted her, notwithstanding all the atrocities which he saw and heard committed in her name; and in this he seems rather to have followed in the footsteps of Lord Camden and Lord Erskine, who stood by her, through good and evil report, to the end. When it is further borne in mind that for such services, rendered during half a century, he never sought, never desired, either salary or pension,—that his sole reward lay in that innate satisfaction which a righteous spirit bestows upon itself, his administration may well be looked upon by future generations, as it was by his cotemporaries, as the bow of Ulysses, which none but himself could direct and bend.

Mr. Le Marchant left two sons, Hirzel and Robert Porret; the former held the office of procureur du roi, and inherited his fathe 's abilities. Unhappily for his country, he died in the prime of life in 1793, at a time when his services were most needed in her defence. His memorials to government, on more than one difficult occasion, remind one of those remonstrances of the French parliament, and of the officers of the crown of the old monarchy, who, we are told, "savaient au besoin proclamer la vérité aux rois, sans nul épargner." Mr. Robert Porret Le Marchant, who succeeded his father as bailiff in 1800, was the inheritor of his virtues, though not of his abilities. Being of a weak constitution, he resigned the office in 1810, when he was succeeded by Sir Peter De Havilland. Three Le Marchants have since occupied a seat on the bench,—Mr. Eleazar Le Marchant (who filled the office of lieutenant-bailiff and jurat upwards of half a century), Mr. Josias Le Marchant, and Mr. John Le Marchant,—all remarkable for that independence which bespeaks the inherent virtue of the family; and though, by a long and gratuitous tenure of office, they have added but little to, it is enough for their memory that they should have done naught to dim, the lustre of the name.

Sir John Jeremie, who, from his experience as an advocate, and a familiar acquaintance with some of Mr. Le Mar-

chant's cotemporaries, had more than ordinary opportunities of appreciating his services, considered him the ablest lawyer that ever sat on the bench of his native place;* and seems to have taken his administration as a model, profited by his labours, and followed his example in reforming the institutions of St. Lucia,—where he was appointed chief justice in 1824, and where he remained till May, 1831,—as may be seen from the character of his services, and the measures he enacted for the improvement of maritime law, of the law of real property, and in securing the public credit by the establishment of a mortgage office, and, with the same object, rendering real property liable to seizure by a process known as the "saisie réelle," by which it became really available for the discharge of loans and settlement of claims, in the shape of hypothecations and mortgages imposed on such property.

On the surrender of St. Lucia to the British on the 26th May, 1796, Mr. Breen, in his "History of St. Lucia," observes, that it was stipulated that all questions relating to trade should be determined by the law of England, in conformity with a regulation to be framed for that purpose. A period of thirty years, however, had been suffered to elapse, during which, this preliminary formality not having been fulfilled, the wise intentions of the government failed to receive any practical effect. Mr. Jeremie's attention was immediately directed to the supplying of this omission, and on the 25th March, 1827, he drew up a statement, setting

* Mr. Hilary Carré, father of the present lieutenant-bailiff, he often spoke of as an eminent jurat, who, to the great practical knowledge he had acquired, added a thorough acquaintance with the laws and usages of the island. To hear him argue a point with Mr. Peter Le Pelley the older,—the "black-lettered jurat," as they were wont to call him,—who so often, after a first gentle enquiry, would set the advocates to discuss the points most deserving the consideration of the court, was quite a treat for the bench and bar of the time. Notwithstanding Mr. Carré's extremely cautious mode of reasoning, arising from a desire of looking at every side of a question,—the hesitating manner in which he would deliver those opinions, whereby, somehow or other, he always contrived to arrive at a sound conclusion,—those doubts and difficulties by which he appeared to be sometimes beset, and in the act of explaining away which he would convey to his colleagues so much information, himself, from his manner, appearing the only one unconscious of its value,—were no doubt great drawbacks upon the influence such opinions might, if differently delivered, have exercised upon his colleagues, and detracted from the weight to which they were entitled. Notwithstanding, he enjoyed the reputation of one of the ablest magistrates of his time, and none ever left behind a more enviable name.

forth in juxtaposition the commercial law of France, as then observed, and the English about to be substituted in its place. This regulation contains a clear and comprehensive exposition of the law on the following points:—

1. Property in shipping.
2. The building, repairing, and supplying of shipping.
3. The duties and powers of owners and masters of ships.
4. The qualifications of masters and seamen.
5. The duties of seamen.
6. The wages of seamen.
7. Freights, whether by charter-party or bills of lading, and all questions relating to the conveyance of merchandise in ships, including demurrage.
8. Stoppage *in transitu.*
9. Salvage.
10. Marine insurances and averages.
11. Bottomry bonds.
12. Bills of exchange and notes or bills to order or bearer.
13. The relative rights of merchant and factor.
14. Commercial co-partnerships.

For the purpose of preserving mortgages and titles to property there was established an office for the registration of deeds and "hypothèques," to be regulated by the law of France, and modelled, as far as practicable, on the plan of similar institutions in the French colonies. By this important reform, which came into operation on the 7th July, 1829, a stop was put to that illimitable system of credit which had proved so detrimental to the trading interests of the colony.*

* "The planter could now," says Mr. Breen, "contemplate all the horrors of his position in the tableau of his debts, and the merchant measure the extent of his embarrassment in the list of his claims. Liabilities began to be incurred with more caution, advances to be made with greater security; while the transfers of property, until then inefficient and undefined, received the sanction and stringency of legal contracts. A term of eighteen months was allowed for the registration of all mortgages then in existence, and it was enacted that every mortgage enrolled within that period should retain its original priority and privileged character; but that otherwise it should only take rank and precedence from the date of the enrolment. Nothing can more forcibly illustrate the crippled condition of the colony than the data furnished by these registrations. Perhaps few persons out of St. Lucia may be disposed to credit the startling fact, that before the expiration

To rescue the colonists from a state of unmitigated bankruptcy, Mr. Jeremie proposed the enactment of a law to authorize the seizure and sale (saisie réelle) of immovable property; and in preparing the government and the country for the application of this panacea, Mr. Jeremie exerted himself with such perseverance and success, that before his departure in May, 1831, he had the satisfaction to know that his views on this important subject had received the sanction of the minister of the crown; although it was not until January, 1833, that measures were taken to give them the force and effect of a legal enactment.* It was now that Mr. Jeremie's forecast began to be felt and appreciated. In the space of a few years, the sale of the estates and other property brought into circulation no less a sum than £170,000 stg., which, but for the opportune institution of the mortgage registry, must have lain in the marshal's coffers to this day. The estates might have been levied upon and sold, but there could have been no marshalling of the creditors, no distribution of the proceeds. Nor was this the only benefit derived from the establishment of the mortgage office. By that were the commissioners of compensation aided in unravelling the system of craft and confusion which had been carried on for better than half a century; by that were they enabled to adjudicate upon the claims of contending creditors, and ultimately to distribute

of the eighteen months, the number of mortgages produced to the registrar was one thousand nine hundred and eighteen, exhibiting the debts and liabilities of the proprietary body at the enormous sum of £59,498,249 17s. 6d., late colonial currency, or one million one hundred and eighty-nine thousand nine hundred and sixty-five pounds."

* The effect of these measures is thus described by Mr. Breen: "Soon after the enactment of the law authorizing the seizure and sale of immovable property, several estates were levied upon and brought to the hammer; and the same process has continued until almost every estate in the island has now been disposed of by judicial sale. This course, pregnant in appearance with so much misery and impoverishment, was not attended in reality with hardship to any party. There were but few whose condition could have been aggravated by being dispossessed of property of which they had but the nominal ownership, and fewer still whose private means were absolutely restricted to the resources of the soil; while, on the other hand, the sale of the estates produced the highly advantageous results of enabling the planter to liquidate his affairs, and of throwing the estates into the hands of persons possessed of ample means to provide for their cultivation on a footing of respectability and independence."

with such general satisfaction the portion of the twenty millions accruing to St. Lucia (£335,627 16s.). But, above all, it was the creation of the mortgage office that, by facilitating the sale of real property, enabled the colony to assume an attitude of independence on the advent of final emancipation. This portentous change—a change fraught with embarrassment under the most favourable aspect—found the greater proportion of the estates in the hands of persons in easy and even affluent circumstances, instead of finding them in the possession of a generation of bankrupts, planters of the old school, whose passions and prejudices, fostered rather by the folly of the system than the fault of the men, had long since unfitted them for the management of willing slaves, and could have awakened but little sympathy for the intercourse of free cultivators. "On his arrival in the colony his first care was to improve the civil, criminal, and commercial institutions of the colony;"* while he restored confidence in the administration of justice by a series of "judgments and decisions," which cost him days and nights of patient investigation, and which, for power of thought, felicity of illustration, and searching sagacity, as applications of law, may be studied as models. "To say that he was the ablest judge that ever presided in St. Lucia, is to say little indeed. Wherever you turn your eyes, you meet the proofs of his activity in the discharge of the administrative duties which at one time devolved on the first president. The high roads opened up and levelled, the paving and drains for the salubrity of Castries, the erection of the Protestant church,—all attest his unwearied and zealous labours. Nor was the sphere of his usefulness confined to St. Lucia. Placed on the pinnacle of judicial power in the centre of the archipelago, he shone forth, a 'light for all nations,' over the still dreary and tempestuous horizon of West Indian slavery—infusing a spirit of moderation into the colonial laws, and spreading far and wide those feelings of sympathy

* Chief Justice Reddie's address to the bar of St. Lucia, delivered on the 15th June, 1841, on the announcement of the death of Sir John Jeremie.

for the negro race which were destined, ere long, to usher in the glorious day of their deliverance from bondage." *

Nor among the useful works to be consulted should Mr. Thomas Le Marchant's "Remarques et Animadversions" on Terrien be overlooked; † though, from the recent changes that have taken place in the law of real property, the work is no longer of the practical value it formerly was, though still important as an historical reference.

In the category of English works should be placed the "Letters to a Young Man of Property," by Lord St. Leonards. There, in a small compass, in the most lucid style, combined with all the profound knowledge which might be expected from, it may be, the greatest of living lawyers, will be found an admirable compendium of the law of real property, and which, though the smallest, is not the least valuable of his own eminent works.

Among the most useful and elaborate works to be consulted is the "Dictionary of Commerce," equally valuable to the lawyer as to the merchant,—which might not inappropriately be called "Encyclopædia of Commerce,"—by the late Mr. John R. MacCulloch, one of the ablest, consistent, and untiring advocates of public economy and free trade, who demonstrated the fallacy of protective duties and sliding scales, and hastened their downfall by adducing

* That his services were at length appreciated by the colonists, may be gathered from the concluding part of Justice Reddie's address. "For the laws which he enforced and the reforms which he introduced into the legal system of this colony, giving stability to commerce, and security for the safe investment of capital, the planters and merchants recognise to him a deep debt of gratitude. The general mourning which I have seen, and seen with a melancholy gratification, shows that his memory will be long cherished by that class of the colonists whose equal rights he secured, and whose social position he upheld and vindicated, both by precept and example; when, to use his own striking language, 'after having submitted to the minister of the crown (Sir George Murray) an argument on the grave colonial question—the distinction of colour—that eminent statesman recognised the policy and justice of a change, and "the curse of Ham" disappeared from the western world.' My lot was to know him under still more trying and difficult circumstances of public life and political struggle,—when he spurned office rather than remain a supple and convenient tool in the hands of others whom he could neither trust nor respect,—when he threw himself with the characteristic singleheartedness on the side of the oppressed, caring little for himself so that they might be protected, and the law enforced, and good government upheld, in the most disturbed and lawless of the colonial possessions of the crown."

† Written about the middle of the 17th century.

the most incontrovertible evidence of their injurious tendency, many years before either Sir Robert Peel or Mr. Cobden sealed their doom by legislative enactment, and earned for themselves an imperishable name.

If, to the acquaintance with these eminent authorities on the French law, the aspirant for the bar or bench of his native country have diligently followed for two or three years a course of lectures in one of the law universities of France, either Paris, Caen, or Rennes, he will hereafter find that the time devoted to these lectures will have been the most precious of his life, that which may have most influenced his prospects. Thus properly trained, and taken his seat among the advocates, though he may not have before him either the woolsack or a chief-justiceship, it will be his fault if, by diligent attendance at court and careful attention of the cases confided to him, he do not attain to easy independence without being under too great obligations either to counsel or law agents, and without there being any necessity of his becoming one himself. It may also afford him some comfort to reflect that, if destined to rise to no very great eminence, he will at least be preserved from want; that in the lottery in which his fortune is cast, if there be no great prizes to be drawn, neither will there be found any conspicuous blanks; that if there be none of those dazzling retainers of thousands which may sometimes meet his ear, neither will starvation be found to stare him in the face; that, upon the whole, in the circumscribed sphere in which his lot is cast, the prospects of success augment as the magnitude of the prizes diminish; and this being known as he enters upon his career, it will be his own fault if his ambition fall far short of what he ultimately attains. However circumscribed his sphere, an important future may still be in reserve for him; at times the life of man, and not unfrequently his honour, liberty, and property may be mainly affected by his advice and exertions; rulers and judges may seek his counsel, and it may be his lot to oppose them. It may also happen that his labours will not always be confined within the precincts of his own jurisdiction: he

may be appealed to by judges from foreign lands, and his opinion become the guide for their own decisions; and even where a different opinion to his own is entertained, it will still be his own fault if they have not reason to respect his integrity, knowledge, and independence, should their decisions run counter to that he may have formed and given, and on what may still turn out well-founded convictions. Nor do we think that, for his guidance in public life, he can make a happier choice than from the works and lives of those men to whom the law of real property, as well as the mercantile law of his own country, will ever be indebted, and of which a brief sketch has been attempted. From them, we believe, a greater stock and more valuable knowledge may be gleaned than in following up the elaborate instructions of D'Aguesseau to his son, or from Mr. Warren's introduction to law studies—works which, however valuable as showing the best authorities to consult and study, would if carried out be much more likely to deter than encourage a student in pursuing what he is most desirous of accomplishing, from the enormous quantity of reading, study, and labour that the bare perusal of the works recommended would imply, to say nothing of the meditation which such works would require if intended for any available purpose; and of this a somewhat convincing proof is afforded from the following passage, taken from Clare et Clapier's "Barreau Français," in their introductory notice of D'Aguesseau's discourses: "On pourra se faire une idée de l'immense étendue du savoir de D'Aguesseau, en parcourant les instructions qu'il écrivit pour son fils. On y verra, non sans admiration, les études immenses qu'il lui ordonne, et qu'il avait lui-même exécutés. Tant et de si pénibles travaux étonnent aujourd'hui nos faibles courages, et l'on éprouve à leur aspect un secret sentiment de honte et de découragement, comme à la vue de ces antiques armures qui revêtaient nos pères, et devenues trop pesantes pour leurs fils dégénérés."

From the works of these eminent civilians, which have so materially served in laying the foundation of the laws of all property, without regard to kind, and of the very contracts

by which that property may be affected in passing from hand to hand, it will be seen how little of the origin and spirit of the Norman or feudal law now remains; and it is with no little satisfaction that we contemplate these changes, achieved as they have been by men who were, perhaps, less remarkable for their pre-eminent scientific attainments, than for that unswerving integrity of purpose which characterized their private life; and what has been said of Pothier,* that when he conceived his immortal treatises, he wrote as with a presentiment that a crisis was approaching when it would be necessary that science should hold her precepts ready at hand to save her from neglect and proscription, will equally apply to his rivals and contemporaries, to whom it was given to illumine and amend every department of civil and maritime law.

Having thus placed before the reader the works and authorities that it behoves him chiefly to consult, in obtaining the most desirable knowledge of the law of real property, we now proceed to show how that property has been affected by the modern law of 1840, and the more recent changes introduced under the administration of Sir P. Stafford Carey, as bailiff.

* "En droit français," Mr. Lerminier observes, "Pothier écrivit avec candeur des traités où il rassembla les traditions et les doctrines sous des formes simples et populaires, comme s'il eut pressenti que bientôt après lui viendrait une de ces époques de trouble et d'emportement pour lesquelles il faut, pour ainsi dire, tenir la science toute préparée et toute facile, afin de la sauver de l'oubli et de la proscription. C'est le Rollin de la jurisprudence française, comme le dit avec bonheur M. Berville. En droit romain sa touche fût plus énergique et plus originale."—"Introduction à l'Histoire du Droit, par M. E. Lerminier," p. 117.

ON INHERITANCE.

Property may be acquired either for a valuable consideration or gratuitously. Inherited property and that acquired by wills, of which it is intended here to treat, are of the latter description. We commence by inheritance, as the most simple and natural mode, and the first in the order of the reformed laws, of which a brief commentary is intended to be given.

To inherit from a person is, in other terms, to occupy the place left vacant in society by his death, or privation of civil rights—such as is entailed by a seven years' banishment from the bailiwick, after conviction of some crime.* The person thus inheriting or occupying the place of another is called his heir, which intimates the absence of the former owner, for *viventis nullus hæres.* How parties inherit, and in what proportions, to different kinds of property, real or personal, of a person dying intestate,† or without having himself selected his heir, will be the subject of the following chapter.

The peculiar rights of primogeniture, according to the present law, and those of all other relatives, whether in a direct, collateral, or ascending line, are now more clearly defined than ever they were; and it is to place this knowledge of them within the reach of all, that the following pages are written.

The articles will be treated as they follow in the Order in

* Which punishment entails confiscation or forfeiture of the convict's property, a result which it is to be hoped may soon disappear from the criminal codes of all civilized nations, as being both inconsistent with the main object of all punishment—the reformation of the offender—and barbarous, as depriving his innocent heirs of property which, in honour and justice, absolutely belong to them.

† The term intestate is derived *ab intestato,* that is, without leaving a will.

Council of the 13th of July, 1840, which was registered on the records of the island on the 4th of August following—in the Orders in Council of May, 1847, and June, 1852. By these orders the laws of inheritance and wills were modified, and the law of real property in general improved. The period of prescription or limitation, both in reference to real and personal property, was considerably abridged, the prescription to realty being now limited to thirty instead of forty years, and the prescription of personalty having been further abridged from thirty to ten years, without any distinction as to the nature of the debt, whether derived from bonds or simple contract debts without acknowledgment.

OF THE VINGTIÈME OR TWENTIETH.

By the first article of the law of 1840, the *vingtième* was abolished. What that *vingtième* was and how it operated will be now seen. The right of primogeniture was materially modified by that law, as will appear from the first ten articles, where those modifications are contained.

ARTICLE 1.

The right of the sons to the *vingtième*, or twentieth part of the estate, is abolished. The eldest son's right to the *préciput* shall be continued, subject, however, to the modifications stated in the articles that follow.*

The *vingtième* or twentieth was a certain portion of real property situated *without* the *barrières* or boundariés of St. Peter-Port, which always devolved to the sons, whenever their number did amount to, but not exceed, double that of the daughters. In other terms, when the number of daughters was so much greater than that of the sons, as to require additional favour, that was precisely the time they were treated with the greatest disadvantage. Thus, in the case of a son and three daughters, the son would first raise his twentieth,

* " Abolition du vingtième et conservation du préciput.

"ARTICLE 1.—Le droit de vingtième en faveur des fils est aboli. Le droit de préciput en faveur du fils aîné continuera à avoir lieu, sujet toutefois aux modifications portées dans les articles suivants."

in which was included his eldership by right of primogeniture, besides the remaining two-thirds of his father's real property; so that each daughter could not have inherited one-twentieth in quantity, nor perhaps one-fortieth in value, of her parent's inheritance.* So then, provided the number of sons only amounted to, but did not exceed, double the number of daughters, they were entitled to the *vingtième*. Where there was one son and a daughter her portion was exactly the same as where there were two sons and a daughter, the number of sons not exceeding double that of the daughters. On levying the *vingtième*, which is done before the douzaine of the parish where the deceased's estate is situated, the sons select the spot they think fit, beginning, as a matter of course, with the most valuable portions of land on which are erected tenements and dwelling houses, which, however valuable, are calculated only as bare ground. The only restriction placed on them is, that when once the sons have chosen their *vingtième* in a certain spot, they are bound to continue taking the whole amount allotted to them, if the spot can furnish it, and that can be done without crossing any street or road; but if it cannot, then they may not only cross from one road to another, but even from one parish to another, to levy the surplus, always, however, under the restriction, that the eldest is bound to levy the remainder of his *préciput* on the nearest spot. Though the *vingtième* was abolished by the first article of the law of 1840, as its operation was suspended in every case where the eldest son, on the 4th of August, 1840, had attained his fourteenth year, it will yet be some time before the law of 1840 comes into uniform operation, and the *vingtième* itself becomes a matter of history. The clearest idea of the *vingtième* may be derived from the fol-

* Well might one of the ablest parochial officers in the island, the late Mr. Mahy, at the frequent instances of legal oppression which arose from such a division of patrimonial estates exclaim—"Que le sang lui bouillonnait dans les veines à l'aspect de si criantes et fréquentes injustices," of which he, perhaps, more than any other person in the island, had been called upon to make, and of the legality of which there did not exist a more competent judge. Yet, had the petitioners and their committee been content to abide by the custom of their forefathers, these abuses must have long continued, as they were very coolly told that their system of inheritance and wills was the best ever framed, and the work of ancestors, perfect models of human wisdom.

lowing passage of the "Approbation des Lois," made in 1582 (the twenty-fourth year of Queen Elizabeth's reign): "Le fil ou les fils," it is said, "prennent le vingtième pied de terre de leurs antécesseurs, qu'ils choisiront où il leur plaira hors les barrières de St. Pierre-Port; et s'il y a maison ou maisons, moulins, ou autres bâtimens, ou jardins, sur le vingtième qui sera pris, ne sera estimé que pour autant d'autre terre; et est ce choix sur l'entier de l'héritage; mais les fils ayant commencé à prendre leur vingtième, en un lieu, doivent prendre tout ce qui leur en peut venir, sans aller sur d'autres terres, si le lieu où ils ont commencé peut suffire; si non, aux autres terres plus prochaines se doivent fournir, et après le dit vingtième pris, doit être parti l'héritage entre les frères et sœurs, dont les sœurs ont le tiers de l'héritage, et font les lots, et choisissent les frères; que s'il y a trois, quatre ou plus de frères et une sœur, elle aura telle part que les fils; et lors ne prennent les fils aucun vingtième." So that before a *vingtième* can be levied, the real estate must be situated without the *barrières* of St. Peter-Port; there must not be more than double the number of sons to that of daughters; once begun to be taken in a certain spot, if that does not furnish a sufficient quantity of land, the sons are bound to take the remainder on the nearest to it.

As the second clause of the first article merely states that the *préciput* or eldership is not abolished, but modified, it will be seen what those modifications are, on examining the fifth, sixth, and seventh articles, of which they form part.

The right of eldership in lineal successions shall be now examined.

ARTICLE II.

In successions to real property in a direct line, when sons and daughters succeed together, they all share, after the *préciput* of the eldest son has been taken, the sons two-thirds, the daughters one-third; except in cases where, by this method, the portion of a son would exceed double that of a daughter, in which case the portions of the sons shall be reduced to double the portion of each of the daughters; excepting also in cases where, by this method the portion of

a daughter would exceed that of a son, in which latter case the sons and daughters will share in equal portions.*

By this provision in lineal successions, the condition of the daughter is now much less disadvantageous than it formerly was. The sons, after once the eldership is taken, can now never inherit more than double the portion accruing to each daughter. Thus, suppose an estate of thirty vergées to be divided between one son and two daughters. Formerly, it would have been divided thus: the son would have first taken one and a half vergées for his *vingtième*† and *préciput*, besides two-thirds of the remaining twenty-eight and a half vergées—that is to say, nineteen vergées of the remainder of the estate, leaving no more than four and a half vergées to each of his sisters; whereas it is evident that the spirit of the law only allowed him a double portion, as he would now have—that is, fourteen vergées and three-quarters, and each of his sisters seven and a quarter; that is, their portion of real property, whether houses, lands, or rents, would be now doubled, and even more than doubled, when the number of daughters greatly exceeds the number of sons. In this res-

* "Dans les partages d'héritage en ligne directe, le fils ne peut jamais hériter plus du double de la portion qui échoit à chacune des filles.

"ARTICLE 2.—En successions héréditales en ligne directe, lorsque les fils et filles succéderont ensemble, ils partageront, après le préciput du fils aîné levé, les fils deux tiers, les filles un tiers; excepté dans le cas où de cette manière la portion d'un fils excéderait le double de celle d'une fille, auxquels cas la portion de chacun des fils sera réduite au double de la portion de chaque fille; excepté aussi dans les cas où de cette manière la portion d'une fille excéderait celle d'un fils, auxquels derniers cas les fils et les filles partageront en portions égales."

† This mode of raising the *vingtième* before the *préciput*, and taking the latter out of the former, goes far to show that originally there existed no eldership, as Mr. Thomas Le Marchant asserts; that the *vingtième* was raised for the sons generally, not for the eldest in particular, who was only entitled to his portion of it as his other brothers. It would, however, appear that custom gradually introduced the system of granting a *préciput* to the eldest son; and it may indeed be said immemorial custom, since we find Mr. Le Marchant, who wrote two centuries back, inveighing against what appeared to him a great abuse and usurpation. Since this learned man's time, the practice of granting an eldership has continued without interruption, and may at present be said to be inherent in the laws and constitution of the island, where the principle, when restrained to the estate of a single parent (as will be the case in future), cannot be said to operate disadvantageously, as its consequences must be to prevent the dismemberment of small estates and too extensive subdivision of houses and lands, which, it is well known, are extremely injurious to agriculture.

pect, the system of the former law, which aggravated the condition of daughters as their number increased, is completely reversed; the rule now being, that however few or numerous the daughters, the portion of the sons shall never exceed double that of any daughter. Such, too, was the prayer of the petitioners, who represented, that according to the old law, the greatest injustices prevailed; that out of the *barrières* of the town, the eldest son often took away by far the most valuable portion of the real property, and that the sons always divided it to such an extent among themselves, that the daughters were left with merely a nominal portion. In reference to personal property, daughters share equally with sons; nor is the married daughter, by the sole effect of her marriage, any longer debarred, as she formerly was, from participating in any share of the personal property of her deceased parents. The only case which remains unchanged under the new law is that where the number of sons is exactly double that of the daughters, when all the sons and daughters share alike, they then taking what is commonly called "lot à frère" (a brother's portion). In reference to inheritance in a direct line, children of the half blood are not excluded by those of the whole blood. Thus, the children of the same father, but of a different mother, inherit with his other children to their father's inheritance, though not to his wife's, she not being their parent. These are called "consanguine." The same rule applies to those issued from the same mother, but of a different father, which are called "uterine." Those who are descended from common parents are called "germains," and inherit from both father and mother, in contradistinction from the uterine and consanguine, who only inherit from one or other of the parents.

By the following article, an advantage over certain kinds of personal property, to the amount of one-seventh, is established in favour of the eldest son.

ARTICLE III.

In successions to personal property, the eldership shall be one-

seventh of the household furniture, after the third of the widow has been taken; and also all family portraits, and pieces of plate or other objects, given to the father or ancestors by public bodies.*

By this, a *préciput* or advantage is introduced, in favour of the eldest son, over certain kinds of personal property to be found in the succession, but not over all kinds of such property. For instance, money, cattle, and other personalty, as contradistinguished from furniture (*meubles meublants* are the terms of the law), would be divided in equal proportions. It would appear that this *préciput* for personal property had almost fallen into desuetude throughout the island; no vestige remained of it in town, personal property of every description being equally divided among all the children. Even in the country parishes, the privilege which the eldest son possessed over his co-heirs was trifling, being restricted to the sword, saddle, and spurs, or a single piece of furniture belonging to the estate.

In inheritances where there are only daughters to share, their respective rights are determined by the following article.

ARTICLE IV.

In direct successions, when there shall be only daughters to share, the youngest one will make the lots, after which they shall choose according to seniority.†

This is conformable to the custom and spirit of the old law, but instances having occurred in successions, where there were only daughters, of drawing lots for their respective portions (vulgarly called "chapoter," each drawing her lot from a hat), it was better to consecrate the rule by a formal clause, and thus render the mode of partition uniform

* "L'aînesse sur les meubles est d'un septième.

"ARTICLE 3.—Dans les successions mobilières, l'aînesse sera un septième des meubles meublants, après les tiers de la veuve prélevé; comme aussi tous les portraits de famille, et les pièces d'argenterie et autres objets donnés au père ou aux ancêtres par des corps publics."

† "Où il n'y a que des filles à hériter, la plus jeune fait les lots, la priorité de choix étant toujours réservée à l'aînée.

"ARTICLE 4.—En succession directe, lorsqu'il no aura que des filles à partager, la plus jeune fera les billes, et elles choisiront suivant leur aînesse."

between sons and daughters. There can now be no longer any doubt upon the mode of apportioning the different lots in a succession, whether composed of sons or daughters, or of both sons and daughters. In all instances when there are sons and daughters, the latter make the lots, and the former choose according to seniority.

The only difference that exists between the fourth and the first article is, that when there are only daughters to divide the inheritance, no eldership whatever is allowed either on the real or personal estate.

The eldership on real property, by the following article, is limited to a single enclosure.

ARTICLE V.

The *préciput* of the eldest son shall not extend beyond a single enclosure, notwithstanding such enclosure may not contain the quantity of land usually given as *préciput*, which is from fourteen to twenty-two perches.*

The term "préciput" is derived, according to some, from "præcipio," to take beforehand; because it was formerly, and still continues to be, the custom for the eldest son to raise this portion of his inheritance anterior to any other, and previous to his co-heirs taking their portions. Others derive it from "principua pars," because the *préciput* ever formed the most valuable portion of the succession, comprising the principal dwelling-house and all the adjacent buildings and tenements, which, in rural districts particularly, at once not unfrequently swept away from one-fourth to one-third of the value of the whole estate. In the town parish, the *préciput* amounted frequently to much more than one-half, or even three-fourths, the value of the whole real property to be divided among the children, from the eldest son's taking his eldership over a surface of land from sixteen to twenty-two perches, on which were sometimes erected dwellings of con-

* "Le préciput est restreint à un seul enclos.

"ARTICLE 5.—Le préciput du fils aîné ne pourra s'étendre au-delà d'un seul enclos, malgré que cet enclos ne contienne pas la quantité de terrain qui est ordinairement assignée pour cet objet, qui est de quatorze à vingt-deux perches."

siderable value, and which all disappeared in the eldership. Thus, suppose a succession in which are four houses, one of which has a garden, outhouses, and field adjoining, valued at £3000, and from their extent and value the douzaine have allotted a medium between the sixteen* and twenty-two perches for an eldership (say eighteen); that three of these are built each on five perches of land (and without the precincts of the old *barrières* there were many of considerable value, varying from £1000 to £2000 each, built on no greater surface); the whole of such an inheritance would, under the old law, have devolved to the eldest son, as he would have commenced by taking the three houses, which being comprised within only fifteen of the eighteen perches allotted to him as his *préciput*, he would have taken the remainder (say three perches) on the most valuable house, garden, and adjacent lands, which, if situated in a rural district—according to the system at present pursued, of rating lands in successions—he would have obtained it at not more than one-third its value, and if in town, certainly at not more than one-half; lands destined to cultivation being estimated at such a rate, that the eldest son may be induced to take to and cultivate the estate with his parent, rather than devote himself to a trade or seek an occupation abroad.

By thus limiting the eldership to a single enclosure, in the foregoing case, three of the houses would now fall into the succession, and be divided equally among the co-heirs, if all were sons or all daughters; but if sons and daughters, then two-thirds would go to the sons and one-third to the daughters, in such a manner, however, as that in no case would the portion of any son exceed double that of any daughter.

This reform in the law is one of the happiest of the whole, and as its execution was not, as in some other cases of lineal inheritance, deferred, where the eldest son had attained his fourteenth year on the 3rd of August, 1840, its existence

* In town, the number of perches formerly allowed was from sixteen to twenty-two perches.

as a principle has only had the effect of conferring additional benefits on the inhabitants.

In the last clause of the fifth article, the quantity of ground allotted to the *préciput* is mentioned, and stated to be from fourteen to twenty-two perches. In 1828, an inquiry was instituted respecting the quantity of land usually allotted by the douzaines throughout the island for a *préciput*, when it appeared that twenty-five or even thirty perches had, in a few instances, been allowed by some douzaines, when the estate was larger than usual, and the adjacent buildings consequently required for the cultivation of the farm more numerous; but that the general rule was to grant from fifteen to twenty-two perches, though not unfrequently from fourteen to twenty-two, the latter was therefore fixed upon for the basis of the modern law.

It was once a question how the adjacent tenements and buildings round the principal dwelling-house, which could not be comprised within the number of perches granted to the eldest son as *préciput*, should be valued. Was it as bare ground only, as the ground on which the *préciput* stood, or was the eldest son to pay a compensation for their value to the co-heirs? In the case of Robin *v.* Robin, it was decided that no compensation was due to the co-heirs, and that the ground on which the tenements were built should be valued as bare ground.*

In elderships on real property situated in rural districts,

* The sense of all the douzaines of the island was recorded at the Chief Pleas after Michaelmas, 1828, when it appeared that the usual practice was to allow from fourteen to twenty-two perches as a *préciput*, and to value the dwelling-houses (however valuable) situated thereon as naked ground.

That part of the decision of the Court which refers to the custom runs thus: "The Court, in annulling the report of the St. Sampson's douzaine, sends back the eldest son and his co-heirs before the douzaine, to value the land, without the *préciput*, at so much per vergée, according to the ordinary value of land, unless any peculiar circumstances have arisen which may have added permanently to its value; the Court judging that the houses and lands situated without the boundary fixed as a *préciput*, and which form part of those contiguous to or essentially dependent on the principal dwelling, shall be valued as bare ground, the Court deciding at the same time that the *préciput* shall be reduced from thirty to twenty-two perches."—Decision, dated the 21st December, 1829, and given unanimously by the bailiff and eight jurats, from which there was no appeal. ("Re Robin, des Grandes Capelles.")

the eldest son may require that one-third of the estate be allotted to him as part of his eldership, on his indemnifying his co-heirs for so much of the third as is not comprised in his *préciput*.

ARTICLE VI.

When an enclosure, on which the eldest son has taken his *préciput*, shall not contain one-third of the land to be divided, the said *préciput* included, the douzeniers of the parish shall assign him, should he require it, besides the said enclosure, land to the extent of the said third, in such part of the estate as they shall think proper. And the said eldest son shall remunerate his co-heirs for the value of the said third (the *préciput* excepted), according to an estimate that shall be made by the said douzeniers.*

The object of granting to the eldest son, under any circumstances, one-third of the real estate situated within the rural districts, has been to prevent the too great dismemberment of estates—a principle which was never lost sight of, either by the committee of the petitioners, or the authorities generally in framing this law; the private advantage momentarily accruing to most members of a family from too extensive a subdivision of estates, in consequence of the apportionment of their lots, offering by no means a sufficient inducement to undergo the disadvantages which equalization entails as a system, applied to real inheritance. It is, however, only when the estate does not form an enclosure—that is, when some of its parts are separated from the main dwelling, either by roads or fields belonging to other persons—that the eldest son is entitled to demand his third; for if it formed a single enclosure, he could take the whole as formerly, the object being to augment, not to dismember, the already too diminished size of farms in the island. Such third, it need scarcely be remarked, is entirely at the son's option. It is only should he require it, that the douzaine of the parish

* "L'aîné a toujours la faculté de prendre le tiers de l'héritage en indemnisant la cohérédité.

"ARTICLE 6.—Lorsque l'enclos sur lequel le fils aîné aura levé son *préciput* ne contiendra pas le tiers de la terre à partager dans la succession, le dit *préciput* inclu, les douzeniers de la paroisse lui assigneront, s'il l'exige en outre le dit enclos, de la terre en telle partie de l'héritage qu'ils jugeront convenable, jusqu'à concurrence du dit tiers. Et fera le dit aîné récompense à ses cohéritiers de la valeur du dit tiers (sauf le *préciput*), d'après l'estimation qui en sera faite par les dits douzeniers."

where the estate is situated would be authorized to assign him this third: "unicuique licet, in favorem suam juri introducto, renunciare."

When required, as there is little doubt it will be, as the eldest son generally finds it his advantage not to dismember his estate, from the circumstance that farms of a certain extent are proportionably cultivated at much less expense than smaller ones, the douzeniers are appointed to assign him land to this extent, from such portion of the estate as they may deem most advisable. From their decision an appeal, as a matter of course, will lie to the Royal Court, whose members would do well to sanction it, unless very strong reasons be adduced against it, more particularly if, by such decision, the dismemberment of the estate is prevented; for such is, all things equally considered, the object of the law in investing them with this accession of power.

By the second clause of the sixth article, it will be seen that when the third of the estate, beyond the limits of the *préciput*, is assigned by the douzaine to the eldest son, he is bound to account to his co-heirs for the value of the property so assigned. From the rate set upon the property by the douzaine, any of the parties interested may, if dissatisfied, appeal to the Court, as they deem it too high or too low. By the law of 1840, the eldership or *préciput* is restricted to a single enclosure, consisting of the house or lands which are so contiguous to each other that they form but one—that is, that they are separated by neither walls, hedges, nor ditches, so as to form different fields or houses; for, if so separated, they then become different enclosures.

Thus, a row of adjoining houses may either form one or more enclosures, according as they are separated from each other, or as they communicate to each other by entrances from within, or private paths from without; in the latter case, however numerous, they form but one enclosure on account of the private communication; in the former, as the communication can only take place through the public street or road, in contra-distinction to a private path or communication, such houses would then form separate enclosures, each

tenement being walled in, and totally distinct from the adjoining one. So that to form an enclosure, it is not enough that houses or lands should join, they must besides communicate with each other by some common entrance, for it is only in the absence of such common entrance that tenements may be said to constitute as many different enclosures, in which case one only would fall to the eldest son for his *préciput*. Thus, adjoining houses in the Arcade would either form one or more distinct enclosures as there existed any private or common communication between them, other than the public passage. This distinction should not be lost sight of, as public spirited individuals need no longer be deterred from entering into extensive speculations in building rows of houses, or purchasing land for building lots, seeing that by means of distinct separations, either walls or hedges, each portion, as a different enclosure, may be made to descend to different members in the same degree of inheritance.

On the same principle, in rural districts, adjoining fields or gardens form one or more enclosures, as there exists or not one common entrance or communication between them, other than the public road or passage,—if they are connected by the same entrance they then form one enclosure. If they are entered by a different passage, and are separated by a wall or hedge, they then form different enclosures.*

* This matter came before the Court in January, 1845, on the action of Matthew, eldest son of Nicholas Bailleul, of the Corbière, to annul the report of the douzaine of the Forest, for not having comprised in his enclosure two fields, called the "Barrac," which he contended should have been so comprised. The eldest son and co-heirs having been sent before Messrs. Carré and H. Dobrée, commissioners of the Court, to make their report upon the subject matter in dispute, the parties ultimately came to a private arrangement, so that no decision took place.

The principle itself was decided, *en vue de justice*, by a full Court at the *Pins*, in the Câtel parish, in "re co-heirs De Jersey *v.* Peter Girard" (the eldest son), on the 11th October, 1865.

"Vue de Justice.—In re co-heirs De Jersey *v.* the eldest son.—Miss Rachel Elizabeth Girard and co-heirs of the late Mrs. Rachel De Jersey, their mother, brought this action again Mr. Peter Girard, eldest son and principal heir of the said Mrs. De Jersey, to see the Court decide on the question raised between the parties as to what constituted an enclosure; the douzaine having given the eldest son, Peter Girard, two fields named the 'Hougue au Comte,' and a meadow called the 'Chambre,' as forming part of the enclosure of the estate of the deceased, and as a portion of his *préciput* or eldership. The co-heirs brought this action to annul the report of the douzaine, contending that the fields should not be looked upon as forming any part of the enclosure, they

By the following article it is prescribed, that in future the eldest son shall only have one *préciput* on the estates of his parents; it also refers to the mode in which it must be raised, to secure him the choice of that which may accrue either from his father or mother's succession. It may be right to observe, that since the seventh article passed, an important modification to its third clause has been introduced by the Order in Council of the 26th December, 1851, on the prescription of real property; whereby all assignable rents, created for the purpose of equalizing the portions or shares of co-heirs in successions, were declared essentially assignable from the date of the 1st January, 1852. By the first article of this order, the period of prescription, in matters of realty, was reduced from forty to thirty years.

ARTICLE VII.

The eldest son shall take no *préciput* on the estate of the survivor of his father or mother, unless he have caused a valuation to be made, by the douzeniers of the parish, of the *préciput* already taken by him on the estate of his first deceased parent, at the period when he took it; and he shall bring back the said value, that it may be divided, if he intends taking the second *préciput*. The valuation shall be made by the said douzeniers, both in rents and in money, so that the said eldest son may have the choice to bring back the value in either way. If the value be brought back in rents, those rents shall be assignable during forty years,* in the same manner as all other rents created to equalize lots among co-heirs. A grandson, who shall already have taken a *préciput* on the estate of his father and mother, may always take, in the succession of a grandfather or grandmother, the *préciput* to which his father (if he was the eldest son) would have had a right, in the same manner, and on

being separated by a hedge from the remainder of the estate, and therefore that the eldest son was not entitled to them as *préciput* or eldership.

"On the other hand, the eldest son maintained that they should be looked upon as an enclosure, the two fields not only being contiguous, but actually that there were breaches and gaps formed in the hedge and an entrance made, through which the proprietor was accustomed to pass from the fields which, it was admitted, formed part of the enclosure to the two fields in dispute, without going into the main road.

"The Court, after hearing the parties, unanimously decided that the report of the douzaine should be confirmed, and that the fields in dispute formed part of the eldest son's *préciput* or eldership, and should be allotted to him as a portion of his enclosure in his mother's succession, and sentenced his co-heirs to the costs of the action."

* Now reduced to thirty years.

the same conditions, with respect to the co-heirs of his said father. And it shall be optional with him to divide it between his consanguine brothers or sisters, or keep it himself, on bringing back the value of that which he already possesses.*

Formerly, an eldest son had a right to take an eldership from all his parents and grandparents, without any regard to number; by this amended law, he is only entitled to take one in each line, either in the paternal or maternal, at his option. The same may be said of the corresponding lines in each generation of grandparents. This is conformable to the fourth article of the original petition, recommending that the eldest son be restricted to a single eldership. Its spirit has also been preserved by extending the privilege of a single eldership to each line of grandparents an eldest son may have; the object being, that not more than one shall accrue to him from the inheritance of any two parents in the same degree. Thus, having selected his eldership from his father's inheritance, he cannot afterwards come upon his mother's for an eldership; though his having taken his eldership on his father's would not debar him from taking it on his grandfather's, which might afterwards fall in. The same reasons will, *vice versa*, apply to the choice he might have made of his mother and grandfather's estates; in either case he can only come upon the estate of the surviving parent in each line, on bringing back or accounting for the estate of his first deceased parent or grandparent of such line, or its value in rents or money,

* "L'aîné ne peut désormais lever qu'un seul préciput dans chaque lignée de ses parents; le choix lui est toujours réservé en obtenant un rapport d'évaluation de la douzaine du premier préciput qu'il lève.

"ARTICLE 7.—Le fils aîné ne pourra lever de préciput sur la succession héréditale du survivant de ses père et mère, à moins qu'il n'ait fait évaluer par les douzeniers de la paroisse le préciput qu'il aura levé sur la succession du prédécédé de ses dits père et mère à l'époque même qu'il le leva; et il sera tenu de rapporter la dite valeur à partage, s'il lève le second préciput. L'évaluation se fera par les dits douzeniers, tant en rentes qu'en argent, afin que le dit aîné ait le choix de faire le dit rapport de l'une ou de l'autre manière. Si le rapport se fait en rentes, elles seront assignables pendant quarante ans [présentement pendant trente ans], de même que tout autre retour de bille. Un petit fils qui aurait déjà levé un préciput sur l'héritage de ses père et mère, pourra toujours prendre, dans la succession d'un aïeul ou aïeule, celui auquel son dit père (s'il était fils aîné) aurait eu droit, de la même manière et aux mêmes conditions par rapport aux cohéritiers de son dit père. Et aura l'option de le partager avec ses frères et sœurs consanguins, ou de le garder lui-même, en rapportant la valeur de celui qu'il possède déjà."

according to the valuation which he has caused to be taken at the time of his entering into possession of the estate of his former deceased parent. It is only this precaution which will secure him the choice of either eldership; for if he have not taken it, he will be presumed to have irrevocably fixed upon that which has first fallen to him: such is the evident spirit and letter of the seventh article It is hardly necessary to state that a son, having already raised the eldership on his father's estate, would not be debarred from raising another on that of either of his grandparents, though no valuation had been made on his taking the first; the precaution being only necessary where the son, having already selected an eldership from a parent in a certain degree or line, might wish to preserve his right to that which may afterwards fall in from the other parent in the same line. This, besides being conformable to the general rule which obtains on the subject of eldership, will appear still more evident when brought in connection with the following clause of the seventh article: "A grandson, who has already taken a *préciput* on the estate of his father and mother, may always take, in the succession of a grandfather and grandmother, the *préciput* to which his father (if he was the eldest son) would have had a right, in the same manner and on the same conditions, with respect to the co-heirs of his said father."

In fact, the two last clauses of this article show, that the rights of the grandson representing his father are, towards his uncles and aunts, the same in every respect as those he has already exercised in his father's succession towards his brothers or sisters. However self evident these propositions may appear, it was as well to repeat them, that no doubt should arise respecting the object and consequences of restricting the eldership to a single one in each line of descent.

A feature peculiar to the right of *préciput* or eldership on real estate is that which allows the eldest son a single *préciput* only instead of two, in case his parents' inheritances fall in at the same time, which makes it the advantage of the

sons to take to their inheritance immediately on the death of either parent. Some children who, from a feeling of delicacy, have sometimes delayed thus taking immediate possession, have been debarred from a portion of their inheritance, from the succession of both relatives falling in at the same time. The remedy which secures the eldest son the choice of either eldership much resembles that which the married daughter, who has received her marriage portion, exercises when she claims to share in the personal property of her parents. On her claiming to divide the succession with her co-heirs, she is accountable to them for the marriage portion she may have received; but that marriage portion she is ever at liberty to retain without any interference from her co-heirs, on her abstaining to share in the personal property.

In reference to the third clause of the seventh article, it should be borne in mind that, by the Order in Council of the 26th December, 1851, registered on the 10th January, 1852,* a change was effected in the time required for the prescription of real property, which formerly was forty years, but by

* The following is the text of the Order in Council, the ordinance on which it was based having been passed by the Court at the Easter Chief Pleas held on the 28th April, 1851, confirmed by the States on the 23rd December, 1851, and finally sanctioned by Council on the 10th January, 1852:

"DE LA PRESCRIPTION IMMOBILIÈRE.

"1.—Toutes choses immobilières et actions réelles ou dépendantes de réalité, qui se prescrivent maintenant par le laps de quarante ans, seront à l'avenir prescrites par le laps de trente ans; et suffit le terme de trente ans pour titre compétant en matière héréditale.

"2.—Toutesfois les prescriptions commencées avant le 1er Janvier, 1852, seront réglées conformément aux lois précédemment en force; néanmoins, les prescriptions alors commencées, et pour lesquelles il faudrait encore, suivant les dites lois, plus de trente ans à compter du dit jour, seront accomplies par le laps de trente ans.

"3.—Le droit de racheter ou assigner les rentes rachetables ou assignables, qui seront créées à compter du 1er Janvier, 1852, sera imprescriptible.

"4.—Ne sera cette loi applicable à l'exemption du paiement de champart.

"A la Court de plus ordonné que le présent Acte sera transmis par le Greffier de la Reine à Monsieur le Juge de l'île d'Auregny et à Monsieur le Sénéchal de l'île de Serk."

If to those dispositions, in reference to prescription, we add that which passed at the Chief Pleas held on the 12th March, 1847, and which was subsequently sanctioned by Council, whereby, in reference to all actions of personalty, the term was reduced from thirty to ten years, we shall have collected together the most important dispositions on this subject: "Toutes choses mobilières et actions personnelles qui se prescrivent maintenant par le laps de trente ans, seront à l'avenir prescrites par le laps de dix ans."

this order was reduced to thirty. By the same order, from the 1st January, 1852, assignable rents cease to be so after thirty years, when they become *foncière* or irredeemable. Assignable rents created after the 1st of January, 1852, were declared to be irrevocably assignable, instead of becoming, as formerly, irredeemable or *foncière*, after a period of thirty years. These rents were formerly, not only assignable, but repurchasable, as appears by an ordinance of the Easter Chief Pleas of 1614.* It was also stated, by the second article of the order, that all assignable rents created previously to the emanation of the order, and which had more than thirty years to run from that date to become irredeemable, would become so by the lapse of thirty years—that is, after the longest period now recognized for the prescription of real property.

OF LINEAL INHERITANCE WITHOUT PRIMOGENITURE.

Having thus seen the respective rights of children to real property in lineal inheritance, where primogeniture exists, they shall be now viewed in connection with real estate, where primogeniture does not obtain, but where sons nevertheless inherit a larger portion than daughters; which forms the distinctive character between such inheritances and those of personal property, where all children inherit in equal proportions, without any distinction of sex.

The following article refers to real property situated in particular districts, which are divided among children, without the eldest son's possessing any advantage over his younger brothers, but where sons may still claim a double portion over their sisters. Besides houses and lands thus situated, ground rents, whether created on lands or houses, without any

* "Pareillement est ordonné que tous ceux, lesquels seront trouvés redevables à aulcun de leurs perchonniers d'aulcuns retour de billes de leurs parties d'héritage, pouront, dans les vingt ans du jour de la confection de leur partages, les racquitter au denier dix-huit, ou bien leur assigner en pareille somme, avec fourniture et garantie, le dix retour qu'ils leurs doivent."

regard whatever as to the locality on which they are due, whether town or country, would be divided in the same manner.

Article VIII.

The houses, buildings, and lands, situated within the *barrières* of the town, shall be divided between co-heirs in a direct line, in the manner indicated in Article 2,* without a *préciput* being allowed to the eldest son. The limits of the *barrières* shall be traced as follows: All properties found to the left of the line, traced as far as the sea, will be included in the *barrières*, viz., the line to commence on the shore at Long Store, passing in front of the said building, taking the road leading to St. John's Church,—through the Amballes, as far as the road leading to the Côtils,—through the Côtils road to the east of Mr. Tupper's estate, and to the north of Castle Carey,—then descending by Vauxlorens pump as far as the north-west wall of the Town Hospital,—following the line of the said wall as far as Hospital Street, ascending that street,—passing in front of the principal entrance of St. James's Church,—up Grange Road as far as Vauvert Road, by the top of Vauvert to the west of the house belonging to the heirs of the late William Le Cocq, Esq., descending the lane leading to the Petites Fontaines, to the east of the land belonging to Mr. J. Crick. From this point the line will cross the lands in a straight direction as far as Mount Durand pump, and from thence, also in a straight direction, to the east of the angle of the Charrotterie pond,—then ascend Park Lane steps, descend Vardes Road, and through Havelet Road as far as the sea.†

* That is to say, the sons may have a double portion.

† "Extension des barrières de la ville. Le droit d'aînesse sur les immeubles y situés, ne se prélève pas.

"Article 8.—Les maisons, édifices et terrains situés dans l'enceinte des barrières de la ville, seront partagés entre cohéritiers en ligne directe, de la manière indiquée dans l'Article 2, sans qu'aucun préciput soit accordé au fils aîné. Les limites de cette enceinte seront tracées comme suit : Tout ce qui se trouvera à gauche de la ligne ainsi tracée jusqu'à la mer, sera compris dans la dite enceinte ; savoir : Commençant la ligne des dites limites au rivage et passant en devant, et par le carrefour du magasin dit *Long Store*, prendre par la rue menant à l'église St. Jean ; suivre la route des Amballes jusqu'au chemin à droit qui monte aux Côtils, et passant à l'est de l'héritage de Jean-Elizée Tupper, éc., et au sud de celui de Castle Carey, par la pompe des Volorens, jusqu'à la muraille au nord-ouest de l'hôpital de la ville ; suivre la ligne de cette muraille jusqu'à la rue dite de l'hôpital, monter cette rue, et passant en devant de la grande entrée de l'église de St. James, continuer à monter jusqu'au carrefour au haut de la rue St. James. De là prendre la grande route du Câtel jusqu'au carrefour de la Grange ; tourner à gauche et passant à peu-près en droite ligne, à l'ouest de la maison des héritiers de feu William-Pierre Le Cocq, éc., descendre le petite ruette escarpée à l'est du terrain du Sieur Crick, jusqu'à la ruette des Petites Fontaines. De cette partie de la ruette traverser les terres en droite ligne jusqu'à la pompe dans la grande route du Mont

This article contains two very distinct propositions—the mode of subdividing property within the *barrières* or precincts of the town parish, where no eldership is allowed, and the extent to which such *barrières* are carried out.

This is, perhaps, the most important article of the new law; certainly that which has formed the subject of most discussion, and even modification, as far as extent goes, by the States; but which, it must be confessed, has not met the wishes of the vast majority of the parishioners in town, who demanded the principle of equal division within the *barrières*, and whose interests, indeed, it solely concerned. This principle of equal division, earnestly demanded by the petitioners in 1838, as conformable to reason, justice, and sound policy,—dismissed in half a dozen lines by the report of the Court's committee in April, 1839, because it is said that, with regard to such property, daughters are already better treated than with regard to real property, situated anywhere else,—insisted upon in the report of the petitioners' committee of the 7th May following, of which it may indeed be said to form the most prominent feature,—was rejected by the States. The principle of equal partition was nevertheless conformable to the 270th article of the ancient custom of Normandy, which prescribes, that "brothers and sisters share equally such inheritances as are in burgage throughout Normandy, even in the bailiwick of Caux, in such cases where daughters are admitted to share."* And in the following article it adds, "that although the daughters have no claims on farms and buildings situated in the country, when there are not more buildings than brothers, they may nevertheless take their share of houses situated in towns or boroughs." (Art. 271.)

Not only real property thus situated, but irredeemable rents or mortgages created on such lands, and which represented their annual value, partook of the same nature.†

Durand; et de là traverser aussi les terres en droite ligne jusqu'au coin de l'est de l'écluse de la Charotterie; de là monter la ruette dite 'Park Lane Steps' jusqu'au chemin venant de la Varde; descendre le dit chemin jusqu'au carrefour du pied de la Varde, là prendre la route de Havelet et la suivre jusqu'à la mer."

* Which they always did to real property, whether they were married or not.

† Respecting these rents, Basnage, in his commentary on the 270th article,

Notwithstanding all these reasons in favour of the equal division of property within the *barrières*, without any regard to sex, the States rejected the principle, as recommended by the Court's committee; it being now stated that the houses, buildings, and lands, situated within the *barrières* of the town, shall be divided between co-heirs in lineal successions, in the manner provided in the second article—that is to say, the sons shall take two-thirds and the daughters one-third, in such a manner, however, that, in no case, shall the portion of any son exceed double that of a daughter, or that her portion shall exceed that of her brother, although it may be equal to it, as is the case whenever the number of sons equals or exceeds double the number of daughters.

The following article refers to the mode of division of property within the *barrières*, and regulates the rights of the parties to choose after once all the co-heirs are agreed upon the mode of partition.

ARTICLE IX.

Properties situated within the *barrières* of the town, becoming divisible in direct successions, shall previously be valued by the douzeniers of the town; and each of them, forming a lot with its dependencies, shall be successively offered, at the price of the valuation, first to the sons and afterwards to the daughters, according to seniority. If the eldest son choose the first lot, the second shall then be offered to the second son, and so on in this manner. Such of the lots as are refused by all the co-heirs at this price, shall be sold by public auction, for account of the co-heirs.*

expresses himself in the following terms: "Of rents due by owners of property situated within boroughs, daughters entitled to share in their father's succession will take a portion equal to that of their brothers."

* "Système particulier de division adopté dans les barrières de la ville; la douzaine y évalue les lots, et les garçons, suivant leur aînesse, choisissent avant les filles.

"ARTICLE 9.—Les propriétés situées dans les barrières de la ville, qui tomberont en partage en succession directe, seront d'abord évaluées par les douzeniers de la ville, et chacune d'elles formant un lot avec ses dépendances sera offerte à cette évaluation séparément et successivement aux fils, et ensuite aux filles, suivant leur aînesse. Si l'aîné choisit le premier lot, le deuxième sera offert, en premier lieu, au second fils, et ainsi de suite. Les lots que tous les cohéritiers refuseront de prendre à la dite évaluation seront licités publiquement pour le compte de la cohérédité."

Formerly, every house situated within the *barrières* was divided among the co-heirs, which not unfrequently turned out a considerable loss to the estate generally. It is, besides, a great advantage, both in a public as in a private point of view, that houses should, as much as possible, belong to single owners, which puts an end to those questions concerning the exercise of rights between property held in common and joint property which so often arise, and which are frequently so difficult to decide. It was for this reason proposed in the petition, that the principal heir might have the choice of any house or tenement, situated within the *barrières*, at a fair valuation, instead of dividing it among all the co-heirs; a principle acceded to by the committee of the Court, and sanctioned by the legislature; the object being to secure to the eldest, or to any other child, the entire premises in which the parent's business has been carried on, and which thus devolving undivided to the party who is enabled to reap the greatest advantage from its ownership, he will, as a matter of course, be induced to give the fairest price for it—an advantage which would be lost to the estate generally, had the old law for dividing such houses in the *barrières* any longer continued.

If the eldest son will not accept the valuation set upon it by the town douzaine, then it will be successively offered to the sons and daughters in rotation, according to seniority—males, however, always retaining a priority of choice over females; the object being less to grant any particular heir an advantage over his co-heirs, than to prevent, as much as possible, the subdivision of real property, which, in a small island, besides other evils, has a great tendency to generate pauperism. If there are several houses or tenements within the *barrières* belonging to the estate, they do not, under the new law, fall in common to all the co-heirs as formerly, each having his portion of every house, but are to be divided in as many lots, which are duly parcelled out among the co-heirs, and rated by the douzaine, as the most competent judges of their value.

As to the right of selecting these lots, it is very clearly

determined by the second and third clauses of the ninth article, wherein it is stated, that if the eldest son choose the first lot, the second shall be offered to the next in seniority, and so on in rotation. If the eldest son refuse the first lot, he shall have the choice of the second, and so on, in the same manner. Such lots as are refused by all the co-heirs, at the valuation put upon them by the douzaine, shall be sold by public auction for the general account of the succession.

The faculty thus allowed to each child to accept or reject each lot, according to seniority, proves the anxiety of the framers of the new law to prevent the subdivision of property; and the provision by which it is decreed it will be sold to the highest bidder, in case all the parties refuse it, is in strict accordance with the common law, which provides a sale by auction, either among the parties themselves or among strangers, whenever two or more proprietors of any object cannot agree among themselves as to the mode of disposing of it: "nul n'est tenu de rester dans l'indivis."

The following article, which provides for the married daughter who has not been provided for by her parents, closes the subject on lineal inheritance.

ARTICLE X.

Married daughters shall have a right to share in the successions of their father and mother, provided they bring back to the division the capital they may have received from the parent whose succession is about to be shared. But it shall always be optional with them to retain their capital, on their declining to share in the succession.*

By this legal provision in favour of the married daughter, who has neither received a marriage portion from her parents, nor been provided for by a marriage contract, one of the gros-

* "Les filles mariées partageront de droit dans la cohérédité en rapportant à partage leur dot, laquelle leur sera exclusivement dévolue quand elles s'abstiendront d'y entrer.

"ARTICLE 10.—Les filles mariées partageront de droit dans les successions mobilières de leurs pères et mères, pourvu qu'elles rapportent à partage la dot qu'elles auront reçue du défunt de la succession duquel il s'agit. Mais elles auront toujours la faculté de retenir la dite dot, en refusant d'entrer en partage."

sest and most unwarrantable injustices of the old system is removed, in accordance with the principle laid down in the petition, that married daughters should always be admitted to share with their brothers and sisters, on accounting to them for their marriage portions, and when having received none, that they should be admitted to share as a matter of course. This legal reserve has been animadverted upon as unjust, where the daughter marries a rich husband; but an exception of this nature cannot surely be adduced as a reason to disinherit a child. Besides, it not unfrequently happens that a rich bachelor will prefer a rich maid; and in the absence of a legal reservation, prudence would always suggest to him the propriety of a marriage settlement, which often so strongly rivets the hands of obliging parents, that they frequently become the bankers, rather than the guardians, of their children. Formerly there was no legal reservation for married daughters, consequently, when not expressly reserved to them in the inheritance, by will or otherwise, they could claim no portion whatever of it, though nothing had been received by them from their parents; a custom that constituted a direct anomaly in a law, which expressly decrees that a parent shall have no power to treat one child more favourably, or, by parity of reason, worse, than another. Nor was this the only or greatest anomaly in that law, for we find that though a daughter, who had received nothing, was virtually disinherited, when not expressly reserved, yet if, at any time during marriage, she had received double or treble her portion, on her being reserved by her parent, she could still share, with her brothers and sisters, an equal portion of his personal inheritance. All these anomalies have been swept away, and the right of married daughters to inherit personal property put upon the same footing as their right to inherit real property, which they have always had the power of sharing with their brothers and unmarried sisters, whether or not reserved to the inheritance. The only difference that can now be made between their condition and that of their unmarried sisters is, that during marriage their parents may order the capital of their proportion of inheritance to be

placed in trust. They, notwithstanding, receive the dividends, when it is deemed expedient to place the principal beyond the control of their husbands, at whose death, however, such sisters recover the disposal of their capital. Why should not the same power be vested in a parent over his own prodigal child, as is vested in him over his married daughter and son-in-law? Is not the principle equally subject to abuse in both instances? Is it to be supposed that parents, in the vast majority of instances, would turn such an authority to an unwise purpose?

The second clause of the tenth article, granting the married daughter the faculty of retaining her marriage portion, by refusing to share in the inheritance, is an advantage peculiar to herself; a very great one indeed, as it may, in some degree, preserve her from the consequences of pecuniary misfortunes occurring to her parents after her own marriage, yet necessary for the maintenance of any marriage settlement which may have been entered into between the husband and her parents. Such was the reason of its being set forth in the petition, that, in lineal inheritances, the married daughter should have the option of sharing the personal property of her parents, on her accounting for her marriage portion; a faculty which, thus bestowed, not only preserves the rights of every member of the family, but violates none of the engagements arising from settlements entered into with those allied to it.

From the terms in which the tenth article is couched—"pourvu que les filles mariées rapportent à partage la dot qu'elles auront reçue"—and which in the Order in Council are construed, "provided they bring back to the division the capital they may have received from their parent's inheritance"—it is easy to perceive that married daughters are by no means bound to account for any annual sums allowed them by their parents, in the shape of a maintenance, income, or present; it is only for the marriage portion, or capital received, by virtue of settlements or agreements, that they are accountable to their co-heirs, and this clearly appears from the term "dot," which, after mature consideration, was introduced by

the States as an amendment to the tenth article of the Court's committee. The parent is already too dependent on his children, with regard to his pecuniary settlements, or disposal of his fortune, for the legislature to have dreamt of drawing his fetters any closer; and should the children living with him at his death find fault with the annual apportionments made to their married co-heirs, these, on the other hand, might rejoin by calling them to account for their maintenance, which would often have the effect of turning the wealthy parent's abode, as well during life as after his death, into a complete counting-house, where each member might instal himself judge of his parent's annual disbursements, or apportionments among his children.

ON INHERITANCE IN THE COLLATERAL LINE.

It would be difficult to conceive any part of the law or constitution which called for more serious investigation, than the system which heretofore prevailed in collateral and ascending inheritances; it would indeed be hardly possible, from the innumerable systems which have prevailed from the rudest ages to the present time, to find one more incongruous in principle, or more barbarous in its consequences, than that which, till the 3rd of August, 1840, existed here. Though, during the reign of feudalism, the system of inheritance was as replete with injustice as might be well imagined, from the constituted authorities sacrificing every principle of affection, justice, and honour, to the ruling passion of perpetuating a family name, at least, had they some ostensible end in view. But what could possibly be the object of selecting and continuing here the very worst of systems? where the sister was treated as illegitimate, in presence of her brother, in all collateral inheritances; where, again, if he died and left children, these too were treated as illegitimate in presence of either their uncle or aunt; where representation—that remover of injustice by drawing closer the ties of parentage and relation-

ship, so eagerly sought after by all nations claiming any pretension to the qualification of civilized—existed in some instances, whilst it was arbitrarily rejected in by far the greater number, for no other reason, apparently, than because uniformity in legislation ill accorded with the notions such rulers had formed of a sound system; and where, finally, parents were treated as criminals, by their inability to inherit from a child, whose whole fortune, whether consisting of real or personal property—property which he frequently owed to their natural and most commendable desire to secure him, during their own lives, a competent maintenance—in return went to a more distant relative, and, in default of such relative, to the crown, as if the parent had been fairly convicted of some heinous offence. That such abuses in reality once prevailed could hardly be credited, were it not for the existence of the Order in Council of the 13th of July, 1840, expressly abrogating them; but that they should have met with official supporters to the thirty-eighth year of the nineteenth century, can only be accounted for by referring to that blind attachment to an existing system of things, merely because it does exist, which, more than any other cause, obstructs the course of improvement and legitimate reform.

With such a system, any change could not but be an improvement, and though, in ascending successions, it is as advantageous as could be expected, yet, in collateral successions to personal property and real property purchased—or, in other terms, to *acquêts*—it might have been still further improved, by allowing, in all cases, representation, or inheritance *per stirpes*, among nephews and nieces, whether they inherit with uncles or aunts, or whether they come with other nephews and nieces, the descendants of uncles or aunts, to their relatives' successions. This would have rendered the law in collateral successions more uniform, by assimilating, more than ever, the system which prevails in the *propre*, or inherited real property, to that of the *acquêts*, or purchased real property, as well as to personal property of every description, which, in reference to the subjects of inheritance and wills, should ever exist on the same footing.

Before the changes introduced by the new law, respecting collateral successions, are reviewed, it may be proper to point out the mode of determining heirs to such property, either by the lines of parentage or the degrees of relationship,—the difference which exists in inheriting by branches (*per stirpes*) or by heads (*per capita*),—and also the effects of representation, by means of which, children no longer deprived, in certain cases, from inheriting from their relations, in consequence of the death of their parents, are, by representing them, enabled to derive the same advantages as they themselves would have done, had they survived the person whose property is to be divided.

A line in inheritance is the order or series of persons descended from a common ancestor, and is either direct, collateral, or ascending.

It is said to be direct when descending immediately from a common ancestor, and is computed to be so many degrees distant, according to the number of generations there is between the person reckoned from and him concerning whom reference is made. Thus, the son is one degree removed from the father, two degrees from the grandfather, three from the great grandfather, and so on *ad infinitum*, reckoning according to the number of generations. Those persons may, however, be said to be united to each other by a common stock—the great grandfather, by a line or link, which may be defined a series or chain of persons descended from a common ancestor: "vinculum personarum ab eodem stipite descendentium." Persons thus united by descent are, properly speaking, those only which are entitled to the name of parent, because from them alone are they issued or sprung; the term parent being derived from *parere*, to produce, the extent of degree is therefore reckoned by the distance of parentage between them. In the collateral line, as the parties are not descended one from the other, however closely allied they may be, the ties which unite them can only be those of relationship, and the distance between each is said to constitute so many degrees of relationship, not of parentage.

The only difference existing between the ascending and

descending line is, that in the former, generations are reckoned from the son upwards, and in the latter, from the common ancestor downwards; the degrees in both being necessarily determined by the distance there is between the ancestor and the party referred to. When the distance between them is very great, from the length of time which must have elapsed, the parents are then called ancestors or *majores;* the line that separates their persons, quite as effectually as it unites their descent, having insensibly dissolved all those ties of affection and friendship, which so powerfully attach parents to each other; indeed, the Romans, at such a distance, no longer bestowed upon them the revered name, and apparently not without reason, experience proving that mankind commence to set forth their claims to ancestry as the ties of personal attachment towards them insensibly die away: "parentes usque ad tritavum [the sixth generation upwards] apud Romanos proprio vocabulo nominantur; ulteriores qui non habent speciale nomen, majores appellantur." So that the claims to ancestry commenced where the feelings of attachment ceased.

As, in the past or ascending line, reference is made to our ancestors or *majores*, so, in regard to the future or descending line, reference is made to posterity or our descendants, who assumed the qualification of *posteriores* when removed six generations, so that ancestry and posterity commenced at equal distances from a common stock: "parentes usque ad tritavum. . . . majores appellantur: item liberi usque ad trinepotem [the sixth generation downwards]; ultra hos posteriores vocantur."*

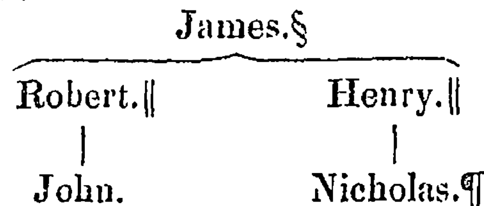
The collateral line is so called from *a latere*, sideways, because the relatives, though not descended from each other, yet spring from a common ancestor; as brothers, who come on the same line side by side, and who, though not descended from each other, yet spring from a common stock or root—the same parents; or, as uncles or cousins, who descend from the same grandparents, and on that account were styled *cognats* or *quasi congeniti*, all having the same origin:

* L. 10, sec. 3, ff. De Gradibus.

"cognati appellati sunt quasi ex uno nati, aut ut Labeo ait, quasi commune nascendi initium habuerint."* A reference to Rouillé or Chabot's Genealogical Table† will easily clear up any difficulty which may arise respecting the mode of computing the degrees of descent, in all cases of inheritance.

There are two modes of computing degrees in a collateral line, the civil and the canonical. By the civil, the relationship is traced from the party seeking his degree to a common ancestor, and from thence down to the person sought. Thus, by the civil law, the brother is in the second degree of relationship to his brother, because it must be first traced up to the father (the common stock), and then down to his son, which makes two;‡ whereas, by the canonical law, where degrees are reckoned by generations, he is in the first degree of relationship.

The canonical is the mode followed in Guernsey, the number of degrees here being reckoned in the longest line; whereas, by the civil law, the number of degrees in both lines is taken to the common ancestor, as the following instance—in ascertaining in what degree John is removed from his cousin germain Nicholas—will show; when it will be found that he is in the fourth, according to the civil, and only in the second, according to the canonical, mode of computation. Thus:



From John to his father is one degree, from Robert to the grandfather James (the common ancestor) is two degrees,

* L. 1, sec. 1, ff. unde cognati.

† Table 19, vol. 1, p. 247, according to the civil mode of computation.

‡ "Superior quidem cognatio et inferior a primo gradu incipit; ex transverso sive a latere nullus est primus gradus, et ideo incipit a secundo."—L. 1, sec. 1, ff. De Gradibus.

§ James, the grandfather and common ancestor.

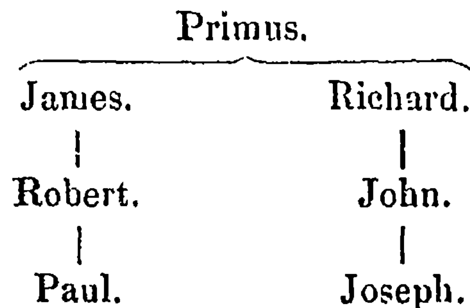
‖ Robert and Henry, James' two sons, father and uncle to John.

¶ Nicholas, John's first cousin.

from James to Henry is three, and from Henry to Nicholas is four; whereas, in the canonical mode, where the computation is only made in the longest line, from the common ancestor, there would be only two generations from either John or Nicholas to such common ancestor; it would, therefore, be said that there are only two degrees. Thus, between John and his father Robert would be one, between whom and his father James would be two. And John being, in regard to Henry, the furthest removed from the common stock—Henry being but one, whereas John is two degrees removed—it would be said that there are two degrees between John and Henry; although no more than two degrees are computed to exist between John and his cousin germain Nicholas, who is evidently one degree more remote; a consequence which shows how defective is the mode of computing degrees by taking them in the longest line only, according to the canonical system, as will be hereafter more fully explained.

It has been said that the difference of the computation by the civil and canon laws consists in this, that civilians take the sum of the degrees in both lines to the common ancestor, whereas the canonists take only the number of degrees in the longest line. It need hardly be said that the civil mode of computation is by far the preferable, and its data must, in every case, be taken and clearly ascertained, before the degrees can be made up, either by the canonical or any other mode of computation.

To adduce one more instance of the mode of reckoning degrees, and to make it available for all practical purposes, take the following, where they are computed from the great grandfather downwards. Thus:



Primus is equally distant from Robert and John, who being two degrees removed from their grandfather, the sum of these degrees makes four as between them. On the same principle Richard, the uncle, is three degrees removed from his nephew Robert, and two from his brother James; which shows that, according to this mode of computation, there can be no first degree of relationship in the collateral line.

This is by far the most simple and judicious mode of computation, the degree of all parties being regularly reckoned. The same simplicity does not exist in the canonical mode of computation, where the reckoning is always from the common ancestor downward; and, in whatever degree the two persons—or the most remote of them, if they are not in parity of degree—is distant from the common ancestor, that is the degree in which they are related to each other. Thus, James and his brother Richard, in the above example, are related in the first degree, for, from the father to each of them is only counted one; and Robert and John, the cousins germain, are in the second degree. So, also, are in the second degree of relationship, James and his nephew John, and Richard and his nephew Robert; for these nephews are, each of them, two degrees removed from the common ancestor, and therefore, according to this mode of computation, two degrees removed from their uncles. So, in the same manner, Paul and Joseph, whilst related to each in the third degree, or that of second cousins, are each of them related, also in the third degree, Joseph to his cousin Robert and also to his great-uncle James, and Paul to his cousin John and also his great-uncle Richard, upon the principle, that the degree in which the most distant of two persons is from the common ancestor is that in which they are related to each other; which shows that the canonical mode of computation is both anomalous and absurd, for a second cousin, according to this mode, is as nearly related as a great-uncle.

Again, Robert, who is two degrees removed from John, his cousin germain, according to the above mode of computation, is also the same number of degrees removed from

Richard, his uncle. Yet it is certain that Richard, the uncle, is nearer to him than John, the cousin; and here it is that we find the inexact and irregular computation of the canonical system, whereby the degrees are reckoned from one instead of both parties, in which case, when they are at unequal distances from the common ancestor, the degree of the most distant is alone computed. Thus, Robert being two degrees from Primus, and Richard but one, it is said that Robert is two degrees distant from Richard, though the same is said of his son John, who is evidently more distantly related, and who, as such, would be excluded from his cousin Robert's succession of personal property, as well as real property acquired, had he left any uncles. Thus, not only must the distance of the parties from the common ancestor, but their comparative degree, be always borne in mind, according to the canonical mode of computation, as the following text will show: "in lineâ collaterali inæquali, quoto gradu persona remotior distat a communi stipite, eodem gradu distant inter se."

In Guernsey, the canonical rule obtains, though it would appear that in reality it is neither followed in England nor in modern France—that is to say, since the commencement of the sixteenth century: and it will be found that, according to the above example, the civil and not the canonical rule obtains, from the circumstance, that though it be said that Richard and John are two degrees removed from Robert, yet it is evident that Richard, the uncle, is nearer than John, the cousin, who would be excluded by an uncle to any cousin's succession, at least for certain kinds of property, wherein collateral successions representation does not extend beyond the second degree. As a proof of this assertion, the following note from Mr. Christian's learned remarks on Blackstone's Commentary may be quoted to show that, in reality, the civil and not the canonical mode of computing degrees obtains in England.

"The difference of the computation by the civil and canon laws," says Mr. Christian, "may be expressed shortly thus: the civilians take the sum of the degrees in both lines to the

common ancestor; the canonists take only the number of degrees in the longest line. Hence, when the canon law prohibits all marriages between persons related to each other within the seventh degree, this would restrain all marriages within the fourteenth degree of the civil law. In the 1st vol., p. 435, § 2, it is observed, that all marriages are prohibited between persons who are related to each other within the third degree, according to the computation of the civil law. This affords a solution to the vulgar paradox, that first cousins may marry and second cousins cannot. For first cousins and all cousins may marry by the civil law,* and neither first nor second cousins can marry by the canon law.† But all the prohibitions of the canon law might have been dispensed with. It is said that the canon law computation has been adopted by the law of England, yet I do not know a single instance in which we have occasion to refer to it. But the civil law computation is of great importance in ascertaining who are entitled to the administration, and to the distributive shares, of intestate personal property."‡

In France, since the revolution, the civil mode of computation is alone followed; and that it was so, in point of fact, in France since the sixteenth century, may be seen from the following quotation from the "Encyclopédie Moderne," which, in the main, reproduces the opinions of Pothier on this subject.

After stating that there are two modes of reckoning the degrees of relationship, the civil and canonical,—that the civil mode obtains on the subject of inheritance, and the canonical on that of marriages,—the editors of that work observe the technical distinction that exists, when the relatives sought after are in unequal degrees, and thus refer to the distinction existing between these modes:

"Pour compter les degrés en collatéral, suivant le droit canon, il y a deux règles à observer.

* For first cousins are in the fourth degree by the civil law.

† Because second cousins are only in the third by the canon law.

‡ Blackstone's Commentaries, book 2, ch. 14, p. 207. In a note in reference to the mode of computing the degrees from tables of consanguinity.

"L'une est que quand ceux dont on cherche le degré de parenté, sont également éloignés de la souche commune, on compte autant de degrés de distance entr'eux transversalement, qu'il y en a de chacun d'eux à la souche commune.

"L'autre règle est que quand les collatéraux dont il s'agit, ne sont pas également éloignés de la souche commune, on compte les degrés de celui qui en est le plus éloigné; ainsi l'oncle et le neveu sont parens entre eux au second degré, parce que le neveu est éloigné de deux degrés de son aïeul, père de l'oncle, et ainsi des autres collatéraux.

"Quand on veut mieux désigner la position de ces collatéraux, on explique l'inégalité de degré qui est entre eux, en disant, par exemple, que l'oncle et le neveu sont parens du premier au second degré, c'est-à-dire, que l'oncle est distant d'un degré de la souche commune, et le neveu de deux degrés, ce qui fait toujours deux degrés de distance entre eux."

The term degree, or step, is derived from the comparison which the mode of computing the distance between relatives bears to the steps of a ladder; generations appearing gradually to descend from the common ancestor, by means of steps or gradations, until they reach a given point: "gradus dicti sunt a similitudine scalarum locorumve proclivium; quos ita ingredimur ut a proximo in proximum id est in eum qui quasi ex eo nascitur transeamus."*

It is often very essential correctly to ascertain the degree, for it is by its proximity that, in collateral successions particularly, the rights of the parties are determined, because representation in them is not always allowed *ad infinitum*, as in lineal inheritance.

The principle of representation—the most just and sacred that can be imagined, introduced in favour of the bereaved parent, the helpless widow, and the unprotected orphan, by all civilized nations—may be defined the right which a person possesses of inheriting from another, by occupying the place and proximity of degree of a deceased person, or, as the civilians have it, "jus concurrendi cum proximiore

* L. 10, sec. 10, ff. De Gradibus.

succedendo in locum personæ deficientis"—a definition preferable to that set forth in the French code, where it is defined a legal fiction, the effect of which is to cause the representing party to assume the position, the degree, and the rights of the party represented. It is said, "by all civilized nations," because in the earlier ages of each state it is generally found, that, in collateral successions, the nearest of kin excludes the more distant. Thus, the ancient law of Normandy, as the ancient law of all the French provinces, and the ancient law of Rome according to the twelve tables, all decreed that the nearest of kin should be preferred: "proximus agnatus familiam habeto." Moved by the calls of humanity, the Emperor Justinian introduced the right of representation in favour of the children of deceased brothers and sisters to succeed with their uncles and aunts; and by degrees, as the barbarity of the middle ages disappeared, the French civilians, as Justinian, introduced into their reformed laws and customs the principle of representation in collateral successions, as far as the children of uncles and aunts, or what is here misnamed the second, instead of the third, degree of relationship. Such, too, was the common law of France before the revolution, and such it now is here, having been adopted by the Order in Council, registered on the 3rd of August, 1840. They who may feel any interest in tracing the history of representation will find it admirably set forth in the French "Encyclopédie de Jurisprudence," where it will be seen that in France it formerly existed, in a variety of shapes, in different provinces; that it affected differently various kinds of property, and that, even in lineal inheritance, it sometimes never existed at all. Thus, the grandson, through the premature death of his father, the eldest son, was no longer heir to his grandfather's inheritance when the latter left children, who, being nearer in degree, excluded the grandchildren.

There being, even now, in the new law two different systems of representation in collateral successions, as the property is real or personal, and as the real property is either inherited

or purchased, it may be right to begin by the real property inherited, where representation still continues *ad infinitum* among the descendants of brothers and sisters, as in lineal successions.

ARTICLE XI.

In collateral successions to *propres*, neither males nor their descendants shall exclude females or their descendants; but the relatives of both sexes belonging to the line whence the property descends shall divide the estate by branches, in the same proportion as in successions in the direct line.*

This article contains two distinct propositions: first, it decrees that females in collateral successions shall no longer be excluded by males; and secondly, that to real property inherited, as contradistinguished from real property purchased, the co-heirs shall come to the inheritance by representation, and, without any regard to their number, shall divide it among themselves, in the same proportions as the party from whom they derive their right would have done had he been living—that is, they shall divide it by branches (*per stirpes*), and not by heads (*per capita*). As far as regards the mode of division by branches, no change is introduced into the modern law; but there is a great and very just one in reference to the admission of females, in each branch, to divide with the males a proportion of their parent's inheritance. Formerly, in collateral successions, no female was allowed, in parity of degree, to inherit with males. Thus, suppose a brother dies, leaving brothers and sisters, besides nephews and nieces descended from a brother and sister deceased. Formerly, neither the sister nor her descendants, whether males or females, nor nieces, though descended from males, could inherit with their own brothers any portion of their uncle or granduncle's inheritance, and that *ad infinitum*. Thus, suppose Nicholas dying without issue, leaving James, Robert,

* "Dans les successions collatérales, le sexe feminin n'est plus exclu par le sexe masculin en parité de degré, et notamment aux propres, où l'on hérite par souche, c'est-à-dire, par représentation, et non par tête autrement de son chef.

"ARTICLE 11.—En succession collatérale de propres, les mâles ni leurs descendants n'excluront pas les femelles ni leurs descendants, mais les parents des deux sexes, dans la ligne de qui l'héritage descend, partageront l'héritage par souche dans les mêmes proportions qu'en ligne directe."

and Sarah, his brothers and sisters, besides three nephews and two nieces, descended, two nephews and one niece from his deceased brother Richard, and one nephew and one niece from his deceased sister Anne; his real estate, worth fifteen quarters, and his personal property, however great, would now be thus divided among the following co-heirs:

Nicholas, *de cujus*. James. Robert. Richard, deceased. Anne, deceased. Sarah.

  Richard → William. Joseph. Mary.
  Anne → Henry. Elizabeth.

There being five co-heirs, either in person or by representative, James and Robert, his brothers, and Sarah, his sister, will divide three-fifths of the whole personal property among them in equal proportions. William, Joseph, and Mary, as the representatives of their father Richard, will divide one-fifth between them, while each of them will again equally subdivide; and the remaining one-fifth will be taken by Henry and Elizabeth, children of Anne, who, in the same manner as the children of Richard, will also subdivide their fifth between them in equal proportions. Hence it will be seen, that personal property is always equally divided, without any distinction of sex, among co-heirs in parity of degree.

The real property will be differently apportioned. Of the fifteen quarters, James and Robert will each take three quarters, one bushel, and two denerels; Richard's children, William, Joseph, and Mary, representing their father, will also take three quarters, one bushel, and two denerels; and the remaining five quarters will be equally divided between Sarah and the children of her deceased sister Anne—that is, Sarah will take two quarters and two bushels; and Henry and Elizabeth will have the remaining two quarters and two bushels divided between them—the brother taking two-thirds (that is, one quarter, two bushels, and four denerels), and the sister the remaining three bushels and two denerels for her third; making altogether exactly the fifteen quarters of their uncle Nicholas's real property. Thus:

				Q.	*B.*	*D.*
To James				3	1	2
To Robert				3	1	2
To William, Joseph, and Mary, representing their deceased father Richard, 3 quarters, 1 bushel, 2 denerels, subdivided thus:						
William	Qrs. 1	0	$2\frac{2}{3}$			
Joseph	1	0	$2\frac{2}{3}$			
Mary	1	0	$2\frac{2}{3}$			
				3	1	2
To Sarah				2	2	0
To Henry and Elizabeth, representing their deceased mother Anne, 2 quarters, 2 bushels, subdivided thus:						
Henry, two-thirds	Qrs. 1	2	4			
Elizabeth, one-third	0	3	2			
				2	2	0
				Qrs. 15	0	0

The children of Richard, as before stated, will equally divide the three quarters, one bushel, and two denerels among them, as they would were it personal property; there never being any eldership in property of this kind, nor, in this case, any privileges allowed the sons over the daughter, the number of the sons being exactly double that of the daughter. But in the case of Anne's children, Henry takes two-thirds and Elizabeth one-third, as in lineal successions, where the sons are entitled to a double portion on real property, whenever their number does not amount to double the number of daughters. Had Anne left two daughters besides a son, the latter would then have been entitled to one half only, and the remaining half would have been equally divided among the daughters, for, in no case, can the portion of the son exceed double that of a daughter, even in lineal inheritance; and, *à fortiori*, it would not be allowed in a collateral one, where all the privileges of eldership being unknown, and the most unwarrantable advantages of one sex over another repealed, more even-handed justice prevails.

Under the old law, neither the sisters Sarah and Anne, nor the nieces Mary and Elizabeth, would have inherited any portion whatever. The former would have been excluded by their brothers James and Robert, as Mary and Elizabeth would have been by their respective brothers; the nephews of the deceased William and Joseph excluding Mary, their sister, as Henry would have excluded his sister Elizabeth. And, but for the right of representation which existed in the particular instance of real property inherited, James and Robert, surviving brothers of Nicholas, would have shared his whole property among them, not only to the exclusion of all their sisters and nieces, but even to the exclusion of William and Joseph, their nephews, the children of their deceased brother Richard. But, by the present law, it is utterly impossible that females should ever be debarred from their portion of any relative's real property inherited, representation being allowed *ad infinitum*, as in lineal inheritance, and females being no longer excluded, in any case whatever, from inheriting with males in parity of degree.

The system which at present prevails in collateral successions to real property inherited is, in every respect, similar to that which exists in lineal inheritances to real property of every description, barring the right of primogeniture. In collateral successions, the male sex no longer excludes the female in parity of degree; sisters inheriting with brothers, aunts with uncles, and cousins without distinction of sex, their relative's property.

The following article refers to the partition of real property purchased, as contradistinguished from real property inherited, and personal property among co-heirs in a collateral line; where it will be seen that a different system of partition is pursued, as the deceased dies, leaving all his relatives in parity of degree or in unequal degrees, dividing *per capita* in the first, and *per stirpes* in the second, of these instances. The mode of division in the collateral line, to personal and real property purchased, also differs from that pursued in the same line to real property inherited; as in the former the

grandnephew or grandniece would not exclude the uncle of the deceased, as he would in the latter, the uncle being in the second and the grandnephew in the third degree of relationship. Representation to such property being allowed no further than the second degree, the grandnephew could no longer avail himself of either the representation of his father or grandfather, to place himself in the first or second degree of relationship, to include his granduncle, as either of these parents would have done had they survived him.

ARTICLE XII.

In collateral successions to personal property and purchased real property, neither males nor their descendants shall exclude females nor their descendants in parity of degree; but the nearest of kin to the deceased, in parity of degree, both males and females, shall share the property in the same proportions as property of this nature, whether personal or real, would be shared in successions in the direct line; and representation of degree shall be allowed when nephews and nieces shall come to the succession of an uncle or aunt with the brothers and sisters of the deceased, and not otherwise; in which case the said nephews and nieces shall subdivide among themselves, in the same manner, that portion of the succession which would have fallen to their father and mother, had he or she been alive.*

This article contains four distinct propositions, with regard to collateral inheritances of personal property and real property purchased; the two most remarkable of which are—first, males no longer exclude females in parity of degree; second, relatives in parity of degree, in the collateral line, share without any distinction of sex, in the same manner as children and grandchildren, in the same degree, divide in lineal inhe-

* "Aux meubles, acquêts et conquêts, les neveux et nièces succèdent par souche quand ils viennent en concurrence avec des oncles ou tantes à la succession d'un oncle ou tante ; et par tête quand ils viennent de leur chef.

"ARTICLE 12.—En succession collatérale de meubles, acquêts, et conquêts, les mâles ou leur descendants n'excluront pas les femelles ou leurs descendants, en parité de degré, mais les plus proches parents du décédé, en parité de degré, tant mâles que femelles, partageront dans les mêmes proportions que des biens de la même nature (soit meuble, soit héritage) seraient partagés en ligne directe. Et il y aura représentation de degré quand les neveux et nièces viendront à la succession d'un oncle ou tante avec les frères et sœurs du décédé et non autrement, dans lequel cas les dits neveux et nièces subdiviseront entr'eux, de la même manière, la part de la succession qui serait échue à leur père ou mère s'il eût été vivant."

ritance—that is, every heir, whether male or female, equally divides the personal property when he inherits in his own right, and he or they who come by representation divide the portion which would have fallen to the deceased, on whose behalf they claim and whom they are thus said to represent; representation being defined an authority by which the parties entitled to it assume the place, degree, and right of the party in whose name they claim—that is, they enjoy the same rights, fulfil the same duties, and discharge the same obligations, as their author himself would have enjoyed, and been subjected to, had he survived the person whose estate is about to be partitioned. It may, then, be truly styled, "jus concurrendi cum proximiore, succedendo in locum personæ deficientis." By the terms of this article—" the nearest of kin to the deceased in parity of degree, both males and females, shall share the property in the same proportions as property of this nature, whether personal or real, would be shared in successions in a direct line"—it will be seen, that, in collateral successions, property of every description, real or personal, is divided in absolutely the same manner as in lineal successions—that is, personal property is equally divided, without distinction of sex, among all who succeed *proprio jure*, and of real property two-thirds go to the males and one-third to the females; always, however, with this salutary modification, that no male heir, in parity of degree, shall take more than double the portion which falls to each female, however numerous, in the same degree; always on the principle, that a son can never inherit more than double the portion accruing to the daughter, nor the daughter a greater portion than the son; although, in some instances, her portion may be equal to that of the sons, which will occur whenever the number of sons is exactly double, or more than double, the number of daughters.

The following example of equal and unequal divisions among collateral heirs, as each succeeds *proprio jure*—or, in other terms, *per capita*, or by representation—will put these remarks in the clearest light. Thus, suppose Richard dies without issue, leaving thirty quarters of wheat rent, or an

estate of thirty vergées (for the division would be the same in the collateral line), and two thousand pounds, to be divided between the following co-heirs: a brother, a sister, two nieces descended from a brother, and a nephew descended from a sister.

Richard, *de cujus.*	Paul.	Elizabeth.	William, deceased.		Anne, deceased.
			Mary.	Jane.	Henry.

There being one brother and one sister, and the representatives of one brother and of one sister, Paul and Elizabeth and Henry (by representing his mother Anne) would each inherit five hundred pounds, and Mary and Jane would each inherit two hundred and fifty pounds—they and their cousin Henry being "in locum personæ deficientis," or deriving their right from deceased persons. The same division of property would have occurred had Richard been the father and grandfather, instead of the brother and uncle, of the co-heirs above-mentioned. By the old law, now abrogated, in the above case, Paul would have inherited the whole personal as well as real estate of his brother, excluding Elizabeth by the dignity of his sex, and his nieces and nephew, Mary, Jane, and Henry, by proximity of degree.

The division of the real property would, even now, be somewhat different from that of the personal, as the portion of William accruing to Jane and Mary would be one-third (or ten) of the thirty quarters; each inheriting five would take as much as their aunt Elizabeth, who would take one-sixth in her own right, or their cousin Henry, who would do the same in the right of his mother; the remaining ten quarters would go to Paul as in a lineal inheritance, only that in the collateral line the privileges of primogeniture do not exist. In the above case Henry, the nephew, Mary and Jane, the nieces, inherit by virtue of the representation of their parents, and not *proprio jure*, as it is easy to see, their uncle Paul and their aunt Elizabeth being alive. To this case, then, applies the third clause of the twelfth article, by which it is stated that "representation of degree shall be allowed, when

nephews and nieces shall come to the succession of an uncle and aunt, with the brothers and sisters of the deceased, and not otherwise;" in which case, "the said nephews and nieces shall subdivide among themselves, in the same manner, that portion of the succession which would have fallen to their father and mother, had he or she been alive." Here, then, is the case of nephews, through representation, concurring with uncles to their deceased uncle or aunt's property; consequently, where the "jus concurrendi cum proximiore succedendo in locum personæ deficientis" is open. But where no representation of degree is required, from all the nephews and nieces coming in their own right to their uncle's inheritance—as would have been the case in the above instance, had Richard survived his brother Paul and sister Elizabeth—then the first clause of the article comes into operation, and all divide as so many sons and daughters would do in a lineal inheritance—that is to say, *per capita* (by heads), and not *per stirpes* (by branches); in other words, there is no representation, no "jus concurrendi cum proximiore succedendo in locum personæ deficientis."

Such, then, is the law. A different mode of partition exists in collateral successions to personal property and real property purchased, when there are only nephews and nieces, or when any of these succeed, with uncles or aunts, to an uncle's succession. Representation is thus made to depend upon the casualty of an inequality of co-heirs, which certainly appears an anomaly.* Why, in the above case, should not

* It appears that the question, whether nephews sprung from different branches should inherit *per capita* or *per stirpes*, by heads or by representing their parents, when all are in an equality of degree, has excited much discussion among civilians, some preferring the former and others the latter system. In early times the former seems to have prevailed; more recently, however, the latter seems to have been preferred, and among others by the framers of the French code, who preferred the doctrine of Accursius to that of Azzo. These eminent Florentine civilians are remarkable for the steady light they threw upon the science of law when yet in its infancy. They flourished at the end of the twelfth and commencement of the thirteenth centuries.

That this point has been extremely discussed among legists at different times, may be seen from the reflections on the subject to be found in Domat and Basnage; but the ultimatum of all these discussions cannot be placed in a clearer light than has been done in the following words of M. Touillier, one of the most eminent writers of any age on civil law (liv. 3, tit. 1, ch. 3, Des Successions, No. 190, tome 4, p. 213): "C'était autrefois," says he, "à

Richard's estate be divided, in the same manner, among his nephew Henry and nieces Mary and Jane, whether his brother Paul and sister Elizabeth either survived or died before him? Why not allow the principle of uniformity of representation to take place in both instances, and all nephews and nieces to represent their parent? By the present mode, the system of representation is completely overturned. Thus, in supposing Paul and Elizabeth dead, Mary, Jane, and Henry, instead of succeeding by virtue of representation, would come in *proprio jure*, and all being in equality of degree would share in equal proportions their parent's personal property; but Henry, though the son of the aunt, would take one half of the whole real property purchased, and Mary and Jane would only have one half between them; whereas if Anne, his mother, had survived her brother Richard, she could only have taken one-third, and Mary and Jane, her nieces (representing their father), would have inherited two-thirds; so that, by this system, in many instances, the child may inherit more, in consequence of the death of his parent, than when alone he has any claims, which is contrary to every sound principle of inheritance, and which shows how much more rational and just it would have been to have made the system of representation uniform in its operation, and left all the nephews and nieces to inherit, *per stirpes*, the personal and real property purchased, as they do the real property inherited; leaving it to the uncle or aunt to place, as either thought fit, by means of a will, all the nephews and nieces on an equality, without any regard as to the number of parents from whom they descended.

l'école et au barreau une grande question de savoir si, dans ce cas, les neveux qui se trouvent en degrés égaux devaient succéder par têtes ou par souches. Azon prétendait qu'ils devaient succéder par têtes: Accurse, qu'ils devaient succéder par souches. Les docteurs étaient partagés entre ces deux interprètes, et les arrêts avaient alternativement consacré l'une et l'autre de ces deux opinions en différens tems. Enfin, lors de la réformation des coutumes, le sentiment d'Azon prévalut, et la coutume de Paris ordonna le partage par têtes.

"Il était alors vrai de dire que la représentation n'était ordonnée qu'en faveur des neveux; mais le code a préféré l'opinion d'Accurse, en ordonnant que le partage serait fait par souches, lorsque des neveux en degrés égaux concourent à la succession d'un oncle ou d'une tante."

But the anomaly of allowing nephews and nieces to represent their parents, only when they succeed with an uncle or aunt, to another uncle or aunt's personal property and real property purchased, and then dividing it *per stirpes*, or branches (thus foregoing the principle of representation, when they do not succeed with an uncle or aunt, because all are then in the same degree of relationship),* having been sanctioned by the legislature, it must be acted upon by the judicial authority, whose duties are confined to obey and, at most, to interpret the laws, not to make them: "jus dicere et leges interpretari non condere," says Bacon (De Officio Judicis).

The petitioners demanded, in their report, that the principle of representation might be extended one degree further, in collateral successions to personal property and real property purchased—that is, that grandnephews as well as nephews might inherit of their uncles and aunts in the event of the death of both their parent and grandparent; and thus prevent all possibility of excluding the orphans from their grand relative's property, as in the case of real property inherited. This proposition was, however, rejected by the Court and States, who all adopted the principle set forth in the eleventh article of the original petition, which had been sanctioned by the Court's committee, as conformable to the 304th article of the reformed custom of Normandy, and to the custom of Paris, where it had been introduced from the Justinian code, which had decreed that representation should be confined to the children of brothers and sisters only: "hujusmodi vero privilegium [that is, representation] in hoc ordine cognationis, solis præbemus fratrum masculorum et fœminarum filiis et filiabus, ut in suorum parentum jura succedunt."† Notwithstanding such high authority, it is submitted that the extension of representation one degree further, in collateral

* It may, however, be stated, that this mode of inheriting *per capita*, when all the nephews and nieces come, *proprio jure*, to a surviving uncle or aunt's estate, had also been adopted throughout certain provinces of France, however more uniform the system of inheriting *per stirpes*, under such circumstances, might appear. The system adopted by the modern law was also that which obtained in Normandy. See the 320th article, and Basnage thereon.

† Nov. 118, cap. 3.

successions, could but have been attended with salutary effects; it already exists *ad infinitum* to real property inherited, which would have had the effect of assimilating, at least for all practical purposes, our whole system of collateral successions to every kind of property, which, as every other department in the law, should be as uniform as possible. Nor would the introduction of this representation into Guernsey have been its first adoption, as it existed in some parts of Normandy and other French provinces before the revolution.*

The principle set forth in the French Code Civil is conformable to such a system, as the descendants of brothers and sisters are admitted *ad infinitum* to succeed to their uncles and granduncles, to the exclusion of all other collateral relatives, and conjointly with the surviving parents of the deceased person that has left no descent.†

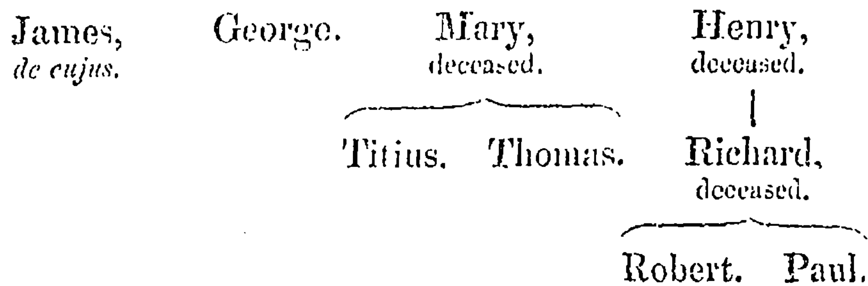
But all these authorities are now of no avail. Representation of degree is only allowed in collateral successions to personal property and real property purchased, when nephews and nieces shall come to the succession of an aunt or uncle with brothers and sisters of the deceased, and not otherwise, as is stated in the third clause of the twelfth article.

The law having thus excluded grandnephews and grandnieces, who have lost their parents and grandparents, from their granduncle's succession to certain properties, when there are uncles and cousins living, it must be followed; and the only remedy left to children so situated is, for their relatives to render them heirs by a will, since the legislature has

* See Basnage, p. 271. Commenting the 304th article, Sec. ult., in alluding to the custom of Epte, in Normandy, he also reports a decision conformable to that custom, given by the Chamber of Inquests on the 8th of August, 1630.

† Code Civil, articles 749 and 750. "Dans le cas où la personne morte sans postérité laisse des frères, sœurs, ou des descendans d'eux, si le père ou la mère est prédécédé, la portion qui lui aurait été dévolue conformément au précédent article, se réunit à la moitié déférée au frères, sœurs, ou à leurs représentans. En cas de prédécès des père et mère d'une personne morte sans postérité, ses frères, sœurs, ou leurs descendans, sont appelés à la succession, à l'exclusion des descendans et des autres collatéraux." It is, therefore, only the father and mother who are allowed to inherit conjointly with brothers and sisters.

thought proper virtually to exclude them as heirs at law. These grandnephews could, however, always succeed to any inherited real property, or *propre*, of their granduncle, notwithstanding the loss of their parent and grandparent, representation to such property being allowed *ad infinitum*, as in lineal successions. Thus, suppose a person (James) dies, leaving one brother (George), the nephews of a deceased sister (Titius and Thomas), and the grandnephews of a deceased brother Henry (Robert and Paul), together with sixty quarters of real property he had inherited, an estate, containing thirty vergées, he had purchased, and a thousand pounds sterling.



George would take five hundred pounds of the money, two-thirds of the estate—that is, twenty of the thirty vergées—and one-third of the sixty quarters in rents his brother had inherited—that is to say, twenty quarters. Titius and Thomas, by representing their mother, would take and share equally between them the remaining five hundred pounds and the ten vergées of the estate, besides twenty quarters of rents inherited; as Mary, their mother, had she survived, would have been entitled to an equal share with their uncle George and the children of their deceased uncle Henry, there being in this case exactly double the number of male heirs to female, in parity of degree, in which case all share equally, without any distinction of sex.

Robert and Paul would, therefore, only have had the remaining twenty of the sixty quarters inherited, which they would have divided in equal proportions; because to an inherited property representation being allowed *ad infinitum*, they could come in parity of degree with their granduncle George, through their father Richard and grandfather Henry,

who, had either of them lived, would have divided equally with George in James's inheritance.

It was to avoid this very possible hardship, that it was demanded that representation might be extended one degree further, in collateral successions to real property purchased and to personal property.

The reason why the principle of representation was not admitted *ad infinitum* to personal property and real property purchased, as for real property inherited, was, that should James have left an uncle or aunt, it was not thought right that he or she should be excluded by a nephew in the third or fourth generation.

Upon the whole, the law — as sanctioned by the local authorities and ultimately by the legislature — affecting the system of collateral inheritance has been much improved; first, by the children of brothers and sisters being always entitled to represent their parents, and secondly, by there being no longer, as formerly in Normandy, any exclusion of the female sex, in parity of degree with the male.*

From the manner in which the twelfth article has been drawn up, it might be a question whether the representation allowed by it to nephews and nieces, to come with their uncles and aunts to the succession of their deceased brother or sister, should be strictly confined to the succession of uncles and aunts, or be extended to that of a cousin. Thus:

James, deceased.	Mary, deceased.	Richard.
|	|	
Robert, *de cujus.*	William.	

Would William be allowed to represent his mother to his cousin Robert's succession, with his uncle Richard? From the terms in which the twelfth article is expressed, it must be stated that William could not; representation of degree being only allowed to nephews and nieces, with the brothers and sisters of the deceased, and not otherwise. It cannot,

* By the 309th article of the custom of Normandy, males, in collateral successions, were always preferred to females.

however, be denied that there is quite as much reason to allow William the benefit of representation, to succeed with his uncle Richard to the inheritance of his cousin Robert, as there is to allow him to succeed with Richard to that of his uncle James, as he would had the latter survived his son Robert. But the terms of the law being imperative, they must be strictly adhered to; and therefore it must be stated that William, the cousin, will be excluded by Richard, the uncle, to a cousin's inheritance, for all personal property and real property purchased or gratuitously acquired. Here, then, we see the additional reason why the benefit of representation should have been extended one degree further in the collateral line, as proposed by the petitioners in their report.

OF INHERITANCE IN THE ASCENDING LINE.

PRELIMINARY REMARKS, SETTING FORTH THE CONTRAST EXHIBITED BETWEEN THE ANCIENT AND THE REFORMED LAWS OF DIFFERENT NATIONS.

Upon no subject could unanimity more strongly prevail than in reforming the unnatural usage which debarred parents from their children's inheritance, which went to an uncle, cousin, or other more distant relative, before it could come to the parent; and if the child had no relative, then the crown took it in preference to the parent, though such property had come in the child's possession through the parent's instrumentality and bounty.

The Roman law, as reformed by the humane policy of the emperors, who assumed justice and the ties of affection as the basis of their system of inheritance, exhibits quite a contrast with that which obtained in earlier ages; and also with those institutions which the spirit of feudalism afterwards introduced, in order to transmit property to a few individuals, with the view of investing all the territorial influence, and consequently the government of the country, in their hands.

To destroy the fatal consequences arising from the pernicious system of preferring males to females, the eldest to all

other sons, the nearest in the collateral line (to the prejudice of the unhappy widow and orphans, bereft of their main support), and collateral relatives to parents, was the work of time, and was gradually accomplished by the chancellors L'Hopital and D'Aguesseau; the spirit of whose works, from their intrinsic wisdom, gradually gained ground throughout all the provinces of France, notwithstanding the diversity which otherwise prevailed in their civil laws. They, with Lamoignon, Pothier, Valin, and Emerigon, may be said to have laid the foundation of the civil and maritime law, which to this day governs that country; and a thorough knowledge of the works of the three latter, more particularly, is quite as indispensable to the lawyer of the nineteenth, as ever it was to the lawyer of the eighteenth, century; notwithstanding the occurrence of a revolution, which, after powerfully exciting the minds of men throughout all nations, has wrought the completest change in the habits, institutions, government, and laws of France, that was ever exhibited in the annals of any country.

The predominant idea, in reference to ascending inheritance, with which modern lawgivers seem to have been imbued, is to prevent parents, who had already incurred the mortification of losing their children, being aggrieved by the additional one of losing their inheritance. Such, too, was the reason assigned by the Roman law to restore to parents, in preference to all other heirs, the gifts they had presented to their children: "jure succursum est patri ut filiâ amissâ solatii loco cederet rederetur dos ab eo profecta, ne et filiæ amissæ et pecuniæ damnum sentiret."*

As Justinian abolished the last vestiges of the old Roman law, which excluded all females from inheriting, and parents from succeeding to their children—the severity of which had been, in great measure, removed by the decrees of different emperors, who, in opposition to the law of the twelve tables, had admitted the mother to inherit from her child, and children to inherit from their mother—so did rulers, in more modern times, gradually remove the rigour

* L. 6, ff. De Jure Dotium; L. 4, Cod. Solut. Matrim.

of feudalism from their own laws. Thus, as civilization advanced, the barbarity of the law disappeared, until it may be said that Justinian, by his celebrated CXVIII. of the "Novelles," caused justice and humanity to triumph, by establishing three degrees of inheritance—the lineal, ascending, and collateral—which, however variously modified, have nevertheless formed the basis of the modern system of inheritance throughout Europe: the children first succeeding, to the exclusion of all others; secondly, the parents succeeding in conjunction with brothers and sisters, and, in default of the latter, the parents succeeding exclusively of all other heirs—a system, in principle, adopted by the modern French code.

The foundation of this right of parents and grandparents to inherit from their children and grandchildren, has nowhere been more admirably set forth than by Domat, who, after stating that there are three orders of succession—the first, that children should inherit from their parents; the second, that parents should inherit from their children; and the third, that heirs in a collateral line should inherit—observes "that this second order, by which ascendants or parents are allowed to inherit from their children, is not so natural a one as that whereby children are allowed to inherit from their parents. It being in the order of nature that children survive their parents, it is contrary to this order that parents should survive their children. But when the case happens, equity naturally requires that the parents should not be deprived of the sad consolation of inheriting from their children, and, at the same moment, be thus subjected to the loss of both children and property."* As the possession of property adds to the comforts of life, and that children receive both from their parents, the same reasons exist to allow parents who survive their children to inherit from them, as that these should inherit from their children, according to

* These remarks may in truth be said to be little else than transpositions from various passages in the digest, more particularly the law 7, sec. Si tabulæ testamenti nullæ extabunt, unde liberi (lib. 4), the law 6 in the same book, De Jure Dotium, and the law De Inofficioso Testamento, lib. 5, tit. 2, as a comparison between these and Domat's remarks will show.

the well-known axiom: "Parentes ad bona liberorum ratio miserationis admittit, liberos naturæ simul et parentium commune votum. Ne et filiæ amissæ et pecuniæ damnum sentiret."

"And as children and other descendants are indebted for existence to their parents," says Domat, "their property is naturally destined to provide for the necessities of life to those from whom they descend. So, then, it is as conformable to the law of nature, that parents should inherit from their children as that children should inherit from them; and one, as the other, is the natural consequence of that intimate connection and mutual duties which Heaven has imposed on them, and one of the immediate consequences of which is, that children should inherit the property of their parents, and reciprocally, that these should inherit that of their children; nature having, as it were, rendered their property common to both. It was on this principle that the Roman law, even before that people were acquainted with the Christian religion, considered the property of parents as common to their children, and that of the children as common to their parents; and viewed their mutual inheritances less as an hereditament by which they acquired any new right, than as a continuation of that principle in hereditaments, which appears to have rendered them mutually masters of each other's property."*

It is in beholding such passages, where the noblest feelings of our nature are thus blended with the positive laws of that mighty people, whose civil code has so long survived their empire, that we forcibly call to mind the remarks on Domat's works by Mr. Lerminier, who, in his learned treatise on the study of the law, shows, in a few words, how much his countrymen are indebted to him for the amelioration of their civil laws. The following brief extract will be the more readily excused, as the name of Domat is here associated with that of his friend and no less illustrious and revered townsman, Blaize Pascal, who, to borrow Mr. Lerminier's

* "In suis hœredibus evidentius apparet continuationem domini eo rem perduceri, ut nulla videatur hœreditas fuisse, quasi olim hi domini essent, qui etiam vivo patre quodammodo domini existimantur."—L. 11, Dig., De Liberis et post.

own words, "était Chrétien en philosophie comme Domat était Chrétien en législation." Of the latter he observes: "Domat, ami et presque élève de Pascal,* n'hésita pas à faire découler le droit du Christianisme, à ses yeux la forme la plus pure de la vérité sur la terre; à enseigner, dans ses lois civiles, que l'homme est fait par Dieu et pour Dieu; et dans ce dogme, à la fois si simple et si profond, si clair et si mystérieux, où il plongea l'œil de la foi, il découvrit le monde, la société, ses lois, sa fin. Et, chose admirable! il s'appropria la législation Romaine comme une suite de ces principes sacrés; il se trouva que les doctrines des jurisconsultes, de ces élèves du Portique, passèrent sans effort au rang des conséquences naturelles du Christianisme; et ces fiers Stoïciens, qui se croyaient des dieux sur la terre, ne furent plus, sous la plume de Domat, que les respectueux disciples d'un Dieu qu'ils avaient ignoré. On n'a pas assez remarqué cette conciliation merveilleuse des dogmes et des maximes de l'évangile avec la sagesse altière de la jurisprudence Romaine; à elle seule, elle est une création. Domat a été Chrétien en législation, comme Pascal a été Chrétien en philosophie." †

Having thus alluded to the diversified opinions which exist on the subject of ascending inheritance, it was not extraordinary that a difference of opinion should have manifested itself between the committee of the petitioners and that of the Court, the former demanding that parents might succeed when the deceased left neither brothers nor sisters; whereas,

* Pascal and Domat were both born at Clermont, in Auvergne. Pascal, born in 1683, died at the early age of thirty-nine. Domat, born in 1625, attained the age of seventy. Four years after his death, Pothier, his great rival in fame, was born, and only expired in 1775. M. Toullier, the rival of the latter, was then a promising young barrister at the parliament of Rennes, who lived to see his work on the Code Civil esteemed the most renowned of the day, and attained the age of eighty. Since the death of the Chancellor L'Hopital at the close of the sixteenth century, it would appear that no sooner has one eminent civilian dropped in France than another has arisen to supply his place; and of the works of each it may be said, "fortes creantur fortibus." Hence the clearness of her civil laws, the European reputation of so many of her distinguished civilians, and the translation of their works in so many living languages.

† Chap. 12, Sur Domat, pp. 111, 112, Introduction à l'Etude du Droit.

by the law, as recommended by the committee of the Court and sanctioned by Council, the parent's issue must be extinct before he can inherit from any of his descendants. The reason why it was not proposed, that the parent should inherit from the child before any of its brothers or sisters was, that in the event of a second marriage these might be eventually cut off; particularly in the case of the surviving mother, whose personal property would belong to her second husband. Besides, the parent having the stronger lien over his child's affections, it would be always in the power of the latter to favour him by a will, which, in most instances, will remedy the inconvenience which might follow from preferring, in the case of brothers and sisters and other descendants, the collateral to the ascending line.

ARTICLE XIII.

Ascendants, having no descendants living, shall inherit the personal property and purchased real property of the last of their descendants. In ascending successions, the father shall be preferred to the mother, and the paternal to the maternal line, in parity of degree. In the same cases as above, the ascendants shall also inherit respectively the inherited real property of their line only. The father shall, in all cases, have the right to take from the estate of his child, deceased without descendants, such advances in anticipation of his own death as he may have made him, and for which he has obtained an acknowledgment in writing or an Act of Court, stating the advance so made.*

This article contains four distinct propositions, and by it is established:

1.—That ascendants shall inherit only from the last of their descendants.

* "Les ascendans sont admis à hériter de leurs descendans, et à l'exclusion de tous autres parens, aux choses par eux données, dont ils rapporteront la preuve du don.

"ARTICLE 13.—Les ascendans qui n'auront plus de descendans vivans hériteront des meubles, acquêts et conquêts du dernier survivant de leurs descendans. En succession ascendante, le père sera préféré à la mère, et la ligne paternelle à la ligne maternelle en parité de degré. Dans les mêmes cas que dessus, les ascendans hériteront aussi respectivement du propre de leur ligne seulement. Le père aura droit, dans tous les cas, de prélever sur la succession de son enfant, mort sans descendans, les avances de succession qu'il lui aura faites, et pour lesquelles il aura obtenu soit la reconnaissance par écrit du défunt, soit un Acte de Cour constatant l'avance faite."

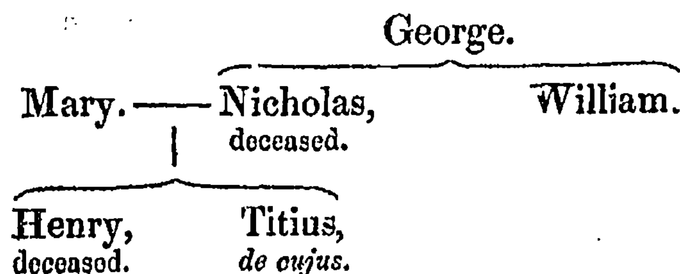
2.—That the male parent is always preferred to the female, in parity of degree.

3.—That real property inherited, whether from the paternal or maternal line, returns to the nearest of the stock whence it originated, though the party be not the nearest allied or related to the deceased; according to the principle, "paterna paternis, materna maternis."

4.—That parents who take the precaution of securing an acknowledgment from their descendants or donees shall inherit, exclusively of all others, to such property. (This shall form the subject of a distinct section.)

The effects of these distinct propositions require to be separately examined. First, that ascendants, or parents who leave no issue, shall inherit from their last descendant all his personal property and real property purchased (or *acquêts*), to the exclusion of all collateral relatives—such as uncles, cousins, and all others more distantly related. In fact, brothers and sisters, and their issue only, are preferred to all the ascendants or parents of a person deceased without children. And, among such parents, the male is always preferred to the female, in parity of degree, and the paternal line to the maternal, also in parity of degree—that is, they shall inherit all the personal property and real property either purchased by, or given to, the deceased, but not the real property he may have inherited, which returns to the stock whence it proceeded, and, in default, to the crown.

Thus, suppose Titius leaves his mother, Mary, a paternal grandfather, George, and a paternal uncle, William, his heirs to one thousand pounds sterling and two estates, one of them purchased with five hundred pounds received from his deceased father Nicholas, and the other inherited from him.



Nicholas, the father, being dead, Mary, the mother of Titius, as nearest of kin, will exclude William, the paternal uncle, and George, the paternal grandfather, to the moneys—that being personal property—and to the estate purchased by her son, though paid for with his father's money—such estate being *acquêt.* The same rule would hold good, had the estate been given to Titius by will or deed of gift. But the real estate inherited by Titius would go to his uncle William, who would exclude his own father, George; because, though Mary—or Nicholas, were he living—might say that Titius was their last descendant, this cannot be said by George, who leaves William, by whom consequently he would be excluded; it being expressly stated in the thirteenth article, that it is only from their last descendant that ascendants can inherit, on the same principle that, had Titius's brother Henry lived, neither the mother, nor even the father, could have inherited, as it could not then have been said of either, that Titius was their last descendant.

The law, as sanctioned by the Order in Council of the 13th of July, 1840, decrees that, under such circumstances, the mother would exclude all the other grandparents and relatives to the personal property and *acquêts*, but William would exclude her, and also his own father, George, to his nephew's real property inherited; and that, too, though the estate as a *propre* might have been George's own, and given to his late son Nicholas as his portion of inheritance, or *avancement de hoirie*—in Guernsey commonly known as an *avance de succession*—and afterward, through Nicholas, inherited by Titius.

Under no circumstances could Mary, the mother, claim any portion of this property, it having come to Titius through the paternal line.

Had the proposition of the petitioners—whereby it was set forth that, in default of heirs in either the paternal or maternal line, the nearest of kin in the other line should succeed—been adopted, the mother, in this instance, would have been entitled to enjoy, during life, the usufruct or life interest of the real property her son had inherited from his father, as the follow-

ing extract will show: "that in ascending successions, fathers and mothers inherit from their children, when these leave neither children nor brothers or sisters; the ascendants or survivors shall inherit all the real and personal property of their children, and the usufruct of the property left by descent."

Had the principles here set forth been adopted, Mary, besides claiming the whole real property her son had purchased and his personal property, would also have been entitled to the enjoyment of his real property inherited. Under any circumstances, George, the grandfather, would have come in for Titius's real property inherited before William, the uncle, William not being an ascendant, and the petitioners proposing that none but brothers or sisters should exclude ascendants; but the law having passed, that the parent or ascendant shall only inherit when he leaves no issue or descendant, William would now come in for Titius's inheritance before his father, George, of whom it cannot be said that he leaves no descent, since he in fact leaves William, which does not appear altogether just or reasonable.

Nor is this the only difference between the petition and the law as adopted by the States, and confirmed by Her Majesty's Order in Council. Supposing, in the above case, George and William dead, Titius's real property inherited would escheat to the crown, to the prejudice of his mother; which would have been remedied, had the thirteenth article of the petition been adopted, which proposed that, in default of heirs in one line, the property should go to those of the other, in conformity to the rule, "fiscus post omnes"—the crown only takes to an inheritance in the absence of all heirs —that is to say, only succeeds to vacant property, from the deceased owner's leaving no one behind him claiming any affinity or relationship, either by the ties of blood or affection.

But the proposition, as recommended by the Court's committee, having passed into law—which is, that it shall be only when "ascendants have no descendants living, they shall inherit the personal property and purchased real property of

the last of their descendants,"* and that "ascendants shall only respectively inherit the inherited real property of their line only"—it must be followed, and in consequence ruled, that the parents of the maternal line can never inherit either the absolute property or enjoyment of real property inherited from the paternal line; and, *vice versâ*, that the parents in the paternal line can never enjoy any greater advantages from those of the maternal line—which, it must be confessed, is not altogether consonant to those principles of justice and humanity, which might have been reasonably anticipated from our local and privileged legislature of the nineteenth century. Even those exiled rulers, of whom it has been sometimes said—how justly, is a very different question—"that they never forgot nor ever forgave," were far too high-minded and just than to allow of such a principle in their civil laws; they formally consecrating, not only that the crown should never succeed to property whilst there existed a single individual descended from, or allied to, the deceased owner, who could make out a claim to it, but that they should never consent to the principle of confiscating the property of innocent individuals, on account of the crimes of their relatives or parents: "la peine de la confiscation des biens est abolie, et ne pourra pas être rétablie."†

By the law, as it now stands, it will be seen that the crown no longer excludes a parent from every kind of property left by his child; that in the ascending line the male is always preferred to the female in parity of degree, excepting when the property is real and comes by descent, in which case the nearest male ascendant (and, in his absence, the nearest female ascendant) of the line where the property originated, succeeds, to the exclusion of all other parents or ascendants.

But what possible good could result from the rejection of

* The generic terms are: *meubles*, or personal property of every description; *acquêts*, real property purchased before marriage; *conquêts*, real property purchased between husband and wife. Under the term *acquêts* would also be comprised any real property received by donation or bequest, as contradistinguished from inherited real property, for that is only known by the generic term *propres*; personal property, though inherited, without any regard to its value or amount, being known as *meubles et acquêts*.

† Sixty-sixth article of Louis XVIII.'s charter.

the thirteenth article of the petitioners, recommending that the heirs of one line should succeed, preferably to the crown, to the real property which a deceased owner had inherited from either his parents or relatives of the other line? Was it not, then, sufficient that the local authorities should see the real property of Miss De Rozel—which by law she was debarred from bequeathing—escheat to the crown, to the prejudice of relatives in the maternal line, to allow the parents and relatives of one line to inherit reciprocally from each other, on the extinction of the issue in either? Why should the nearest relative, to the exclusion of the more distant, be deemed in law the most worthy of inheriting the personal property and real property purchased by the deceased—which, more particularly in these days, forms the bulk of private fortunes—and yet be treated as a convict with regard to the real property the deceased has inherited from a relative in a different line? Should not Miss De Rozel's case have served as an example, to show the utter injustice of any longer retaining the unwise distinction between *propres* and *acquêts*, and to have substituted in its stead the dictum of the greatest of philosophers and lawyers of modern times, that the ties of blood are too sacred to be set aside by the decrees of the civil law: "jura sanguinis nullo jure civili dirimi possunt"?* How forcibly do not these invidious distinctions reveal the truth of the saying of the illustrious Blaize Pascal, that the rights derived from inheritance have often had no better foundation than the fancy and caprice of lawgivers.†

* Bacon, On the Maxims of the Common Law of England, art. 11.

† "Le titre par lequel on possède," says Pascal, "n'est dans son origine que la fantaisie de ceux qui ont fait les lois."—Pensées, ch. 25.

This Pascal demonstrates, by asking the youthful heir of an illustrious house whether he was aware of the origin whence the title to his property sprang. "Vous imaginez-vous," says he to the Duc De Roannez, "que la voie par laquelle ces biens ont passé de vos ancêtres à vous soit une voie naturelle? Cela n'est pas véritable. Cette ordre n'est fondé que sur la seule volonté des législateurs, qui ont pu avoir de bonnes raisons pour l'établir, mais dont aucune certainement n'est prise d'un droit naturel que vous ayez sur ces choses. S'il leur avait plu d'ordonner que ces biens, après avoir été possédés par les pères durant leur vie, retourneraient à la république après leur mort, vous n'auriez aucun sujet de vous en plaindre. Ainsi tout le titre par lequel vous possédez votre bien n'est pas un titre fondé sur la nature, mais sur un établissement humain. Un autre tour d'imagination, dans ceux qui ont fait les lois, vous aurait rendu pauvre; et ce n'est que cette rencontre du hazard qui vous a fait

In the mean time, Miss De Rozel's property was disposed of by the crown. The claims of her own heirs in the maternal line, who had petitioned for it, had been rejected; but the Misses Le Roy, who were not relatives of the deceased, but the friends with whom she was living at the time of her death, who had also petitioned for this property, were more fortunate, and obtained from the crown one hundred pounds from the proceeds, as would appear from the Order in Council of the 26th of February, 1838, where the nature of the real property, the authority to dispose of it, and the parties by whom it was so disposed of, are set forth. The Order in Council was not registered on the records of the island till the 24th of October, 1840.*

naître avec la fantaisie des lois qui s'est trouvée favorable à votre égard, qui vous met en possession de tous ces biens. Je ne veux pas dire qu'ils ne vous appartiennent pas légitimement, et qu'il soit permis à un autre de vous les ravir; car Dieu, qui en est le maître, a permis aux sociétés de faire des lois pour les partager; et quand ces lois sont une fois établies, il est injuste de les violer."—Pensées de Pascal, supplément, première partie, art. 12.

* That part of the order authorising the crown officers to dispose of these various kinds of property runs thus:

"At the Court at Buckingham Palace, the 26th of February, 1838.

"Whereas there was this day read at the Board a report from the Right Honourable the Lords of the Committee of Council for the affairs of Guernsey and Jersey, dated the 23rd of February instant, in the words following.

[Here follow the particulars respecting the nature of the real property sought to be disposed of, with suggestions as to the mode; after which is the following authority:]

"Her Majesty having taken the said report into consideration, was pleased, by and with the advice of her Privy Council, to approve thereof, and to authorize Charles De Jersey, Esq., Her Majesty's Procureur, John Thomas De Sausmarez, Esq., Her Majesty's Comptroller, and Daniel Tupper, Esq., Her Majesty's Receiver-General in the said island of Guernsey, to sell, dispose, alienate, altogether or separately, either for money or perpetual yearly wheat rents, or partly for money and partly for perpetual yearly wheat rents, the said mill and garden called the Queen's Mill, and the said house and garden late belonging to the said Charlotte Mary De Rozel, on the most advantageous terms, for the benefit of Her Majesty's revenues in the said island; and to invest the money arising from such sales, save and except the third part of the proceeds of the said Charlotte Mary De Rozel's estate, or the sum of one hundred pounds sterling, as the case may be, in the purchase of perpetual yearly wheat rents, for the benefit of Her Majesty's revenues in the said island, and to pass all necessary contracts or deeds for the same; and to pay over the one-third part of the proceeds of the said Charlotte Mary De Rozel's estate provided such third do not exceed the sum of one hundred pounds sterling, or the sum of one hundred pounds sterling, as the case may be, in equal proportions to Martha Le Roy and Margaret Le Roy: Whereof all persons concerned are to take notice and govern themselves accordingly.

(Signed) "W. L. BATHURST."

Could it be credited, that, contemporaneous with such an act of fiscality,

Nothing proves more forcibly than this order, the justice of admitting the heirs of the paternal line, according to proximity of degree, to inherit from those of the maternal, on the extinction of heirs in that line; and, *vice versâ*, the heirs of the maternal line to those of the paternal, on the extinction of relatives in that line.

So far has the principle, *fiscus post omnes*, been recently carried in England, that not only are the relatives of the paternal line admitted to succeed to those of the maternal, and, *vice versâ*, those of the maternal admitted to succeed to those of the paternal line, but, by the statute 22 and 23 Vic., cap. 35, the maternal heirs of the son of an illegitimate father will inherit lands purchased by the latter. They no longer escheat to the crown, but in default of heirs.

Let it not be assigned as a reason, that a person leaving no descent may now bequeath his real property inherited.* Many persons may not even then have the power or faculty of doing so; they may be prevented from some legal incapacity; they may be minors, or prevented from mental incapacity; they may, besides, be taken off suddenly, without having had an opportunity of providing suitably for their most deserving parents, relatives, or friends. Besides, has not a parent a greater claim on his child than any collateral relative, without any regard as to the source whence the property sprang. Under any circumstances, it is evident that nothing can be more just or politic than to make no distinction whatever between the right of bequeathing real property inherited and the right of bequeathing real property purchased; and to admit the heirs of the paternal line, according to proximity of degree, to inherit from those of the maternal,

debarring the natural, though not legal, heirs to this real property, the Queen's greffier should have registered, on the public records of this island, the munificent donation of £300 from Peter Martin Carey to the De La Court fund? Six years after, in 1845, this act of generosity was followed up by another of £400 to the same fund, from his widow, Frances Jane Stafford, and his son, Peter Stafford Carey, the present bailiff of Guernsey.

* Article 1 of the Law on Wills, passed by the States on the 7th of May, 1847, and sanctioned by an Order in Council of the 22nd of July following; whereby the right of bequeathing real property, without regard to its being either inherited or purchased, in the event of the owner leaving no descent, was recognized.

on the extinction of heirs in such line; and, *vice versâ*, the heirs of the maternal line to those of the paternal, on the extinction of relatives in that line.

SECTION II.—ON THE RIGHT OF PARENTS TO SUCCEED, IN CERTAIN CASES, IN PREFERENCE TO ALL OTHER HEIRS, TO CERTAIN PROPERTIES WHICH THEY MAY HAVE BESTOWED UPON THEIR CHILDREN OR RELATIVES.

The fourth clause of the thirteenth article referring to a subject totally unconnected with the three preceding, it has been deemed right to make it the subject of a distinct section. It is one whence many important consequences flow, and has found a place in the legislation of ancient and modern states; being in strict conformity to those rules of justice and humanity, which, among a civilized people, should ever form the basis of their laws of inheritance. It was introduced with a view of soothing, in some measure, the affliction of parents who had been bereft of their children, that they should not at the same time lose the property they had generously bestowed upon them, by beholding it pass into the hands of strangers to their own detriment; or, as the Roman legislator so emphatically observes: in case the donee leaves no descent, such property shall return to the parent donor whence it sprang; not only that he may recover his own, but that the munificence of parents towards their children may not be impeded by the fear of their property reverting to strangers: "jure succursum est patri, ut filiâ amissâ solatii loco cederet, si rederetur ei dos ab ipso profecta, ne et filiæ amissæ et pecuniæ damnum sentiret."* Without such a provision, it was feared the parent's liberality might have been often stifled: "prospiciendum est enim ne hac injectâ formidine parentum circa liberos munificientia retardetur."† By the modern law, such a result is, in some measure, provided for by the fourth clause of the thirteenth article, which shall be now examined.

It is conceived as follows:

* L. 6, ff. De Jure Dotium. † L. 2 of the C. de bonis quæ lib.

ARTICLE XIII. (4TH CLAUSE.)

The father shall, in all cases, have the right to take from the estate of his child, deceased without descendants, such advances in anticipation of his own death as he may have made him, and for which he has obtained an acknowledgment in writing or an Act of Court, stating the advance so made.*

Were this article construed literally, upon the principle that the nominal admission of the father only is a tacit exclusion of all other parents—or, as the civilians say, "inclusio uniûs est exclusio alteriûs"—it would follow, that the father would be the only parent who had a right to take, in his child's succession who had left no issue, the property he had generously bestowed upon him during his lifetime; but such a construction would be a forced one, there being quite as much reason to admit the mother—or, indeed, any other parent or relative—as the father, to take any portion he might have bestowed as an advance of succession on his heir, in the event of the latter dying without descent, on the donor's producing an acknowledgment to that effect, in writing, from the donee. The expression "father" is here employed rather in an explanatory sense than as a limitation to that particular ascendant. The term "parent" would have been more appropriate. The original law on this species of reversion was introduced with a view, that a parent in general might not be deterred from bestowing any liberality on his children and grandchildren, through the apprehension that their death might cause it to be transferred to strangers, probably unknown to him, or at any rate to persons, towards whom he did not conceive there existed the same reasons for bestowing his liberality. Under no system of inheritance was such a principle of legislation more urgently required than in the Guernsey or Norman system, where affection as a principle was utterly banished from the

* "Les parens et autres ascendans qui ont survécu leurs descendans sont préférés à tous les parens collatéraux du défunt à reprendre, en sa succession, les objets qu'ils lui ont donnés, en rapportant la preuve du don.

"ARTICLE 13 (4e clause).—Le père aura droit dans tous les cas, de prélever sur la succession de son enfant, mort sans descendans, les avances de succession qu'il lui aura faites, et pour lesquelles il aura obtenu soit la reconnaissance par écrit du défunt, soit un Acte de Cour, constatant l'avance faite."

law of inheritance—where the barbarous axiom that property shall never ascend ("propres ne remontent point"), by which the crown excluded the parents from their child's estate, existed in full vigour; being here applied to all property, and not, as in Normandy and other places, to only one particular kind of property. "Successio feudi talis est ut ascendentes non succedunt" was the ancient feudal law of Normandy, because men in the full vigour of life were better able than their declining parents to bear arms; or rather because in the origin of fiefs all landed proprietors, being regarded by their lords rather as life tenants than as owners, their property, even on this precarious tenure, having been granted the vassal for himself and descendants ("sibi suisque descendentibus"), on the failure of these it reverted to the original grantor—a maxim which continued long after the custom and habits in which it originated had been swept away by the constant assumptions of regal authority, the more beneficent influence attendant on commercial pursuits, and, above all, the gradual extension of civil and religious liberty.

The system by which persons inherited the grants made to their children, exclusively of all other heirs, was styled "anomalous inheritance," because this system interverted the order of nature, according to whose laws the offspring generally outlives the parent; and it was created by the civil law to avoid the augmentation of distress, which the loss of property would entail with the loss of the donee on whom it was bestowed, much on the same principle that representation was created for the purpose of relieving the offspring who had lost their parents. By the Roman law,* and by the usages which prevailed amongst the greater number of the ancient provinces of France,† as well as by the present Code Civil, a parent in his own right succeeds, in preference to all other relatives, to property of every kind bestowed on his descendants, on these dying without issue;‡ but such is not

* L. 6, ff. De Jure Dotium; L. 4, Cod. Solutione Matrimonio.

† As may be seen from the celebrated treatises of Domat and Lebrun, as well as Pothier (Des Successions).

‡ Art. 747 of the Code Civil.

the case in the modern law, as set forth in the above article, wherein it is clearly laid down that the father (or, more properly speaking, the parent) shall only have a right to *prélever*—that is to say, to take, in preference to all other relatives of his child deceased without issue, the advances which may have been made him in contemplation of the donor's death, when he has obtained either an acknowledgment in writing or an Act of Court, setting forth the nature of the advance made. Without some proof in writing, the parent could not take back these advances from his child's estate, though they could be easily identified, and some even existed in kind; but had he in his possession a commencement of proof in writing, such as a note or a letter referring to the gift of such property, such evidence would be admitted on behalf of the parent to identify his former property, which will revert to him on the decease of his child without issue. It matters little whether these advances be made in money or in real property; either will equally revert to the donor before any heir can claim it, always excepting the donee's issue. Hence, it will often be prudent in the parent to take such an acknowledgment; and as the law prescribes no particular form in which it is to be drawn up, any document or writing, whence it will be made reasonably to appear that the advances have been paid or the property bestowed, will suffice. These inferences seem clearly to follow from the original terms in which the law is expressed: "the father shall, in all cases, have the right to take from the estate of his child, deceased without descendants, such advances in anticipation of his own death as he may have made him, and for which he has obtained an acknowledgment in writing or an Act of Court, stating the advance so made."

When these advances are made in real property, neither acknowledgment nor Act of Court would be required; the instrument of conveyance would itself be the best proof of the liberality, and consequently of the parent's reversionary right.

From the above terms of the thirteenth article, it clearly follows that, by the modern law, the father is not entitled to

succeed as a matter of course to the advances he may have bestowed on his child, as was the case at Rome and in France, and as it still continues to be in the latter country; for he can only here take to such property, on his adducing satisfactory evidence that the property claimed originated in his own bounty. The reversion, therefore, without such proof, could not take place in his favour, however much inclined the judge might be to grant it.

This reversion partakes more of the conventional than of the legal form, or that anomalous succession of which so much has been said and written by civilians; for by our law the parent rather retakes, by virtue of his acknowledgment, than, properly speaking, inherits the property originally bestowed in the anticipation of his child's surviving him.*

* And this seems to have been decided by the following precedent, passed on the 10th of January, 1846; whereby the Court decreed that Mr. Moses Vaudin, who had survived his son—to whom he had, by a *délaissance* or contract, abandoned his real and personal property, on condition of the son's paying his father's creditors—was not entitled to the reversion of such property at the son's death, to the exclusion of the sisters of the deceased, who were his next of kin. The case was heard before the bailiff, and Messrs. John Le Marchant, H. O. Carré, Harry Dobrée, and Thomas Andros. The action was brought by Mr. John Ozanne, as guardian to Mr. Moses Vaudin, the father, against the sisters and the husbands of the married sisters of the deceased, in the following form:

"A reconnaître que le dit Moïse Vaudin, sén., a le droit de prélever sur la succession du dit feu Moïse Vaudin, jun., l'avance de succession faite par le dit Moïse Vaudin, sén., au dit Moïse Vaudin, jun., consistant en tout et tel droit tant mobilière qu'héréditale comme au dit Moïse Vaudin, sén., pouvait compéter et appartenir en toute cette île de Guernesey, rien excepté ni réservé, et ce à la charge et condition que le dit Moïse Vaudin, jun., payerait les rentes dues sur les propriétés du dit Moïse Vaudin, sén., et payerait et acquitterait toutes et telles rentes, chefrentes, arrérages de rentes, et autres dettes mobilières comme le dit Moïse Vaudin, sén., pouvait alors devoir, le tout suivant contrat signé de justice, en date du 29 Octobre, 1835.

"La question à décider était à savoir si la délaissance faite par M, Vaudin, père, à son fils aîné Moïse, le 29 Octobre, 1835, à condition d'acquitter toutes ses dettes tant mobilières que immobilières donnait au père le droit de prélever dans la succession de son fils, mort sans héritiers directs, les mêmes biens qui se trouvaient en sa succession; en d'autres termes, la délaissance de Vaudin, père, l'autorisait-il à prélever le bien immeuble qu'il avait donné à son fils à charge de payer ses dettes? Dans le cas actuel les créanciers du père avaient fait un compromis avec le fils, la question se présente, si cette délaissance est une avance de succession par le père au fils; en d'autres termes, est-ce un acte de libéralité ou une vente pure et simple? Dans le premier cas, on serait porté à croire que le père put prélever les biens donnés à un fils à l'exclusion des parens collatéraux. Dans le second, on ne voit pas que ceux-ci soient exclus par le père qui a déjà reçu une valeur légitime pour son bien. La Cour juge à l'unanimité que la délaissance à la charge d'acquitter des dettes n'est pas une libéralité dans le cas de M. Vaudin, sén., et le met à silence et aux

Many of the rules which govern the subject of anomalous successions will, however, come into operation after once the parent has satisfactorily made out his claim to his descendant's property.

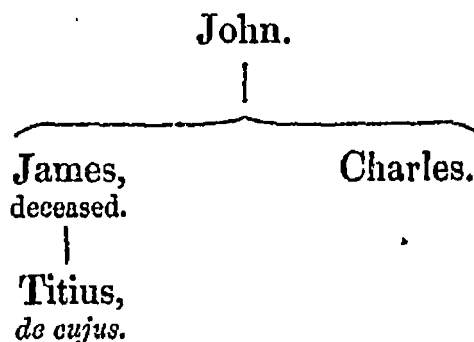
That important question, which excited so much elaborate discussion and elicited such a variety of opinions, as well under the system of anomalous inheritance which prevailed in France before the revolution as under the present code—whether the surviving donor of property found in the succession of the donee's son, deceased without issue, could take it in preference to all other heirs—cannot present itself under the thirteenth article, as sanctioned by Council. This right being a privilege personal to the donor, in the succession of his child, deceased without descent, from whom an acknowledgment is moreover required, the reversion cannot be extended to the son of the donee, as will appear on investigating the subject.

Even under the system where the parent was invested by law with the right of succeeding, in preference to all others, to property bestowed upon his child or descendant—for a parent, as well as a grandparent, would have the faculty of thus inheriting, exclusively of all others, to property bestowed through his own generosity—it was very questionable whether he could exclusively inherit such property from any other descendant but his own child or grandchild, the immediate donee; whether, in fact, he could inherit from his grandchild, who had himself inherited the property in question from his own parent; whether, on the donor's surviving the donee and his issue, the property originally bestowed reverted to the donor, to the exclusion of all other heirs, when the property given was yet to be found entire in his descendant's succession. Thus, John bestows on one of his sons, James, an estate and one thousand pounds, which are

frais sur sa prétention, de prélever les biens contenus dans la délaissance de 1835, au préjudice des frères et sœurs du défunt. Quelques-uns des magistrats se sont aussi prononcés pour un à silence fondé sur ce que M. Vaudin, père, n'avait pas obtenu de son fils une réconnaissance constatant l'avance faite."

From this decision, Mr. Moses Vaudin, the father, entered an appeal, but it was not followed up.

both inherited by the grandson of John, Titius, who dies without heirs. The question is, who will inherit the estate and amount originally bestowed by John—shall it be his son Charles, the uncle of Titius, or himself, the grandfather and original donor?



One might be tempted to say that John should inherit, but he is excluded by the law, as a parent can only inherit from the last of his descendants, which Titius is not so long as Charles lives; nor can he, according to the fourth clause of the thirteenth article, by virtue of an acknowledgment of the gift received from James, as by his death the property has become that of Titius, his descendant; for it is only from the child deceased without issue—or, in other terms, from the immediate donee—who has given an acknowledgment, that the donor can retake or recover the original grant, to the exclusion of all other heirs.

There could be no difficulty had James survived Titius and inherited from him, which he would have done as his last descendant, to the exclusion of Charles, the uncle, for the property would have then been found in the immediate donee's possession; and a person who survives his issue, for most purposes of inheritance, is supposed never to have had any, in which case John would exclude Charles.

This would be a hard case, but it could not be avoided. Titius's will would be his grandfather's only resource, had he left one. The Norman law would afford John no assistance, where this anomalous succession—or right of the parents to inherit the property they had bestowed on their children, to the exclusion of all other heirs—was unknown; nor would the former clauses of the thirteenth article avail him in a greater degree, for in them may be found the 241st article of

the custom of Normandy, copied in other terms, by which no parent could succeed to his descendants, whilst any one of them survived him.*

So, then, it may be fairly stated, that it is only in the immediate donee's succession, and not in that of any of his descendants, that this property would revert to the donor by virtue of his original acknowledgment.

The safer way for the donor to prevent all discussion is, to stipulate that the property is bestowed on the donee and his descendants; and in failure of the latter, that it shall revert to the donor.

Nor can there be any doubt, from the terms in which the last clause of the thirteenth article is framed, that the parent donor could take, in the succession of his child, in preference to all other heirs, not only the moneys or personal property he might have bestowed on him, and for which he had taken the precaution to procure a written acknowledgment, but also the real property bestowed by contract without any such receipt, where the contract itself was proof of the liberality.

Would the parent donor be preferred to the creditors of the donee? It would not appear so, because these must be paid before the estate can be said to be solvent or yield any bonus: "bona non sunt, nisi deducto ære alieno." Besides, the creditors might justly state, that they only gave credit in consequence of the donee's ameliorated condition; and, moreover, that the stipulation of reversion between him and the donor only relates to his heirs and issue, not to his creditors. Upon this point the Roman law, which caused the property granted to revert to the original donor, on the donee's decease without issue, free from all charges or hypothecations imposed on it, would not be followed.

* "Père et mère, aïeul ou aïeule, ou autre ascendant tant qu'il y a aucun descendant de lui vivant, ne peut succéder à l'un de ses enfans." (Art. 241.) A decree of the parliament of Rouen was given in 1657 to that effect. The right of legal reversion may indeed be said to have been unknown in Normandy, nor has it been introduced into the modern law. The first clause of the thirteenth article and the 241st of the custom of Normandy are absolutely to the same purport.

ON WILLS.

PRELIMINARY REMARKS.

The power of willing, or the right by which a person is allowed by law to dispose of his property, even when by his death he has no longer any control over it, constitutes one of the most legitimate and natural rights arising from property. Wills, like inheritances, are mere creations of the civil law, introduced for the purpose of regulating the transmission of property from one person to another, that it should not fall into the hands of the first occupier, as it otherwise would by the decease of its owner or original possessor. The gratuitous ownership of property is determined either by the law or by the owner's will. The first are usually called heirs at law; the second, legatees, or heirs of the will. The first are generally determined by the degree of affection which it is presumed the deceased entertained for particular persons—such as his offspring, his parents and relations in the collateral line (according to their proximity of relationship), and those as the presumed heirs are preferred, unless the owner have otherwise determined by his selecting or creating one or more of his choice; then it is that the rule, "dicat testator et erit lex," comes into operation—that is to say, that the heir of the will is preferred to all others.

Intestate inheritances may then be defined, those where the law undertakes to provide an heir according to the presumed affections of the deceased. They who have broached the idea that individuals, after their death, having no control over the affairs of this world, are not competent to make wills or select their own heirs, and who, on that eccentric idea, would destroy the principle of testamentary bequests, do not appear to have bestowed on the sacred rights of property that consideration the subject deserves, nor to have

surrounded it with that protection to which it is so eminently entitled. Is not an owner on his death-bed quite as absolute master of his property as he was at any other period of his life? Why should he, then, be debarred from distributing it among those whom he considers have the strongest claim either on his honour, his affections, or his regard? Upon what principle debar him from exercising the noblest prerogative inherent in his nature, which the laws of all civilized society expressly uphold, as one of the most strenuous promoters of industrious habits, as one of the strongest inducements to the accumulation of wealth, and a powerful means of maintaining the tranquillity and peace of families, as a distributor of rewards and punishments? The institution of wills as a measure of rewards, and that of representation as a preventive against the afflicted widow and unoffending orphans falling victims to the rigidity of legal principles, deservedly rank amongst the noblest of civilized institutions; and it has already been seen, how the progress of civilization may, in some measure, be traced by the extent to which they have been acknowledged, at various periods, in different countries.

Of the power of willing it has been justly remarked: "nihil est quod magis hominibus debeatur, quam ut supremæ voluntatis, post quam jam aliud velle non possunt, liber sit stilus, et licitum quod iterum non redit arbitrium"*—no civil right is indeed more precious than that of allowing an owner to bequeath his property. But the power of the law over man's rights in civil society was never, perhaps, more happily expressed, than in the following words of one of the first lawyers and professors† of the day: "Avant que l'homme ne soit conçu la loi s'occupe de lui;‡ pendant son

* L. 1, c. De SS. Ecclesi., lib. 1, tit. 2.

† M. P. H. M. Lesbaupin, in his course of lectures on the Roman law, and his introductory discourse on wills, delivered in the university of Rennes in 1827.

‡ This is strictly conformable to the rule laid down in the law 1, Dig. de Ventre in Possessionem Mittendo: "Sicuti liberorum eorum qui jam in rebus humanis sunt, curam prætor habuit, ita etiam eos qui nondum nati sunt, propter spem nascendi non neglexit. Nam et hac parte edicti eos tuitus est dum ventrem mittit in possessionem." The law 7 of the Dig. de Statu Hominum is to the same effect: "Qui in utero est, perinde ac si in rebus humanis esset, custoditur, quoties de commodis ipcius partus quæritur."

enfance et son adolescence encore hors d'état de veiller sur lui-même, elle lui nomme des aides ou gardiens pour surveiller sa personne, et pour conserver et améliorer sa propriété; arrivé à l'âge mûr elle le maintient dans le libre exercice de ses droits civils, c'est-à-dire, de sa liberté et de sa propriété; elle veille encore à sa sûreté tandis qu'il ne commet aucun acte qui lui fasse forfaire ses droits; et même après son existence elle fait respecter sa volonté pourvu qu'il se tienne dans les bornes de son devoir."* Such, indeed, should be the object of the law in all states, and in those having any pretensions to the qualification of free, the power of willing has been sanctioned as one of the most undisputed rights of property; so much so, that the Roman lawgiver considered the power of willing less as the attribute of the civil law, than as the common right of mankind: "testamenti factio non privati, sed publici juris est."† Perhaps the most singular feature in the whole history of the law of wills is that which occurs in England, where the intestate heir pays a heavier probate duty when he takes out letters of administration without there being a will annexed, than when he succeeds with a will annexed. Thus, the heir who succeeds, without a will, to an estate sworn under £20,000, pays £330 probate duty; whereas, if he succeeds with a will annexed to his title, he only pays £300; so that persons dying intestate subject their successors to penalties, in the shape of probate duty, sometimes one-third heavier than they would pay had they left a will. Children and other relatives are also affected, though in a minor degree. A legacy bestowed on the husband or wife is exempt from duty. Neither do legacies to strangers under £20 pay any duty, so that a legacy for £19 19s. at present saves £2 duty.

The feudal law—which, with regard to real property, was

* This is fully confirmed by the following definition given of a will by the Roman law: "De eo quod quis post mortem suam fieri velit." (L. 1, Dig. qui Testamentum facere possunt.) And again: "Paterfamilias uti legassit supellectiliâ pecuniâ ve suâ ita jus esto; dicat testator et erit lex." So, then, the father of a family, as well as any other individual, who left no descent, could dispose of his property by his will; which, when regularly drawn up and clearly expressed, was as binding as any law.

† L. 3, ff. Qui Testamenta facere possunt.

till lately in so many respects the law of this island—was very much opposed to the principle of wills; and, with regard to real property inherited, they were absolutely forbidden.

It has been often asked whether wills, as inheritances, were absolutely natural rights, or mere creations of the law. The Chancellor D'Aguesseau,* finding wills established throughout the greatest number of nations, considered the institution as derived from the law of nations, but regulated by the positive laws of each in particular.† Both might, however, be said to be derived from the law of nature, it being natural to man that these institutions should be regulated according to his affections and his commands. At the same time, they may be said to be derived from the positive laws of each state, as in all they can only be made in complying with forms more or less numerous or intricate.

Having thus far alluded to the right and power of an individual disposing of his property after his death, we shall see how far these are affected by the modern law, as sanctioned by Her Majesty's Order in Council of the 3rd of August, 1840, and by the Orders in Council of 1847 and 1852.

* This eminent lawyer made an ordinance on this subject, which ranks amongst the most famous of the reign of Louis XV.

† Upon this question see M. Toullier, in his introduction on wills, vol. 5, ch. 5, p. 352, wherein he states it to be derived from the civil law. Burlamaqui considers wills, or the power of disposing of one's property after death, "une suite naturelle du droit de propriété et de l'ordre de la société;" he also states, that most nations have regarded the power of willing as a natural right, by which mankind were more or less indemnified for the necessity to which all are subject in leaving their property behind them: "la pluspart des nations ont regardé la faculté de tester comme un droit naturel, par lequel on se dedommageait en quelque sorte de la nécessité où l'on est d'abandonner ses biens par la mort." (See Burlamaqui, Elémens du Droit Naturel, ch. 9, sec. 2; Des Testamens, p. 457.) D'Aguesseau considers wills "une invention du droit des gens autorisé par le droit civil." (Tome 3, p. 386.) Heineccius, on the other hand, considers the power of man over his property limited to that of disposing of it during life. (De Jure Naturali, lib. 1, sec. 287 et seq.) From these opinions of the most eminent writers on natural and civil law, it follows that wills may be said to be derived from the law of nations—as they are found tolerated among all who have most eminently respected the rights of property,—and from the civil law—as most have prescribed certain forms, conformable to which they must be made to be available; and which, to be really beneficial, should have for their sole object to enable the testator fully and clearly to make known his wishes.

At present, a person leaving neither wife nor descent is allowed, not only to dispose of all his personal property by will, but he may do the same with his real property, without any regard to its having been either inherited or purchased. So, then, an owner of real property, who has no descendants, may by his will now dispose of the whole of his real property, always subject to the third of the enjoyment devolving to the widow, of which he cannot deprive her. The respective rights of husband and wife to the consort's real and personal property shall be examined under the twenty-eighth article, which refers to the wife's dower.

SECTION I.—OF THE RIGHT OF WILLING REAL AND PERSONAL PROPERTY, AS MODIFIED BY THE ORDERS IN COUNCIL OF JULY 22, 1847, AND JUNE 15, 1852.

In the foregoing section, the right and policy of making wills having been referred to, we shall now consider the forms according to which wills of real and personal property are to be drawn up. These forms having been materially altered by the Orders in Council of July, 1847, and June, 1852, and all uncertainty set aside as to the mode of drawing them up, we shall see how far the power of willing extends, what forms are to be observed, and the difference that still exists in the mode of bequeathing real and personal property. The fourteenth article of the law of 1840—which refers to the power of willing, and which prohibited bequests of real property inherited, whenever the testator left relatives within the degree of first cousins—has been repealed; a person being now at liberty, if he leaves no issue, to bequeath all his property, as well real as personal, without any regard as to its having been either purchased or inherited.

By the fourteenth article of the law of 1840 it was enacted, that "every person leaving no descendants shall be at liberty to dispose by will, or by gift to take effect at his death, of the whole of his purchased real property; and also, in the same manner, of his inherited real property, provided he have no relatives in the second degree, inclusively, belonging

to the line whence that inherited real property has been derived."*

This article has been repealed by the following disposition of the Order in Council of the 22nd of July, 1847, which serves as its substitute, and does away with the restriction which formerly existed in willing real property inherited.

A person leaving no issue may, by will, dispose of all his real property of whatever kind, by following the forms prescribed for such wills.†

The first and indispensable condition attached to the power of willing any real property whatever, under the modern law, is that the testator leave no issue—that is, neither children nor descendants of children; which is already expressed in the original by the terms, that "toute personne qui ne laissera pas de descendans pourra disposer par testament de tous ses immeubles de quelque nature qu'ils soient." Thus, a person without issue, whether married or not, may bequeath the whole of his real property purchased or acquired by will or deed of gift, and even the real property he may have inherited. A married person dying without issue can only bequeath one half of his personal property; the other belongs to his widow, who, in the absence of a marriage contract, will also enjoy, during life, one-third of the whole of his real property as her dower. A married person leaving issue can only dispose of one-third of his personal property; another third is divided in equal proportions between his children; the remaining third is taken by the widow as her dower. Of the

* "La disposition par dernière volonté d'immeuble acquis et conquis est admise quand le testateur ne laisse point de descendans; il en est autrement relativement aux propres si le testateur laisse des parens collatéraux au second degré.

"ARTICLE 14.—Toute personne qui ne laissera pas de descendans pourra disposer par testament, ou donation à cause de mort, de l'entier de ses acquêts et conquêts; et pourra aussi disposer de la même manière de ses propres, dans le cas seulement où il n'aura point de parens dans le second degré, inclusivement, de la ligne dont ces propres sont provenus."

† "ARTICLE 1.—Toute personne qui ne laissera pas de descendants pourra disposer, par testament, de tous ses immeubles, de quelque nature qu'ils soient, en suivant les formalités requises pour les testaments d'immeubles.

"ARTICLE 2.—Sera rappelé l'article 14 de la loi sanctionnée par Sa Majesté, par son Ordre en Conseil en date du 13 Juillet, 1840."

personal property of an intestate, two-thirds go to the children, the other is taken by the widow. A parent cannot, however, bequeath a greater portion to one child than to another, however great or urgent may be the wants of such child. The petitioners, in 1838, prayed the States to modify this part of the law, but their request was not acceded to. No sound reason can, however, be adduced to prevent a parent's disposing of a certain portion of his property in favour of any of his children; nor can there be any why a parent should not have an absolute power of disposal of at least one-third of his property among his children, as he has the power of doing among strangers. Small sums, trifling presents, moneys laid out by parents for the maintenance or education of their children, are not looked upon as *avances de succession*, or grants made as advances, for which the recipients are afterwards accountable in the division or distribution of the succession. Those amounts or advantages only are looked upon as advances, and the recipients accountable, which, looking to the child's sphere or condition in life and the parent's means, are calculated to improve his condition and materially affect the portion of the other children.

Having thus seen when property may be disposed of by will, we shall now refer to the persons who are empowered to make wills and donations, before we arrive at the distinct and peculiar forms, according to which wills of real property and those of personal property are to be drawn up, as stated by the law of 1840, and the Orders in Council of July, 1847, and June, 1852.

The first and indispensable condition to make a will is, that the testator be *capax mentis*. If he be insane, or incapacitated through a seven years' banishment for any crime, in consequence of which he has lost all control over his property, he cannot make a will. But if he be deprived of the administration of his property by having a guardian placed over him, in consequence of his being in an habitual state of intoxication, or from having contracted a habit of foolishly expending his resources on trifles which yield no adequate return—in one word, on account of his prodigality—the will

he makes will be valid; the guardian being appointed for the purpose of securing him against want (to which both intoxication and prodigality have a tendency to reduce him), not for that of depriving him of any civil right, which he can only forfeit through the commission of a crime, or lose through his intellect becoming so weak or deranged as to render him unfit to select the heir of his choice. The object of appointing a guardian is to protect his person and to secure his property on his own account, and not for the account of his heirs. The difference there is between the state of habitual imbecility, or madness, and that of intoxication, naturally requires that a difference should be made in the degree of incapacity, as the party may be addicted to either. In the two former instances, he is deprived by law not only of the whole administration of his property, but of his liberty also, when he so far forgets himself as to become dangerous to others or to himself; whereas, in the second, as he is only deprived of the administration of his property, to be subjected to such salutary restraints as will prevent its being lavishly squandered, any further restrictions would be deemed unwarrantable infringements of those sacred rights of liberty and property, against which the judicial power is more particularly bound to secure those who seek its interference. The line cannot be better drawn between the degrees of incapacity to which the insane, the prodigal, and weak-minded are subjected, than by pointing out the difference of authority exercised by the *curateur* entrusted with the care of the former, and the *conseil judiciaire*, or professional adviser appointed to assist the latter, to prevent their being duped by designing characters, ever ready to impose on too confident and unmeaning individuals.

A person aged twenty—because at that age he attains his majority in Guernsey—may make a valid will, though he be under guardianship at the time, provided the guardian have been appointed merely for the purpose of securing his property; for if he have been appointed on account of the weakness of intellect of the testator, and rather with a view of protecting his person than his property, the will he after-

wards would make would be void, but for the modification introduced by the tenth article of the Order in Council of the 15th of June, 1852; wherein it is laid down, that the mere fact of a person's being under a state of guardianship no longer constitutes an obstacle to his disposing of his property by will.* If the will is made before the appointment of the guardian—that is, at a period when the law presumes that the testator was *capax mentis*—it is incumbent on them who deny the validity of the will to prove the testator's incapacity at the time it was made; and if its contents are reasonable, and particularly if written by the testator himself, the state of incapacity will be with difficulty presumed. If, on the other hand, the clauses of the will are irregular and incoherent, and not such as might be expected from a person in the testator's station in life and education, in the ordinary enjoyment of his mental faculties, his incapacity will be easily presumed; and it is for them who argue in favour of the validity of the will to show, that the testator was really *capax mentis* at the period of its confection.† Hence, it is incumbent on a court of justice to weigh well the reasons adduced by the parties requiring the appointment of a guardian before they grant the demand; and, above all, to consider maturely

* "L'existence d'un Acte de Curatelle ne sera pas censée preuve concluante de l'incapacité de la personne sous curatelle de disposer de ses biens par testament."—Art. 10.

† To put this distinction in the clearest light, it may be well to adduce the opinion of the Chancellor D'Aguesseau, than whom a more eminent authority never existed on all subjects connected with wills, donations, and others affecting man's civil condition in society, in reference to the rights derived from births, marriages, and deaths, and whose works upon these subjects have immortalized his name. In reference to the question, on whom it is incumbent to prove the validity or invalidity of a will made by a testator previous to the appointment of a guardian, he sets forth the following distinction: "Où le testament contient des dispositions sages et judicieuses, et alors c'est à ceux qui l'attaquent à prouver que le testateur était en démence lorsqu'il a fait cette disposition; où, au contraire, le testament par lui-même fait naître des soupçons de faiblesse et d'égarement d'esprit, et en ce cas c'est à l'héritier institué ou au légataire à soutenir son titre par la preuve de la sagesse du testateur." (Tome 3, pp. 367 et 368 de ses œuvres.) This idea may be said to have been borrowed from the Roman law, wherein it is stated that the reasonableness of the act or bequest, rather than that of the testator's mind, should form the principal object of consideration with the judge when called upon to confirm or invalidate testamentary bequests: "magis enim centumviri quod scriptum esset in tabulis quam quis scripsisset considerandum existimaverunt." (Valer. Maxim., l. 7, cap. 8.)

the nature and degree of the restrictions under which they are about to place a human being, whose future destinies may be so seriously affected by the step they are about to take. For instance, it would not be just to sanction a prodigal's being put under guardianship on the ground of weakness of intellect, unless his weakness had become permanent; the incapacity resulting from such a cause affecting him to a much greater extent than if the guardian were appointed on the score of mere prodigality, which does not entail the forfeiture of any civil or political rights, and among them, that of making a will. Though a prodigal may bequeath his property, he cannot give it *inter vivos;* there being, with regard to his fortune, the same reason to prevent an excess of liberality as an excess of expenditure. In fact, the appointment of a guardian to a person who has attained his majority, when made for the purpose of securing his property against wild, thoughtless, or extravagant expenditure, takes place with a view rather of benefiting the unhappy individual than his heirs. When guardians are placed over furious and bewildered persons, it is as much the protection of society, as their own benefit, that is the object of such appointment.*

The chief disqualifications for making a will are: minority or infancy; madness or lunacy, whilst it lasts; temporary derangement from age or drunkenness, whilst such derangement continues; and civil death, unless the offender be pardoned. Persons born blind, deaf and dumb cannot make wills, it being morally impossible for them to exercise that amount of discretion which the performance of such an act implies. But a blind, deaf and dumb person, who may

* Upon the circumspection which should be observed by judges empowered to appoint guardians over those who may require them, M. Toullier has the following remarks: "L'interdiction ne doit être provoquée qu'avec la plus grande réserve. Elle prive un citoyen du libre exercice de ses droits; elle lui ôte la disposition de ses biens, et souvent la liberté de ses actions; elle ne lui cause pas seulement une humiliation et un déplaisir extrême, elle porte atteinte à sa réputation. Elle ne doit donc être prononcée qu'en cas de nécessité, et seulement lorsque l'intérêt de celui contre qui on la provoque l'exige, car c'est son intérêt plutôt que celui de sa famille que l'on considère. Cependant le furieux est interdit, moins pour son intérêt que pour celui de la société, que ses excès menacent."—Tome 2, p. 524, No. 1313, De la Majorité et de l'Interdiction.

have become afflicted in after life, may, if he attain his majority, make a will by expressing his desire in writing.

SECTION II.—FORMS REQUIRED FOR WILLS OF PERSONAL PROPERTY.

These forms have been much simplified, and those required for the disposal of personal property are set forth in the Order in Council of July, 1847; and as they are very different from those prescribed for bequests of real property by the law of 1840, and the subsequent Order in Council of 1852, they will be separately considered. Three important considerations in reference to wills should ever be borne in mind: first, not to put off making a will to the last moment; secondly, to have it drawn up by a competent person in the habit of making wills; and thirdly, due caution in the observance of the forms prescribed for the making of wills—which, however plain and simple, yet have to be carefully followed, on pain of incurring litigation, and, not unfrequenty, disappointment, for those whom the testator had chiefly in view to protect.

Nuncupative wills are allowed, when made by soldiers in active service, and by seamen in the course of a voyage.*

An holographic will—that is, a will entirely written, dated, and signed at the end or foot by the testator—need not be attested by witnesses.† But if the will be written in any other hand and only signed by the testator, his signature must either be subscribed or recognized in presence of two witnesses, who must be both present at the same time; who, in presence of the testator and in presence of each other, will attest the testator's signature by signing their own names

* Art. 1 of the Order in Council of the 22nd of July, 1847, registered on the 31st of July following. "Aucun testament de meubles (à l'exception des testaments de militaires employés dans le service actif, et des testaments faits par des marins dans le cours d'un voyage) ne sera valable à moins qu'il ne soit par écrit."

† Art. 2 of the same Order in Council. "Le testament olographe ne sera point valable s'il n'est écrit en entier, signé à la fin et daté de la main du testateur."

near his, at the foot or end of the will* — the testator's acknowledgment so made, and attested by two subscribing witnesses, being deemed equivalent to their having seen him sign his will.

When the law of wills was revised in 1847, it was not without great difficulty allowed, that the acknowledgment by the testator, before two witnesses, of a will that he had already signed, and which they afterwards attested, should be deemed equivalent to his signing the will in their joint presence. Yet this acknowledgment of his signature to the will by the testator, in presence of two witnesses who afterwards attest it, is conformable to the law of England; where a will, signed in the absence of the two witnesses, is valid, provided that the testator subsequently acknowledge his signature in their joint presence. What the witnesses have to see is, that the will is either signed by the testator in their joint presence, or if they have not seen the testator sign, then, that he acknowledge and recognize his signature to the will, declaring that signature to be his own.

But the most efficient way is, for the testator to declare to the two attesting witnesses, that he desires them to witness his will, that he calls their attention to the act of his signing his name to the will, and that they immediately attest that signature by subscribing their own names, in presence of the testator and of each other. The signatures of the witnesses should then appear at the foot of the attestation. The testator and the attesting witnesses having thus all three signed, in presence of each other and at the same time, the object the law had in view is fulfilled. It might be as well to mention the place of residence of the witnesses, but that is not material. The following attestation might not inaptly close the will, and being conformable to truth and to the forms required, no fear need be entertained of the will being disturbed: "Signed by the above-named testator in the presence of us, present at the same time, who have herewith signed

* Art. 3. "Tout testament par écrit qui n'est point olographe sera signé à la fin par le testateur; sa signature se fera, ou il la reconnaîtra en présence de deux témoins, tous deux présents en même temps, lesquels attesteront sa dite signature en apposant leur signature auprès de la sienne."

our names as witnesses thereto, in the presence of the said testator and in the presence of each other." In the event of the testator's being unable to sign his name, his placing or making his mark at the foot or end of the instrument will suffice; and such mark, duly attested by two witnesses, in the testator's presence and in presence of each other, will be equivalent to his having himself formally signed the instrument.*

In the event of the testator, from any cause, being unable either to sign his name or make his mark, he should cause his will to be signed by some other person, who will sign or make his mark, as directed, in presence of the testator and the witnesses; to whom the testator should, moreover, acknowledge the signature or mark made on his behalf. No person incapacitated, from whatever cause, from being a witness to the will, can be called in to sign or make a mark on behalf of the testator.† When the testator is unable either to sign his name or make his mark, it should be mentioned in the attestation. The witness to the will must be aged fourteen,‡ and the executor of a will may be an attesting witness. But the husband, or wife, or any of the descendants or issue of the testator, cannot be a witness to

* Art. 4 of the Order in Council of the 22nd of July, 1847. "En cas qu'un testateur ne sache point écrire, ou soit empêché d'écrire par faiblesse de corps ou autrement, il pourra signer en faisant sa marque à la fin du testament."

A will signed by a person in his own name for and on behalf of the testator, setting forth that such signature was so subscribed, has, by the English courts, been held to be valid. Yet such a will would not be valid in Guernsey, according to the fifth article of the above Order in Council. Lord St. Leonards (On Property Law) states, that it is no objection that the person signing for the testator is also one of the attesting witnesses. It has been decided that when a person signed for the testator, but in his own name, stating it to be for the testator and by his direction, the signature was a good one. (Letter 19, Signature of the Will, p. 170.)

† "Article 5.—En cas qu'un testateur ne soit capable, par quelque cause que ce soit, ni d'écrire son nom ni de faire sa marque, il pourra faire signer le testament par quelque autre personne pour lui, laquelle personne signera en présence des témoins, auxquels le testateur déclarera en même temps reconnaître telle signature. Tout individu qui serait incapable d'être témoin d'un testament, sera incapable de signer pour le testateur."

‡ "Article 6.—Tout individu qui aura atteint l'âge de quatorze ans pourra être témoin d'un testament, à l'exception du mari, de la femme, et des descendants du testateur. L'individu désigné dans le testament comme exécuteur pourra y être témoin."

his will.* An attesting witness, or the husband or wife of an attesting witness, is disqualified from receiving any legacy;† the object being to prevent any objection to the will being raised, on the ground of any supposed influence or interest on the part of the attesting witness.

The revocation of a will, or modification of any of its clauses, can only take place by the testator's following the same forms or rules as are prescribed for making the will.‡ The same rule will apply to codicils, which can only be revoked by following forms, similar to those prescribed for their formation.§

There are three modes by which the revocation of a will may occur: first, by the testator's executing a subsequent will or codicil; secondly, by his destroying the will or obliterating his signature; thirdly, by his disposal or sale of the property bequeathed. The Court's committee on the revision of the law proposed, in 1847, that marriage should revoke a will, as it does in England; but this was opposed, on the ground that the testator's marriage so materially modified his will, that no legislative interference was required—a widow being entitled to one-third of the testator's property when he leaves issue, and to one half when there is no issue of the marriage.

The tenth clause of the Order in Council of 1847‖ provides, that a legacy to children or grandchildren shall not lapse through the death of such children or grandchildren happen-

* Art. 6 of the Order in Council of the 22nd of July, 1847.

† "ARTICLE 7.—Tout legs, à quelque titre que ce soit, fait dans un testament à un individu qui y signera comme témoin, ou au mari ou à la femme de tel individu, sera nul et de nul effet."

‡ "ARTICLE 8.—Aucune pièce n'aura l'effet de révoquer un testament, en tout ou en partie, à moins qu'elle ne soit revêtue des mêmes formalités qu'en testament."

§ "ARTICLE 9.—Les codiciles seront sujets aux mêmes règles que les testaments."

‖ "ARTICLE 10.—Les legs faits par un testateur à ses enfants ou petits-enfants ne deviendront point caduce par le prédécès de ces enfants ou petits-enfants, dans le cas où ils laisseront des descendans; mais ces descendans recevront les dits legs à la representation des légataires désignés au testament, à moins que le testateur n'ait exprimé dans le testament une intention contraire."

ing previous to that of the testator; but that the issue of such children or grandchildren shall, by representing their deceased parent and legatee, take to the bequest left him, unless the testator have otherwise determined by his will.

The law of England also provides, that in the event of a testator's bequeathing any part of his real or personal estate to any of his children or grandchildren, for any interest that will not determine at or before the death of such child or grandchild, and that the legatee die before the testator leaving issue, and such issue survive the testator, the bequest shall not lapse, but will take effect as if the death of the child or grandchild happened after the testator's death, and will be treated as forming part of the estate of such child or grandchild.

Obliterations, interlineations, and alterations in the will can only be made by the testator's recognizing them by his signature, and two witnesses, present at the same time, subscribing their names in the margin, or near the place where the interlineation or alteration occurs; or, they may be recognized and alluded to in a memorandum at the end of the will, or in a codicil drawn up in due form—that is, signed by the testator in presence of two witnesses. Generally speaking, interlineations, obliterations, and alterations are deemed to be sufficiently well attested, by the testator and the former witnesses to his will signing their initials; but it would be more prudent that the changes should be recognized by the testator and witnesses signing their names at length. Unattested interlineations, obliterations, and alterations are deemed as though they had never been written, and are presumed to have occurred after the execution of the will; but this presumption is not of a nature to preclude the judge from letting in oral evidence, to show that the interlineations, obliterations, and alterations really occurred before the will was executed.

Before quitting the subject of wills, the habit (too common) of persons putting off such an important act to the last moment cannot be too strongly deprecated. It may be affirmed, that most wills that are cancelled are owing to this

cause; nothing being more diffi than to annul a will in due form, and which has been drawn up at a time when the witnesses no longer remember the incidents that have occurred, and which, if brought to light, might nullify the will.

SECTION III.—OF THE FORMS REQUIRED FOR WILLING REAL PROPERTY.

The forms for wills of real property being quite distinct from those prescribed for wills of personal property, it will be seen by the following article, that they are required to be transcribed on distinct sheets, so as to form separate documents.

ARTICLE XV.

The will of real property shall be made distinct from that of personal property.*

The effect of testamentary bequests disposing of real property being generally different from those disposing of personal property, in reference more particularly to the obligations contracted by the legatees towards third parties, it was necessary to adopt somewhat different rules with regard to the forms affecting the execution of wills of real property—that is to say, it was right for instance that the rentholder, who has a claim on the land bequeathed, should have his title-deeds transferred to him by his new debtor or the legatee, in as perfect a state as if the real property had changed hands by means of a sale; when the rentholder obtains his title to receive the annual payment of his rent on a parchment deed, similar in every respect to a contract of sale, whence the obligation arises to discharge the rent. But in other respects, there does not appear any reason why wills of real property should not be drawn up in the same form, and attested in the same manner, as wills of personal property. Might not an holographic will—that is to say, one

* "Le testament d'immeuble est fait par un acte différent du testament des effets mobiliers.

"ARTICLE 15.—Le testament d'immeubles sera fait séparément de celui de meuble."

entirely drawn up in the testator's own handwriting—have been deemed a sufficient proof of his intentions, without subjecting him to the ceremony of a judicial ordeal, which, after all, is not so likely to answer the ends proposed?

Though it is stated, that a will of real property must be made distinct from that of personal, yet were an individual to make a bequest of his personal property in a will of real property, duly attested and regularly drawn up, such bequest of personal property—bearing, as it would, the signature of the testator—would be valid; as the greater solemnities required for a will of real property having been observed in an instrument where less solemnities might have sufficed, the latter would not be void. This is the case where the rule, "utile per inutile non vitiatur," applies—that is to say, that mere surplusage does not vitiate the instrument, if it, in other respects, bears all the marks essential to its formation. On the other hand, an holographic will would not be deemed sufficient to transmit real property; and however valid its dispositions might be found in reference to the personal property, still, such a will would not hold good with regard to the real property, as will appear from the following article, which regulates the manner in which wills of this description are to be drawn up, and that in which they may be cancelled.

Under all circumstances, it will be best to make the will of real property on a distinct document from that containing the bequests of personal property, when that can be conveniently done.

The following article—the sixteenth of the law of 1840—has been so far modified by the ninth article* of the Order in Council of the 15th of June, 1852, that the bailiff, with two jurats, is no longer required to attest the will of a married woman during her coverture; nor is she any longer held to declare on oath that the will is her own spontaneous act, as she is in contracts of sale of real property. There now no

* Art. 9 of the Order in Council of the 15th of June, 1852. "La femme mariée n'aura pas besoin de l'autorisation de son mari pour faire un testament d'immeubles, et ne sera pas tenue de prêter serment devant justice."

longer exists any difference in the form of the will of a married woman and that of any other person.

ARTICLE XVI.

Every instrument giving real property to be enjoyed at the donor's death, and every legacy of real property, shall be signed by the donor or testator, in the presence of two jurats of the Royal Court; or before the bailiff and two jurats in the case of a wife under coverture, whose oath shall be required. The instrument thus authenticated may, nevertheless, be changed or modified at any time by another similar instrument: it may even be destroyed, without any formality, by the donor or testator.*

The first caution required is, that the will be signed by the testator. If he is unable to sign, his mark—attested by the jurats, to whom his inability will be made known—will suffice. Thus, the representations of those who, in 1840, contended that neither the consent of the husband to his wife's will, nor the intervention of the bailiff to administer the oath to the will, as being the wife's spontaneous act, was at all necessary, at last prevailed. By the common law of the ancient provinces of France, by the 226th and 905th articles of the present civil code, conformable in this respect to the Roman law, the consent of the husband, for the validity of the wife's will, is not requisite. According to these laws, it may be said that a will is always the expression of the testator's mind—the "jus sententia voluntatis nostræ de eo quod quis post mortem suam fieri velit"—ordering certain things to be performed after his death; but the same cannot always be said where the assent of a third party is required to a will.

Though the married woman has thus, by different laws, been allowed to bequeath her property without the consent of her husband, yet none have allowed her to give or make

* "Le testament d'immeuble, autre néanmoins que celui fait par la femme mariée, doit être signé par le testateur, en présence de deux jurés. Cette disposition a été modifiée par l'article 9 de l'Ordre en Conseil de 1852.

"ARTICLE 16.—Tout acte portant donation à cause de mort, ou legs d'immeubles, sera signé par le donateur ou testateur, en présence de deux jurés de la Cour Royale, ou devant justice dans le cas d'une femme couverte de mari, dont le serment sera requis. La pièce ainsi authentiquée pourra néanmoins être changée ou modifiée en tout temps par une pièce revêtue des mêmes formalités; elle pourrait même être détruite sans formalité quelconque par le donateur ou testateur."

a donation *inter vivos* without his consent; the effect of such act being to diminish the value of real property common to herself and her husband, the permission of the latter is necessarily required for such a purpose.*

The question that might have formerly arisen, whether an owner of real property in Guernsey, residing abroad, could bequeath it by an instrument which no jurat had attested, has been settled by the Order in Council of June, 1852; which provides for this contingency by requiring, that if the will of real property situated in Guernsey be drawn up in Guernsey, it shall be signed by the testator, in presence of two jurats of the Royal Court, both present at the same time.† If such a will be drawn up in ALDERNEY, it shall be signed by the testator in presence of two jurats of the Court of Alderney,‡ both present at the same time. If drawn up in SARK,§ it must be signed by the sénéchal, or judge of the island, and greffier, or registrar of the Court; and if the will of real property situated in Guernsey be drawn up in any place beyond the precincts of the bailiwick, then the testator will have to sign his will in presence of a notary public and two witnesses, all four present at the same time.|| The witnesses are to subscribe their names near the signature of the

* Art. 905, Code Civil. "La femme mariée ne pourra donner entre-vifs sans l'assistance ou le consentement spécial de son mari, ou sans y être autorisée par la justice. Elle n'aura besoin ni du consentement du mari ni d'autorisation de justice pour disposer par testament."

† "ARTICLE 1.—Le testament d'immeubles fait dans l'isle de Guernesey sera signé par le testateur en présence de deux jurés de la Cour Royale, tous deux présents en même temps."

If in Jersey, or otherwise out of the bailiwick, it must be signed by a notary, and two witnesses, both present at the time.

‡ "ARTICLE 2.—Le testament d'immeubles fait dans l'isle d'Auregny sera signé par le testateur en présence de deux jurés de la Cour d'Auregny, tous deux présents en même temps."

§ "ARTICLE 3.—Le testament d'immeubles fait dans l'isle de Serk sera signé par le testateur en présence du sénéchal et du greffier de la dite isle, tous deux présents en même temps."

|| "ARTICLE 4.—Le testament d'immeubles fait hors du bailliage sera signé par le testateur en présence d'un notaire public et de deux témoins, tous présents en même temps. Les témoins attesteront la signature du testateur en apposant leur signature auprès de la sienne, et le notaire fera acte de la signature du testateur et des témoins. Ne pourront être témoins le mari ou la femme du testateur."

testator, and the notary will draw up a record of the testator and witnesses having so signed. It is also provided, that neither the wife nor the husband of the testator shall be a witness. The execution of these wills—wherever and by whomsoever drawn up—as the real property is situated in Guernsey, such execution will take place according to its laws, without any regard to the quality of the legatees, whether natives or foreigners. The French code—in this respect conformable to the common law of nations—formally provides by its 1000th article, that "les testamens faits en pays étrangers ne pourront être exécutés sur les biens situés en France qu'après avoir été enregistrés au bureau du domicile du testateur s'il en a conservé un; sinon, au bureau de son dernier domicile connu en France; et, dans le cas où le testament contiendrait des dispositions d'immeubles qui y seraient situés, il devra être en outre enregistré au bureau de la situation de ces immeubles."

This distinction between the form of the instrument—which may be drawn up differently to what it might have been in the country where the object disposed of exists, and which, notwithstanding, retains its validity—and the execution of the same instrument—which always takes place according to the law, and by the administrators of the place where the property is situated—has been clearly set forth in the French code, as may be seen by comparing the foregoing article with the following; by which, though a stranger possessing real property in France may, whilst abroad, dispose of it according to a different form than that prescribed by the French law, yet the legatee would not be exempted from complying with the provisions of the French code in reference to its execution. The 999th article expressly decrees, that a Frenchman's will is valid if it be entirely drawn up in his own handwriting, or, if not so entirely written, it have been drawn up by a public officer, according to the law of the place where he resides.*

* "Un Français qui se trouvera en pays étranger pourra faire ses dispositions testamentaires par acte sous signature privée, ainsi qu'il est prescrit par la loi pour le testament olographe, ou par acte authentique, avec les formes usitées dans le lieu où cet acte sera passé."

The last clause of the sixteenth article refers to the mode in which a will, though regularly made and attested by the competent authority, may be either changed, modified, or destroyed ; it being stated that the instrument, duly authenticated, may nevertheless be changed or modified at any time by another instrument similarly drawn up ; but that it may be destroyed by the donor or testator, without the observance of any formality. Hence, it would appear that the forms required to change or modify a will are different from those by which it may be absolutely revoked. All changes and modifications must be certified by an authority similar to that before whom the original instrument was passed. Thus, where the testator might wish to make different apportionments of his property, to erase the name of any legatee from his will, or introduce any other parties to it, these changes should be attested by the same authority as the original will, though it is not necessary that this authority should be composed of the same officers. Thus, two jurats may attest a will, and two other jurats may certify to the changes or modifications made to the original instrument, and both instruments will be perfectly valid—the original for those dispositions to which no derogation has been made, and the modifications themselves, which, by virtue of the new instrument, have in law acquired the same force as the original. The power thus recognized to alter or destroy a will, and the manner in which such modifications or revocation may be performed, are inherent in the nature of wills ; which may either be altered or altogether cancelled with any change that may have occurred in the testator's mind, as appears from the well-known axiom, "voluntas hominis ambulatoria usque ad mortem."

Nor is this difference respecting the forms to be observed in the changes or modifications of wills, and their revocation, peculiar to our jurisprudence. Wills, as contracts and laws in general, can only be changed or modified by observing the same rules as are required to create them : "omnia quæ jure contrahuntur contrario jure pereunt."* This, together

* L. 100, ff. De Regulis Juris.

with the rule so often quoted, that nothing is more natural than to recall an act in the same manner as it was formed—"nihil tam naturale est quam eo genere quidquid dissolvere quo colligatum est"*—have become a formal disposition in the last clause of the sixteenth article, in reference to the modifications of wills of real property. But this rule does not apply to the absolute revocation of a will, which may be destroyed without any formality. Though it may at first sight appear singular, that a greater number and more complex formalities should be required for the mere modification of some clauses of an instrument than for its total abrogation,—and that the rules above mentioned, drawn from the Roman code, should not be applied to the revocation of a will as to its enactment,—yet, when we reflect on the consequences which follow from the mere modification and the revocation of wills, the difference in the rules may be satisfactorily accounted for. The will being the testator's law—"dicat testator et erit lex"—by which the distribution of his property is regulated at his death, this law is often directly opposed to the laws of inheritance; which, as the general law, would otherwise have provided for such distribution. Constituting a derogation to, and indeed not unfrequently a total abrogation of, the general law of inheritance, the will must be clearly and formally established; but when so established, its provisions supersede the distribution of property provided for by the general law. To revoke the instrument containing such an authority is, therefore, only returning to the general order of things as written in the law; and its revocation will be easily presumed on the appearance of any subseouent act or deed, by which it may fairly be inferred to have been cancelled. Hence is less formality required in returning to the natural order of things than in deviating from it; hence may a will be destroyed without any formality whatever, or by an act or writing whence it may reasonably appear that the deceased had altered his previous inclination to intervert the law of inheritance, by which he had preferred another to his heir. But the modifications or changes in a

* L. 27, ff. De Regulis Juris.

will still infer the existence of a will, or a derogation to the order according to which the legislator would have distributed the deceased's property among his different relatives. Hence the necessity of consigning these modifications or derogations in as perfect and formal a manner as is required of the will itself, the effect of both—as far as interverting the legal distribution of the testator's property—being the same, and the rule, "ubi eadem ratio ibi idem jus," applying, accounts for the greater number of forms being required for the modification than for the destruction of a will. And these dispositions are quite conformable to the principles of the law of England, as laid down in the Act 1 Victoria, cap. 26, on wills; according to which, a will may be revoked by being destroyed by the testator, or by an intention unequivocally expressed to revoke it, but any alteration or derogation to the will must be made in the same manner as the will itself—in other terms, it must be signed by the testator and attested by two witnesses.

From the terms in which the sixteenth article is expressed it may then be clearly inferred, that a will can only be modified by observing the same forms as are required for the existence of the original deed; that it may be cancelled or revoked by any writing which will show a change in the testator's wishes, provided that such writing be executed in the same manner as the will itself; and it may be destroyed without any formality whatever, the act whereby its destruction ensues constituting the best proof of such change of intention.

From the context of the different articles in the modern law on the forms of wills, it does not appear that witnesses would be allowed to prove the change in the testator's wishes in reference to his real property, without some *primâ facie* evidence in writing whence such change could be presumed. Nor should they be allowed to prove the revocation of a will disposing of personal property, unless this change could be reasonably anticipated from some writing left, or act performed, by the testator. It would be too dangerous to judge of the intentions of the testator by the mere *vivâ voce*

evidence, which his heirs might bring forward to overthrow an instrument opposed to their interests; particularly in these days, when there are so few persons who cannot write, and when it is so easy for a testator to alter or cancel the dispositions of his will.

Thus are the respective rights of heirs and legatees again reconciled. The former will always be preferred to the latter, unless it be clearly shown that the testator have ordered otherwise; and even after he has preferred a legatee to the heir at law, every facility is given to revoke his will. But if, to his death, he persist in the same intention as he was when he framed it, then will it be executed as law, to the prejudice of his heirs: "l'héritier de la volonté sera alors préféré à l'héritier de la loi."

The eighth article of the Order in Council of the 22nd of July, 1847, having specifically set forth that no document should have the effect of revoking or modifying a will, either altogether or for a portion, unless drawn up according to forms prescribed for the will, it could not be doubted that a will, drawn up by the testator in presence of two witnesses, would not now be allowed either to revoke or modify a will of real property, as such a will requires to be attested by two jurats. A nuncupative will would, notwithstanding, still be sufficient to revoke or modify a more formal will of personal property, if made by a mariner in the course of a voyage or a soldier in active service; that specific form of bequest being allowed them on account of the peculiar emergency of their position. On this principle it is, that the dictum of President Boucher, of the parliament of Dijon, is founded; who held, that though a wife might require her husband's consent to make a will, yet she could at any time revoke it without any such authority. "Quoique pour l'institution d'un testament il faille autant d'autorité que d'acte, l'autorité du mari," says Boucher, "n'est pas nécessaire pour la révocation d'un testament, et c'est ce qui paroit fort juste;" always on the principle that derogations to the general laws of inheritance —in which light wills are considered—require to be more formally expressed and satisfactorily ascertained than the mere

disposition to return to the general law, which transmits property in accordance with the owner's presumed affections, until the contrary be established by a formal will or instrument announcing a different intention.

The following article refers to the means which a testator possesses of securing his will against the chances of its being lost, by accident or otherwise, by having it deposited at the Greffe, or registrar's office, on the payment of two shillings and sixpence to the registrar; from which depository it may at any time be withdrawn, without payment of any fee. The fear of expense, at least, need not deter the testator from having recourse to this means, should it be deemed either necessary or convenient.

ARTICLE XVII.

Every will of real property may be deposited by the testator himself at the Greffe of the Royal Court, on paying two shillings and sixpence to the greffier. The testator may require the will to be put under a sealed envelope; in which case this envelope shall be put in presence of the greffier, who shall assure himself that the instrument thus secured is really the will of the party depositing it. This will shall at any time be delivered up, without payment, on the demand of the testator.*

This article contains three distinct propositions, which, in many instances, may prove exceedingly useful in forwarding the execution of wills. First, an opportunity is given the testator of securing his will by having it deposited in a place of safety, in the custody of a public officer, on the payment of a moderate fee;† secondly, the registrar is bound to ascer-

* "Le testament attesté de justice peut être de suite logé au Greffe ou rester entre les mains de son auteur.

"ARTICLE 17.—Tout testament d'immeubles pourra être déposé par le testateur lui-même au Greffe de la Cour Royale, en payant deux schellings six pennis au greffier. Le testateur pourra exiger que le testament soit mis sous une enveloppe cachetée; alors cette enveloppe sera mise en présence du greffier, qui devra d'abord s'assurer que la pièce est en effet le testament de la partie qui la dépose. Le testament sera en tous temps livré sans paiement quelconque sur la demande du testateur."

† The same object has been attained by the Act 20 and 21 Vict., cap. 77, and 21 and 22 Vict., cap. 95; which, in establishing a new Court of Probate, has provided depositories for the wills of all living testators who may feel disposed to resort to it, upon payment of such fees and under such regulations as the judge of the Court may direct.

tain, that the instrument deposited with him is really the testator's will (the confidential nature of the trust, and the importance of the sums or legacies which, in a manner, may be thus said to be confided to his care, render his ascertaining this fact a proper precaution); thirdly, the faculty allowed the testator to retake his will, whenever he thinks proper, without any fee.

Thus, persons going abroad may place their wills in the custody of the registrar, whose duties in this respect are very similar to those of notaries in France; who, from the confidential nature of the title deeds and other important objects deposited with them, are looked upon, to a certain extent, as the keepers of the fortunes and secrets of private families. Though the registrar is to satisfy himself that the instrument deposited with him is really a will, yet this would not authorize his perusing its contents or ascertaining the particulars; and that this is the intention of the law may be easily perceived from the circumstance, that the testator may require that the will shall be immediately sealed on its being delivered into the custody of the registrar. "The testator," it is said, "may require the will to be put under a sealed envelope; in which case this envelope shall be put in the presence of the greffier, who shall assure himself that the instrument thus secured is really the will of the party depositing it"—which may be easily done without perusing the particulars.

SEARCH AT THE GREFFE FOR WILLS ONLY ALLOWED AFTER THE TESTATOR'S DEATH.

The following article relates to the right of search respecting wills, which, after the testator's death, any person may make at the registrar's office; where wills may be read, and extracts taken as of any other public document.

Article XVIII.

Any person shall be at liberty to obtain permission from the Royal Court, on furnishing proof of the decease of an individual, to examine at the Greffe whether the deceased had deposited there a will. For the reading of the will, should any be found, the greffier shall

charge two shillings, after which any person may have the will read, on paying one shilling to the greffier.*

The best proof respecting a person's death that can at any time be furnished, according to the above enactment, is that taken from the public records, duly attested by a public officer; and which are ever considered authentic proof until their veracity be questioned and their forgery demonstrated, in which case the parties presenting them become liable to a criminal prosecution. The penalties incurred by a conviction are sufficient to deter from any imposition of this kind; detection being generally easy, and punishment as severe as it is summary. The fees allowed the registrar or greffier are much the same as those charged for examining and getting extracts of title deeds of real property. The right of search in wills is assimilated to that which every person may exercise respecting the registration of births, marriages, and deaths. The fees allowed the registrar, in both cases, are also much the same.

Article XIX.

After the decease of a testator, the legatees, or one of them, shall obtain permission from the Royal Court to cause the will to be registered on the book of contracts, which permission shall be granted after proof of the said decease, without prejudice to the rights of others.†

This article settles two points: first, by whom wills are allowed to be registered before they come into operation; secondly, when the registry of wills is allowed. Those parties who have an interest in the will are empowered to

* "A la mort de tout individu il est permis de vérifier au Greffe s'il y a laissé un testament.

"Article 18.—Toute personne pourra obtenir permission de la Cour Royale, en faisant preuve de la mort d'un individu, de faire examiner au Greffe si le défunt y a déposé un testament. Pour la lecture de tel testament, s'il s'en trouve, le greffier prendra deux schellings; après quoi il sera permis à chacun d'en avoir lecture en payant un schelling au greffier."

† "Le testament d'immeuble, comme tout autre titre translatif de propriété réelle, doit être enregîtré sur les records publics avant de pouvoir être mis à exécution.

"Article 19.—Après le décès du testateur, les légataires ou l'un d'iceux devront obtenir permission de la Cour Royale de faire enregistrer le testament sur le livre des contrats, laquelle permission leur sera accordée après preuve du dit décès, sans préjudice aux droits d'autrui."

get it registered as a measure of precaution, on their furnishing the Royal Court with proof of the testator's death. When the testator dies in the island, nothing is more easy than to prove his death by an extract from the public registries, which are now all kept at the Greffe or record office, whence all title deeds respecting real property, or judicial decisions affecting rights of every description, may be easily obtained and at a moderate cost. On proof thus afforded to the Royal Court, permission, as a matter of course, is at once given to register the will of real property among the public records of the island, by means of which the nature of the transfers of real property in general are ascertained.

Neither the will of real property nor the will of personal property, when such property is in the island, need be proved in the Ecclesiastical Court, for the very obvious reason that the authority, on whose decision the fate of such property depends, is to be found on the spot where the whole is situated, and is consequently the best judge of the nature of the proof by which a title to such property must be established.

By the recent ordinance in reference to the general registry of births, marriages, and deaths, the condition of persons and the titles to their property are now much more likely than they were formerly to be ascertained and preserved; a separate registry being kept for each, besides a day-book, into which an entry is at once made of any birth, marriage, or death that is reported. Within the month, the separate entries of each birth, marriage, and death made in the day-book must be transferred to the permanent book of registries. All the deputy registrars in the country parishes being bound to make their reports within the month, and the rectors in their respective parishes being authorized to examine these registries and compare them with their own, a system of regularity and inspection has been established, which must be attended with good effects. The better to preserve the authenticity and correctness of these important acts or documents, the parent or relative—and, in their

absence, the owner of the house in which a child is born—is bound, under a penalty not exceeding twenty shillings, to inform the registrar of the occurrence; specifying at the same time the day and month when it occurred, the names of the parents, their station in life, and their residence, within one month of the child's birth. In the same manner, and within a week of the occurrence of any death, the nearest relative—and, in his absence, the owner of the house where it happened, or the person superintending the funeral—is bound to inform the registrar of the event under a similar penalty; and all rectors and officiating ministers are bound to furnish the registrar with a report of all the marriages that have been solemnized in their parishes, for each of which they receive sixpence; and to secure uniformity throughout these acts and registries, the rectors are empowered, within the hours of nine and three, whilst the registrar's office continues open, to inspect the registries of births, marriages, and deaths, without payment of any fee.

With registries kept in conformity to the rules above mentioned, and where such constant inspection from different persons is necessary, little doubt can occur respecting their authenticity; hence they may be safely considered, in all cases, to contain the best proof of the circumstances embodied in them. No oral evidence can add any weight to their authenticity or correctness; so that whether adduced with a view to ascertain a person's condition or the state of his property, the registries themselves are the best proofs that can be afforded. "Les extraits délivrés conformes aux registres," says the French legislator, "feront foi jusqu'à inscription de faux."* On the 17th of April, 1841, the first will of real property was registered at the Greffe; permission having been first obtained to that effect from the Royal Court, after (it is said in the act) that the certificate of the testator's burial, dated the 16th of April, 1841, duly attested by the registrar, has appeared; and that two witnesses have moreover declared on oath, that the testator was

* Art. 45 of the Code Civil.

the identical person mentioned in the above certificate of burial.*

When the testator dies abroad or out of the jurisdiction of the bailiwick, it is now provided by the eighth article of the Order in Council of the 15th of June, 1852, that the Court will allow the registration of such a will on proof being administered of the testator's death, provided that the notarial act, which certifies to the existence of the will, be authenticated in due form.†

REGISTRATION OF WILLS—ITS EFFECT.

By the following article, and the last of this section, the will once registered is decreed to be a public document; and, like all others of the same description, extracts may be given by the registrar, which, when so given and attested by him, have the same virtue as the original.

ARTICLE XX.

After the registration of a will, the greffier may give copy thereof to any one, as of a contract, and at the same cost; but the original shall always remain deposited at the Greffe.‡

Thus are wills, in regard to their registration, assimilated to contracts embodying transfers of real property. By such registration they in fact become public property; and the registrar is bound to deliver extracts of wills, as extracts of

* "Le 17 Avril, 1841, devant Daniel De Lisle Brock, écr., baillif, et Jean Le Messurier, écr., Sir William Collings, Frederick Mansell et Thomas William Gosselin, écrs., jurés.—Il a été permis à Henriette Marie Robert, fille d'Hellier, légataire dénommée dans le testament d'immeubles de feue Patty Priaulx Stanbury, fille de Guillaume, de la paroisse de St. Pierre-Port, signé de la dite Stanbury et de Jean Hubert et Harry Dobrée, écrs., jurés, en date du 5 Janvier, 1841, à quoi recours, de faire enregîtrer le dit testament sur le livre des contrats pour la date, pour servir et valoir ainsi que de raison; sans préjudice aux droits d'autrui, après qu'extrait mortuaire de Patty Priaulx Stanbury a paru sous le sceau de Charles Lefebvre, écr., registraire, en date du 16 Avril, 1841, et que Messrs. William Anderson Crousaz et Bredthafft Allez ont déclaré par serment que la dite Patty Priaulx Stanbury, dénommée dans le dit extrait mortuaire, est la testatrice dénommée au susdit testament."

† "ARTICLE 8.—La permission de faire enregistrer sur le livre des contrats un testament d'immeubles fait hors du bailliage sera accordée après preuve du décès du testateur, et ce pourvu que l'acte notarié soit authentiqué suivant loi et coutume."

‡ "L'original du testament restera toujours déposé au Greffe, d'où l'on pourra se faire délivrer un extrait, comme de tout autre acte authentique.

"ARTICLE 20.—Après l'enregistrement d'un testament, le greffier pourra en livrer copie à qui que ce soit, comme d'un contrat, et pour les mêmes prix; mais l'original restera toujours déposé au Greffe."

judicial decisions and contracts, when required, and at the same cost. In one very material point, however, the registration of wills differs from that of judicial decisions and of contracts; the law requiring the original of the former to remain always deposited at the public record office, whereas the originals of contracts are delivered to the parties immediately after registration, and the originals of forms of actions —or, as they are here named, *causes*—on which judicial decisions are given, are burnt by the public registrar after a period of seven years from the date of their registration. This distinction, in reference to the mode of disposing of the original instrument in the case of wills and in that of contracts and judicial decisions, is material and just; being founded on the difference that exists in the nature of these instruments, and the manner in which property or other rights is affected by them. Contracts and judicial decisions are generally executed immediately after they are passed, and in presence of all the parties; hence, no difficulty can arise respecting the consequences of delivering the original of contracts to them in the one case, and destroying the original of causes after so long a period as seven years in the other, from the date of their respective registration. The case of wills of real property is very different, as their execution only takes place after the death of the principal party. The instrument which regulates the fate of the property to which it refers, particularly the rentholders and mortgagees, may be materially affected; it therefore becomes, in point of fact, a public document, the original of which should always be at hand to decide any differences that may arise respecting it, and the only way in which this can be accomplished is by depositing the original at the record office. The parties interested cannot find fault, as they may easily obtain extracts, which will as readily serve their purpose as the original; and the general rights of property will be the better secured, as a means will thus exist to afford every one an idea of the nature of the titles, by which each has become proprietor of what he states himself to be possessed. But perhaps the most convenient method is, for the testator to execute two or

more copies of his will, and have them signed as originals; or, after drawing up the original, get copies of the same drawn up, which might often save the executors much trouble, and might prove more satisfactory to persons abroad, to whom these might be sent, than any copies, however authentic, from the record office. These, however, when duly authenticated by the registrar, have quite as much force as the original, and may always be procured for a moderate fee.

SECTION III.—ON THE RIGHTS, DUTIES, AND OBLIGATIONS OF DIFFERENT KINDS OF LEGATEES.

After regulating the forms to be observed in making and proving wills, as well as the manner in which parties may ascertain the existence of any will affecting them, and the fees to be paid to the greffier or registrar (in whose custody all wills of real property must be delivered before they can be executed), the law proceeds to define the rights, duties, and obligations of the different kinds of legatees. The principles referred to in this section constitute the most important features of the civil law; and as their introduction into our system of real property has only occurred within a comparatively recent date, it may be proper to set them forth as understood in other jurisdictions, whose inhabitants in this respect have enjoyed advantages of which we have been too long deprived. It is by comparing the legislation of other nations with our own, that we find the safest remedies for existing evils. It is in observing the operations of laws in different countries, that their respective advantages and disadvantages may be duly appreciated, and that their consequences, to a great extent, may be foreseen long before they are actually felt. Though we have seen what are the rights bestowed by the laws of inheritance on different individuals—and may have perceived that, generally speaking, these rights, in reference to other property, were the more extensive as the ties of consanguinity were more powerfully interwoven between the deceased and his heir—the obligations derived from such rights have not, however, been so far alluded to;

yet as they, in most instances, affect the heir of the will much in the same manner as they do the heir at law, it was proper to reserve the subject of these obligations for a separate chapter. The rights and obligations of different kinds of legatees have been regulated by the modern law. Their rights, it will be seen, have considerably augmented from the power recognized in individuals, who leave no descendants, to dispose of their real property by testamentary bequests; a residuary legatee, when the testator leaves no issue, being now entitled to take possession of all the deceased's property, without any distinction of real or personal. The children and their issue are now the only heirs who can exclude a residuary legatee from taking immediate possession of all the testator's property; they alone being recognized in law as *héritiers légitimaires*—or heirs of the body lawfully begotten—consequently preferred to the residuary legatee for such possession. On this principle, the legatee for a given sum, on the testator's leaving no descendants, would be preferred to the heir for the amount of his legacy on the personal property, as well as on the real property of the testator; the personal property being no longer solely liable, in the first place, to pay the testator's debts, as was always the case before the promulgation of the new law, which has done away with the absolute prohibition to dispose of real property by testamentary bequests.

This important feature in favour of the legatee, introduced by the modern law, not only favourably affects the power of disposing of personal property and real property purchased by the testator, but also the disposal of his real property inherited.

Respecting the immediate liabilities of heirs and legatees towards the deceased's creditors, we shall find them extended by our law far beyond what justice requires they should be; and that the benefit of an inventory—with which the heir or the residuary legatee may provide himself, on his accepting the deceased's succession, as a precaution against himself being personally liable beyond the value of the deceased's estate to the creditors—was more than ever required in the

Norman law, which renders the heir and the legatee of a given proportion of the estate debtors *in solidum*, not only for the amount the deceased's property may yield, but also personally responsible to make up towards the deceased's creditors any balance that may be due to them, after the whole of their debtor's estate has been effectually disposed of for the liquidation of their own claims.* Nor is this the only feature wherein the severity of the Norman law is apparent; we will find another in the privilege it bestows upon any heir of the deceased who will absolutely take to his estate — that is to say, become at once responsible to its creditors—by giving the estate to such heir, however distant or improvident he may be, to the prejudice of nearer relations; as if the commendable precaution which the latter take to secure themselves against the law's undue severity, and which on that very account it upholds them in taking, should become a reason to deprive them of their legitimate rights. Besides, what more can the creditor require, than to have the whole of the deceased's property set apart for the liquidation of his debts, without the cost of any administration? Should he, in justice, be allowed more?

On attentively examining the principles which should obtain on the subject of the liabilities of heirs, executors, and

* Perhaps the rigour of our law, in this respect, will be best seen from the following decision of the Court; after attentively examining which, it will be well if the reader feels as satisfied of the soundness of the decision as he certainly will of the injustice of the system.

"Aux jugemens et records tenus le 3 Mars, 1840, devant M. le Baillif et neuf jurés présens.—La Cour, quoique d'opinion que l'exécuteur d'un testament en acceptant son exécution et s'y entre-mettant sans bénéfice d'inventaire, est obligé aux dettes et legs du testateur, a pris en considération les circonstances suivantes: 1, la nature des sommes léguées par M. Jean Le Quesne, fils, qui se trouvaient pour la plupart engagées dans un commerce lointain et dont le montant était incertain; 2, l'incertitude du montant des sommes à léguer prévue par le testateur lui-même qui ne voulait, et ne pouvait, léguer plus que ces sommes ne réaliseraient; 3, les pertes imprévues qui ont grandement diminué le montant des sommes à recevoir par M. Jean Le Quesne, père, sans aucune faute de sa part, pertes qui ont eu lieu depuis le testament et décès du fils, et avant qu'il fut possible au père de les prévenir, a jugé que le dit exécuteur n'est obligé qu'au montant du bon de la succession mobilière du dit Jean Le Quesne, jun., et pour en constater le montant et le repartir entre les légataires au marc la livre, sont le dit tuteur au dit nom, les dits exécuteurs de feu M. Jean Le Quesne, sén., et tous les autres légataires présens envoyés devant un commis de la Cour, constater le montant et le régler entre les parties intéressées suivant à leur droit."

assigns, it is easy to see how far justice would be secured in rendering them merely responsible for the quota they take in the deceased's estate, and not *in solidum* for the whole. As to their responsibility whilst in possession of the debtor's or deceased's estate, in the absence of all law, they need no longer fear being declared absolute proprietors—or, in the words of M. Du Comte, personally liable—whilst they confine themselves to acts of mere administration, by taking proper care of the property entrusted to them. For instance, the administrator who would now build a house on an estate *en saisie*, repair dilapidated buildings, and otherwise really improve it, might rest under no apprehension of being condemned to pay all the debts due upon it. The loss of his outlay would be all to which he could be subjected, for not having in due season applied to the proper authority for its sanction to such outlay; and this should surely be deemed a sufficient penalty for such an oversight. As to milking the cows or replacing a broken pane of glass, without a specific authority from the Court or the presence of one of its members, being deemed, on the part of the heir, assignee, or *saisi*, a sufficient presumption of a desire on his part to render himself absolute proprietor, they may be fairly set aside as the dreams of gone-by times,—as the *summum jus* and *summa injuria*,—as the evils of a system, which appears to have been framed with any object but the speedy distribution of the debtor's assets among his lawful creditors, since we find that six years did not then suffice to terminate a *saisie* which is now easily done in two.* But the reign of all these dilatory, unsatisfactory, and litigious processes is past for ever —"tempore evanescunt."

Now all this severity—as that before mentioned, respecting the unlimited liability, or the responsibility *in solidum*, of

* "Le premier devoir du saisi," says Mr. Jeremie, "est de jouir en bon père de famille et de faire en sorte que l'héritage confié à ses soins ne périclite point. Il doit encore expédier la procédure le plutôt possible, et c'est une idée assez communément reçue qu'il est tenu de faire vuider la saisie dans six ans, à peine d'être déclaré saisi propriétaire; outre qu'il ne dépend pas toujours d'un saisi de terminer la procédure dans ce terme, tout long qu'il paraisse, l'Ordonnance du 17 Janvier, 1703, exige seulement que le saisi ouvre un regître, 'et après qu'il sera clos, qu'il fasse venir aux plaids d'héritage les aſſeſſeurs' dans six ans."—Ch. 8, Des Droits et Devoirs du Saisi, pp. 33, 34.

heirs and executors—tended to prevent heirs, who were in good circumstances, taking to the deceased's estate, and to encourage needy ones, who had nothing to lose, in seizing upon what they anticipated might ultimately leave them a portion of the spoil for their pains. Hence, it is easy to see that relaxing the severity of our laws, with regard to the liability of heirs and legatees, is only doing what has been, so far, constantly practised for the general advantage of debtors and creditors; and no stronger arguments can be adduced in favour of such relaxation, than are to be constantly derived from the examples of those ancient and modern nations, the excellence of whose laws only shone forth, as the noblest of their achievements, after they had succeeded in banishing undue severity, as well from their civil as their penal codes.

ARTICLE XXI.

In the event of a universal legacy—that is to say, when the testator shall have given to one or several persons the whole of his real property disposable by will, or the residue thereof if there are other legacies, the universal or residuary legatees shall be entitled to take possession of the entire real property disposable by will, without being obliged to ask delivery thereof from the heirs.*

As no owner of real property can bequeath any portion of it if he leaves issue, the framers of the modern law gave the possession of the deceased's property to the universal legatee, in preference to his heirs, who—as we have seen by the fourteenth article—can be no nearer than collateral relations, and who, by the common law of feudal countries, are not always entitled to the possession of the deceased's estate, as is the lineal heir. In this respect universal legatees, in regard to the possession of the goods bequeathed, are placed by the above article in the same state as they are by the French code—that is to say, when the testator leaves any issue or

* "Le légataire universel a de plein droit la saisine de l'entier des effets dont l'hérédité se compose.

"ARTICLE 21.—Dans le cas d'un legs universel—c'est-à-dire, quand le testateur aura donné à une ou plusieurs personnes l'universalité de ses immeubles disponibles par testament, ou du résidu d'iceux, s'il en avait fait d'autres legs, les légataires universels ou résiduaires seront saisis de plein droit de l'entier de la succession héréditale disponible, sans être tenus d'en demander la délivrance aux héritiers."

ascendants, the universal legatee must claim possession of the property bequeathed from such lineal or ascending heir; but when there exist no such heirs, then he is entitled, as he is here, to the absolute possession of the property bequeathed. By our laws, however, the ascending heir is not entitled to this possession. So far, indeed, from being under any circumstances entitled in his own right to a certain portion of his descendant's estate, as he is by the French code, he is excluded by brothers, sisters, and their descendants in the collateral line, which does not appear altogether reasonable. Nor will such a system tend to discourage wills, it being much more natural for a child to prefer his parents to his collateral relatives, than to allow the latter to exclude his parents. To have effectually checked the progress of testamentary bequests, the reformed law of inheritance should have cherished the principle of affection much more powerfully than it does, by preferring parents to collateral relatives, and allowing in every case grandnephews, who had lost both their parents and grandparents, to succeed with nephews and uncles to their grandparent's succession, as they still do to inherited real property.* Strange inconsistency! legislators wish to discourage wills, and yet they disinherit the very persons who, from their age and position, possess the strongest claims on man's affection and regard.

In comparing the text of the twenty-first and four following articles of the modern law on the nature of residuary and special legatees, and legatees to whom an aliquot portion of the deceased's property may have been given, with the 1003rd, 1009th, 1010th, 1014th, and the 1024th articles of the French code—which define the nature and point out the various rights and liabilities of the different kinds of legatees—and comparing all these articles with the remarks of the Court's committee thereon, it will be easily seen that they had the French code before them, in drawing up the regulations which refer to these various rights and obligations, as contained in the modern law. We confess, that whilst thus

* Known in our law as *propres*, as contradistinguished from *acquêts*—that is, acquired by gift or purchase. (Art. 11, On Collateral Successions. Vide ante, pp. 69, 70.)

engaged on that code they might have extracted a few more salutary principles, which would have been a boon to their country; that contained in the 913th article, for instance, which allows a testator, under any circumstances, the free disposal of at least one-fourth of his property to whomsoever he pleases—a principle which, ere long, will be the law of the island.

It will be seen by the twenty-second article that here, as in France, the heirs and the universal and residuary legatees are alone entitled to the immediate possession, and that all other legatees must claim their legacies from the heir or residuary legatee.

Having thus seen what constitutes a universal legacy or residuary legacy, on examining the twenty-fifth article (which should have been the twenty-third) we shall see how the respective rights and obligations of residuary legatees are defined; here premising, however, that these rights and obligations are precisely the same as those of the heir at law, the residuary legatee of real property in Guernsey being, in fact, constituted the heir of the will—a designation known in the Roman law as "institutio hæredis" (the institution of an heir)—according to which a will, properly speaking, was only designated as such which contained this institution: "quinque verbis potest facere testamentum; ut dicat, Lucius Titius mihi hæres esto;"* and the will itself being defined an act by which a certain thing is desired to be performed after its author's death: "testamentum est voluntatis nostræ justa sententia de eo quod quis post mortem suam fieri velit."† The residuary or universal legatee is then, to all intents and purposes, the heir in law; and whatever name may be given to the instrument establishing such a personage, he is nevertheless the representative of the deceased, and as such the heir of the will; his rights and obligations being in every sense the same, as far as his property is concerned, as those of the heir of the body. And for the correctness of this assertion we have the distinct authority of the law itself. "Verbis legis duodecim tabularum his, uti legassit sua rei, ita

* L. 1, sec. 3, ff. De Hæredibus Instituendis.

† L. 1, ff. Qui Testamenta facere possunt.

jus esto, latissima potestas tributa videtur et hæredes instituendi et legata et libertates dandi, tutelas quoque constituendi. Sed id interpretatione coangustatum est vel legum, vel auctoritate jura constituentium."* But however subject to judicial interpretation the dispositions of a will might be, its authority, once satisfactorily ascertained, was nevertheless tantamount to law: "disposat unusquisque super suis, ut dignum est, et sit lex ejus voluntas."†

The residuary legatee, the heir at law, the executor of a will, as the creditor making himself tenant of his debtor's estate, are all personally answerable for the obligations of the deceased. They in fact are his representatives, and as such are styled in our law his *débiteurs d'aventure*—that is, each becomes the responsible debtor towards the respective creditors, as well of the deceased as of the bankrupt.

After thus defining the obligations of the universal legatee, those of the legatee of an aliquot portion of the estate, and those of the special legatee, or party entitled to any definite portion, we shall—following the order laid down in the law—first examine the rights and obligations of the legatee of an aliquot portion of the estate, known here as the legatee *à titre universel.*

ARTICLE XXII.

Legatees *à titre universel*—that is to say, those to whom the testator shall have bequeathed a given share of the real property which the law allowed him to dispose of by will, shall be bound to ask the division thereof from the heirs or residuary legatees, as the case may be; which latter shall be entitled to seize or possess themselves of the property.‡

By comparing the text of the twenty-first, twenty-second, and twenty-third articles, it is easy to see that there are three kinds

* L. 120, ff. De Verborum Significatione. † Nov. 22, cap. 2.

‡ "Le légataire à titre universel n'est point saisi de plein droit de l'hérédité, mais est tenu de demander la délivrance aux héritiers ou légataires investis de la saisine.

"ARTICLE 22.—Les légataires à titre universel—c'est-à-dire, ceux auxquels le testateur aura donné une quotepart des immeubles dont la loi lui permet de disposer—seront tenus de demander de partager avec les héritiers ou les légataires résiduaires, selon le cas, lesquels seront saisis de plein droit de la succession."

of legatees: the universal or residuary legatee; the legatee of a certain share of the testator's property—such as one half, one-third, or any other aliquot portion; and the legatee of a particular thing—such as a field, a house, or any other definite object, as would be the legacy of all a person's funded property, all his furniture, or any other distinct object belonging to him. Residuary or universal legatees generally come in for the greater portion of the testator's property, and on that account are viewed by law as representing the deceased, whose obligations they, in consequence, are bound to discharge; and (as stated in the twenty-fifth article) they are, as the heir, liable for their proportion of real charges due on the whole estate, and also for their proportion of the excess of personal liabilities, should the personal property of the testator be found insufficient to discharge them. On the other hand, the legatee of any definite portion (or, as the French have it, *à titre universel*) can only be called upon for a similar portion of the debts—such as if he receive a legacy of one half or more of the assets, so in proportion will he be liable for the debts, as the legatee of a certain object is only liable for the debts due upon, or in consequence of, such object. Yet it may nevertheless happen, that the special legatee may be by far the most, and the residuary legatee the least, benefited by the testator; as would be the case where a person, possessing the bulk of his fortune in a certain stock, would leave the whole of such stock to one individual, and the remainder of his effects—which might be of comparatively trifling value—to two or more individuals. These would, in the first instance, have personally to bear the whole burthen of the deceased's debts on their proportion of his assets, before the special legatee could be called upon for any portion; so that their qualification of universal or residuary legatees, which, in most instances, might be deemed most advantageous, would in this particular instance have quite an opposite tendency. These consequences, flowing naturally from the nature of testamentary bequests, are applicable not only to the modern law of Guernsey, but to the general law of nations; which also rules that the legatee of

a certain proportion, as the special legatee, shall require of the heir—or of the residuary legatee, when any has been appointed—to be put in possession of his proportion of the testator's effects, or of the object specially bequeathed. In one word, the residuary legatee, as representing the deceased, is alone entitled to the possession of all his effects; and it may be said of him, as of the heir, that the legacy must come through his hands into those of the legatee, which, on that account, was defined by the Roman law a gift to be paid by the heir: "donatio a defuncto relicta et ab hærede præstanda." *

The two following articles define what in law is meant by a special legatee, and what are his rights and obligations.

ARTICLE XXIII.

The special legatee—that is to say, one to whom a definite object shall have been bequeathed, shall be bound to ask the delivery thereof from the heirs or residuary legatees, as the case may be.†

By this article the special legatee, before he can take possession of the object bequeathed, must apply to the heir at law, however distantly related—when the testator has left no residuary legatee—or to the residuary legatee himself, when one has been appointed. This naturally supposes that the testator leaves no descendants, for in that case the descendants, under any circumstances, would be seized of the testator's effects, according to the well-known axiom, "le mort saisit le vif." Besides, it is only when the testator leaves no descendants that his will of real property is valid.

The following article refers to the obligations of the special legatee.

* Sec. 1, Inst. de Legatis.

† "Le légataire particulier doit toujours demander la possession de l'héritier ou légataire investi de la saisine.

"ARTICLE 23.—Le légataire particulier—c'est-à-dire, celui auquel un objet défini aura été légué—sera tenu d'en demander la délivrance aux héritiers ou aux légataires résiduaires, selon le cas."

Article XXIV.

The special legatee shall not be liable to anything beyond the real charges to which the property bequeathed to him was specially held, unless the other properties of the estate should be insufficient to pay the testator's debts.*

This is conformable to the common law, but the testator may impose on the heir or residuary legatee the obligation to pay off the liabilities due on the property bequeathed; and if the rentholders or mortgagees would not allow it to be rendered free, the heir or residuary legatee would nevertheless be held to give the special legatee an equivalent in some other shape, in order that the testator's will should be accomplished. After stating, that the will comes into operation at the moment of the testator's death, and that the rights of the legatees are thereby irrevocably fixed, the same thing (M. Toullier observes) cannot be said of the possession of the objects bestowed as legacies, which, in the absence of a residuary legatee, must be claimed from the heirs. "Si la propriété est transférée de plein droit aux légataires, il n'en est pas ainsi du droit de possession qu'ils sont ordinairement tenus de demander à l'héritier suivant la nature des legs que les lois définissent une donation qui doit être délivrée par l'héritier, donatio a defuncto relicta et ab hærede præstanda. Le légataire ne peut donc se mettre en possession de son autorité privée; il n'a point la saisine de son legs, hors un seul cas, celui d'un légataire universel, ou héritier testamentaire institué dans un testament public par un testateur qui n'a pas d'héritiers auxquels une quotité de ses biens soit réservée par la loi. Dans ce cas unique, le légataire universel, ou héritier institué, est saisi de plein droit par la mort du testateur, en vertu de la règle le mort saisi le vif, sans être tenu de demander ni délivrance aux héritiers du sang, ni envoi en possession à la justice."†

* "Le légataire particulier n'est pas tenu au-delà des charges dont est grévé l'immeuble légué quand le réliquat de la succession suffit au paiement des dettes.

"Article 24.—Le légataire particulier ne sera tenu que des charges réelles auxquelles le fonds qui lui aura été légué est particulièrement affecté, à moins que les autres biens de la succession ne suffisent pas pour payer les dettes dues sur icelle."

† Du Droit Civil, tome 5, sec. 6, Sur l'Effet des Legs, p. 521, No. 520.

The obligations of the special legatee are fixed by the twenty-fourth article, much after the same principles as those professed by our author, who also expressly states, that the special legatee is only bound to pay off the legacies which the testator has ordered him to discharge: "les légataires particuliers ne contribuent qu'à l'acquit des legs dont ils sont chargés par le testateur."* From these principles it may be inferred, that the special legatee is preferred on the whole of the testator's effects for the payment of his legacy, both to the residuary legatee and to the legatee of any definite portion of his succession, in the same manner as the latter is himself preferred to the residuary legatee.

In the following article, the obligations of the residuary legatee, and of the legatee of a certain proportion of the whole of the testator's effects (better known here as *légataire à titre universel*), are defined.

ARTICLE XXV.

Legatees *à titre universel* shall be liable, in connection with the heirs or residuary legatees, for their proportion of such real charges as are due on the whole estate generally, and to which no separate part thereof is specifically liable. They shall, in the same manner, be liable for their proportion of the excess of personal debts, after the personal property has been applied to the discharge of the same.†

This is one of the most important articles of the modern law,

* Toullier, p. 551, No. 560.

† "Le légataire universel et le légataire à titre universel est chacun pour sa portion respective tenu des charges imposées sur le fonds légué même pour le surplus des dettes mobilières quand elles excèdent l'actif de la succession, mais le légataire résiduaire ou à titre universel d'un leg d'immeuble, en l'abandonnant même après acceptation, n'est pas tenu en son propre nom et sur son bien particulier de faire bon le deficit qui pourrait arriver vis-à-vis des créanciers du défunt, à la différence de l'héritier et le légataire résiduaire ou à titre universel de meuble qui serait tenu par l'acceptation d'un tel leg de faire bon sur ses propres biens le deficit qui résulterait de l'excèdent des dettes sur l'actif de la succession.

"ARTICLE 25.—Les légataires à titre universel seront tenus, de concurrence avec les héritiers ou les légataires résiduaires, pour leur proportion des charges réelles qui sont dues généralement sur tout l'héritage, sans avoir de fonds spécifique. Ils seront aussi tenus de la même manière de leur proportion de l'excèdent des dettes mobilières, après que tout le mobilier de la succession aura été employé à les acquitter."

as it regulates the respective rights and obligations of legatees and heirs, in reference to the property of which heirs and legatees may become possessed. As a general rule the legatee, as the heir, is responsible for the debts of the deceased, in proportion to the sums he receives from the testator's fortune; and when they have accepted a bequest, or taken possession of the deceased's effects, without taking the precaution of making a judicial inventory,* they are liable to make up to the creditors of the deceased, from their own property, any deficiency that may arise from his own assets. In this respect heirs, executors, and creditors, becoming proprietors of their insolvent debtor's estates, are placed upon the same footing by the law of Guernsey. Yet in reference to the *saisi propriétaire* of an insolvent estate, this cannot now be received without some qualification, since the decision given in the *saisie* of Underhill between Mr. Le Marchant and Messrs. Richard Le Lievre and Company, who, after becoming *saisis propriétairement* of Underhill's estate—on which a rent of three quarters was due to Mr. Le Marchant—were allowed to renounce to the said estate, without being compelled to make good Mr. Le Marchant's rent, notwithstanding that they admitted themselves to be Mr. Le Marchant's *garants;* contending that, though his *garants*, they were not precluded from abandoning the estate on which the rent was due, and thus free their own real property from the annual payment of that rent. It is an axiom of our law of *saisie* that a debtor who, through the sheriff, *par loi outrée*, renounces to his real estates, thereby saves his personal property without regard either to its amount or value, and rids himself of all the liabilities, in the shape of rents and other real engagements, he may at any time have either contracted or subjected himself through the acquisition of real property. Yet it has never been contended that, after such a renunciation, either rentholder or any other holders of real property could come on the party so renouncing, to make good by way of guarantee any engagements entered into towards them, notwithstanding that

* Here known by the technical denomination of "bénéfice d'inventaire."

the warranty clause by which the renunciator had voluntarily subjected all his property, both real as well as personal, of himself and heirs, was even more extensive and binding than any that could have been inferred from Le Lievre and Company towards Mr. Le Marchant.* If, then, by a renunciation *par loi outrée*, a purchaser who has contracted engagements, and through them a direct warranty subjecting

* This being an important judgment, founded as we conceive on correct principle, and in strict accordance with sound equity, we here append the dates and nature of the transactions on which it is based.

In 1804, July 21, Joseph Underhill sold a rent of three quarters to Mr. William Le Marchant, on a house in Le Marchant Street.

On the same day, Peter Desperques and wife purchased the house, and bound themselves to pay Mr. Le Marchant's rent.

1806, June 17.—Underhill renounced to his estate.

1807, November 24.—Messrs. Richard Le Lievre and Company, as creditors of Underhill, became tenants of that estate.

1820, July 18.—Peter Desperques and wife renounced, through the sheriff, to their estate. On their *décret*, Mr. R. P. Le Marchant, as heir of the original purchaser, registered his rent; and before the close of the *saisie*, Le Lievre and Company, as *saisis propriétaires* of Underhill's estate, were called on to make good the rent as his *garants*.

1821.—In due course of the *saisie*, Mr. Le Marchant renounced to his rent rather than take Underhill's estate, reserving to himself the right to come on the Messrs. Le Lievre as his *garants;* and accordingly, on the 8th of March, 1822, Mr. Le Marchant brought an action to make good the rent on their own property. To this action Le Lievre and Company answered, that they were ready to abandon Underhill's estate, on which the rent was due; that they were not bound to make it good or replace it on their own property; that, in fact, the property on which it had been constituted, or what belonged to Underhill from the date of the creation of the rent, was all that Mr. Le Marchant could take as security for that rent.

Mr. Le Marchant replied, that Le Lievre and Company having become *saisis propriétaires* of Underhill's estate, they were liable for all his undertakings and obligations, of which to make good the three quarters rent formed one.

The Court held, that as Le Lievre and Company had never been in possession of the house in Le Marchant Street, on which the rent was due, they were at liberty to abandon the property of Underhill, of which they had been seized, and thus relieve themselves from all liability on their own property

"La Cour juge que Messieurs Le Lievre et Cie. n'ayant jamais été tenans du fond sur lequel la dite rente est due, et n'en étant que garans au droit de Underhill, ils sont tenus seulement d'abandonner l'héritage dont ils se sont faits tenans et qui appartenait au dit Underhill, ce qu'ils offrent de faire."

This decision, passed on the 8th of March, 1822, was, on the 2d of December, 1823, affirmed on appeal.

The Court appears to have viewed this question, in reference to Le Lievre and Company, in the same light as though they had purchased the house from Underhill, in which case they might have given it up without their own real property being answerable for the rents due on it—and there really is no reason why the liability should exist in either case. Whether a person engage himself by a deed of purchase, or take to his debtor's estate by means of a judicial expropriation or *saisie* to realize his claim, the liability incurred towards the rentholder is much the same; all that the rentholder can either legally or equitably claim is the real property held as a security for its discharge, and to that it should be confined.

all his real and personal property to their fulfilment, can nevertheless, by paying his debts, retain his personal property, and at the same time free himself by the abandonment of his real property from all the engagements to which that real property subjected him, it is difficult to conceive how this faculty can be denied him when, as in the above precedent, the warranty or guarantee of the Messrs. Le Lievre was but an indirect one, and therefore, one might conclude, equally liable to be done away with through the abandonment of all the real property in their possession, which was guarantee for its discharge. On this ground also we should deem the decision *in re* Underhill to be founded on correct principle and sound equity.

As a general rule, heirs, executors, and *saisis* are liable for the debts of the deceased or of the bankrupt—whom they may be said to represent—even beyond the value of the assets they receive from his property, of which they become the owners; and that such is the case may be clearly inferred from the terms in which the last clause of the twenty-fifth article is drawn up, it being therein stated that universal legatees shall be liable for their proportion of the excess of personal debts, after all the personal property arising from the estate has been applied to its discharge. By the common law of nations, special legatees are not thus bound to make up, from their own property, to the deceased's creditors the deficiency that may arise from his not leaving a sufficient amount to liquidate their claims; because, in point of fact, such legatee can never be said—as the universal legatee, the executor, and the legatee of a given portion—to represent the deceased, nor would such legatee be bound to do so here, in consequence of the special discharge set forth in his favour. All that he is subject to is the loss of the whole or part of his legacy, as may be seen from the following text of the twenty-fourth article, wherein it is stated, that the special legatee shall only be liable to pay the real charges due on the object bequeathed, and should there not be assets in the testator's estate to pay his creditors, he then loses his legacy—or, in other terms, "the special

legatee shall not be liable to anything beyond the real charges to which the property bequeathed to him was specially held, unless the other properties of the estate should be insufficient to pay the testator's debts."

Very different are the obligations of the universal legatee, or the legatee *à titre universel*—that is to say, of a given portion of a deceased's effects. They, representing the deceased, must pay all his creditors if they take to his assets—or, as it is usually expressed in law phraseology, he is bound *ultra vires*—and, as stated in the twenty-fifth article: "legatees *à titre universel* are liable for their proportion of such real charges as are due on the whole estate generally, and to which no part thereof is specifically liable." Nor do their obligations rest here, for by the very next clause their liability is extended to pay the testator's creditors generally, whether they be registered or not, should he not leave sufficient assets for that purpose, as may be seen from the following terms: "they shall in the same manner be liable for their proportion of the excess of personal debts, after all the personal property of the estate has been applied to the discharge of the same."

From this clause one might, at first sight, be led to infer that the universal or residuary legatee, the executor of a will, as the heir and the legatee for a given portion of the estate, are one and all bound *in solidum* towards the creditors of the deceased, whose estates they accept; and that there is none but the special legatee, who, by abandoning his legacy after even his acceptation of it, is exempt from such liability—a very great privilege, peculiar to himself. By the Roman law and by the common law of ancient France, as well as by the modern law of that country, the heir who accepts the deceased's estate, though bound towards the creditors beyond the value of the property he receives, yet is not bound beyond his proportion with other heirs. Thus, a father dies, leaving two children an estate worth £2000, and £4000 in debt. The sons are only personally liable for £2000 each—or, in this instance, one half beyond what they receive—but by our law (conformable in this respect to the Norman law) the case

is different, the heir who accepts thereby becomes liable *in solidum* towards all the deceased's creditors. Though such a liability might appear favourable to the creditors, yet in point of fact its tendency is the very reverse, as honourable heirs often abandon successions which they would otherwise accept, though at a trifling loss, and make the most of their deceased author's property, being deterred from the extent of the liability which an acceptation of the succession involves, and are thus constrained to abandon it. So that (as Pothier very justly observes), by means of this joint liability, the heir who only represents the deceased to obtain a portion of his property is nevertheless bound to pay all his debts—a principle which implies as great a contradiction as an injustice, in reference to those which should obtain in the law of inheritance. "La division des dettes entre les héritiers," says Pothier, "était de droit commun en France, il n'y avait exception que dans deux ou trois coutumes [of which Normandy was one] qui étaient assez déraisonnables pour obliger tous les héritiers au paiement des dettes d'un défunt comme si plusieurs pouvaient succéder *in solidum* aux droits d'une personne. Hors ces coutumes chaque héritier est tenu des dettes pour la part dont il est l'héritier."*

Respecting the obligations of the heirs, he nevertheless declares that the common law, in regard to inheritance, rules that the co-heir, though liable only for his portion of debts, according to the proportion to which he is entitled in the inheritance, is nevertheless held to discharge such portion, even though it should exceed the amount he actually receives. "La seule différence," says he, "entre un héritier unique et des héritiers pour partie, est que les héritiers pour partie ne sont tenus des dettes que pour la même partie dont ils sont héritiers, au lieu que l'unique héritier est tenu du total des dettes, mais ils conviennent en ce point que l'héritier pour partie, par exemple l'héritier du quart, est tenu du quart des dettes au-delà de la valeur du quart des biens auquel il succède, de la même manière que l'héritier unique est tenu du total des dettes au-delà de la valeur du total des biens.

* Des Successions, ch. 5, art. 3, sec. 2, p. 231.

Notre règle ne souffre d'exception qu'à l'égard des héritiers sous bénéfice d'inventaire."*

According to these rules of partitioning the debts among the heirs in the same proportions as each divides the succession, and not rendering any one in particular debtor *in solidum* for the whole, a nephew coming by representation to one-tenth portion of his uncle's succession would never have to bear more than one-tenth portion of his uncle's debts; and if the latter exceeded the assets, the creditors could never render him liable for any greater proportion, whether his co-heirs were or were not insolvent. By our law, however, the nephew's liabilities, in case of any of the co-heirs becoming insolvent, would not be limited to this tenth; which is manifestly unjust in principle, and, like many other unjust principles, by deterring heirs from accepting the succession of their deceased relatives, it operates rather disadvantageously than otherwise for their creditors.

This principle of the Norman law is an impolitic derogation of that ever followed at Rome, and in most other provinces of France before the revolution, where it was held that the heir could never be liable towards the deceased's creditors beyond the portion of property which he inherited, according to the law of the twelve tables: "nomina inter hæredes pro portionibus hæreditariis, ercta cita sunto."

This equitable principle has been fully confirmed by the 870th article of the modern code, where it is decreed that the heir shall only be liable towards the deceased's creditors for the proportion he inherits.† Such, nevertheless, is the

* Des Successions, ch. 5, art. 3, sec. 1, p. 230.

† All the heirs being now held *pro portionibus hæreditariis*—that is, for the portion which they respectively inherit, the framers of the Code Civil have construed this rule in the following terms of its 870th article: "Les co-héritiers contribueront entre eux au paiement des dettes et charges de la succession, chacun dans la proportion de ce qu'il y prend." The 873rd article is, if possible, still more explicit, as it specifically determines that the creditor of the deceased shall only come upon each of the heirs for the portion he inherits. Thus, if one heir inherit half, that heir is only responsible for his half; though the deceased had contracted the debt and his estate was liable for the whole, the creditor must seek the balance of his claim from the other heirs who have inherited it. "Les héritiers sont tenus des dettes et charges de la succession, personnellement pour leur part et portion virile, et hypothécairement pour le tout; sauf leur recours soit contre leurs co-héritiers, soit contre les légataires universels, à raison de la part pour laquelle ils doivent y contribuer."

power of long usage, and the force of habits formed under vicious institutions, that the judges of the Royal Court of Rouen proposed to the framers of the code to adopt the principle consecrated by the ancient law of Normandy, and render all the heirs liable *in solidum* towards the creditors, but their motion was overruled.* The principle of the Roman law, in consequence, continues to be that of France. The creditors can only come apon each of the heirs for his portion of the property to which he was entitled by law in the deceased's succession. The residuary legatee, as the legatees to whom a given portion of the estate of the deceased has been bequeathed—such as one-third, one half, or any other definite portion—are held in the same manner as they represent the deceased; and it may be said of them, as of the heir, that by meddling with the deceased's property they have tacitly obliged themselves towards all who have any claims upon it: "is qui se miscuit hæreditate contrahere videtur."†

But perhaps the clearest idea of the heir's liability, both by the Roman law and the common law of France—and which continues to this day, as sanctioned by the 870th and 873rd articles of the Code Civil—is to be found in Pothier's treatise on contracts and obligations, where he so clearly defines the rights and obligations of heirs, and decides that the heir is not responsible beyond the proportion he receives from it, in the event of the insolvency of any of his co-heirs. "Un héritier est celui qui succède aux droits actifs et passifs, c'est-à-dire, aux dettes et obligations du défunt. Celui qui n'est héritier que pour une partie, n'y succède que pour cette partie. Il n'est donc tenu que pour cette partie. L'insolvabilité de ses co-heritiers, qui survient, ne le rend pas successeur, pour le total, aux droits du défunt. Il ne l'est toujours que pour sa part, et par conséquent il ne peut être tenu des dettes que pour sa part."‡

* At the time that the French codes were under discussion in 1803, when all the courts and inferior tribunals of the country were called upon to give their evidence and suggestions, as to the reforms they deemed most advisable to introduce into the different codes.

† L. 4, ff. Quib. ex Cau. in Poss.

‡ Tome 1, part 2, art. 2, sec. 2.

The articles of the Napoleon code (the 870th and 873rd), rendered conformably with these principles, are as follows: "Les co-héritiers contribueront entre eux au paiement des dettes et charges de la succession, chacun dans la proportion de ce qu'il y prend." "Les héritiers sont tenus des dettes et charges de la succession, personnellement pour leur part et portion virile, et hypothécairement pour le tout; sauf leur recours soit contre leurs co-héritiers, soit contre les légataires universels, à raison de la part pour laquelle ils doivent y contribuer."

Having thus seen what, in reference to the rights and liabilities of heirs, constituted the common law of France, and how the particular custom of Normandy differed from the general law, by extending the liabilities of the heir to an unjustifiable length, we shall now see whether legatees, as heirs, are placed on the same or a different footing—that is, whether legatees other than the special legatee, by merely accepting the will of the deceased, one and all become jointly and severally personally responsible to discharge all the testator's debts.

On carefully examining the text of the twenty-fifth article and the obligations it involves, one cannot but think that the liability of the residuary legatee of real property does not extend beyond the value of the real property bequeathed. That by his having accepted such legacy and afterwards abandoning it, the residuary legatee of real property does not become personally liable, in his own name, to make up the deficiency that might arise in consequence of the testator's real and personal estate proving insufficient to liquidate all the debts and claims due upon it. That a difference in this respect exists between the residuary legatee of real property and the residuary legatee or executor of personal property, who, by accepting the deceased's succession, thereby becomes liable *in solidum* towards the creditors for the whole amount of the debts due on the testator's estate. The extreme liability to which the heir and executor are subjected exists in virtue of a clear and definite law so obliging them—a liability nowhere to be found, in reference to the residuary legatee of real

property, and such a liability is too extensive to be introduced by mere implication; opposed, moreover, as it is to every principle which should obtain in matters of wills and inheritance, and of solidarity, which can only be founded on positive enactment. "La solidarité ne se présume pas. La division des dettes entre les héritiers," says Pothier, "était de droit commun en France, il n'y avait exception que dans deux ou trois coutumes qui étaient assez déraisonnables pour obliger tous les héritiers au paiement des dettes d'un défunt comme is plusieurs pouvaient succéder *in solidum* au droits d'une personne." Nor does the obligation *in solidum* follow from the closing text of the twenty-fifth article—the legatees *à titre universel* and the residuary legatees "shall, in the same manner, be liable for their proportion of the excess of personal debts, after the personal property has been applied to the discharge of the same."

No doubt, that in the event of the debtor's personal estate being insufficient to discharge his liabilities, the whole of his real estate is answerable for such liabilities; but the whole of the deceased's real estate being thus applied, if still inadequate, it does not follow that the residuary legatee—by whom it has been accepted—after abandoning it, should still be held to make up the deficiency from his own property. And that this is the correct interpretation of the last clause of the twenty-fifth article may be inferred from the decision given in the affair of "Heirs Falla *v.* the douzaine of St. Sampson's.*

* The following note of this decision was taken at the time.

"COUR ROYALE.—Séance de Samedi, le 31 Octobre, 1857. Question de garantie en fait de legs d'immeubles: jusqu'où elle s'étend?

"La douzaine de St. Sampson et Dame Esther Collas, veuve de feu M. Pierre Falla, légataires particuliers des immeubles du dit défunt, *versus* Dorey, Le Boutillier et autres, légataires résiduaires des dits immeubles.

"MM. Nicolas Blampied et Daniel Ogier, deux des douzeniers de St. Sampson, et dûment autorisés à cet effet par les autres douzeniers, actionnaient M. Matthieu Gallienne, procureur de Dame Veuve Pierre Le Boutillier et autres, légataires résiduaires, désignés au testament d'acquêts de M. Thomas Falla, à se voir adjuger faire la délivrance aux dits douzeniers de cinq quartiers de froment de rente, légués par le dit testament aux dits douzeniers et à leurs successeurs-douzeniers, pour en être le revenu distribué comme est porté au dit testament.

"Par Acte du 11 Octobre, 1856, il fut ordonné que Dame Esther Collas, veuve du dit feu Thomas Falla, et autres, légataires particuliers du défunt, seraient appelés à intervenir en cause.

The danger in which the fortunes of heirs and legatees were thus placed naturally required some equitable temperament, by which the law generally provides against undue severity; hence the institution of the benefit of inventory,

"Par Acte du 18 Octobre, 1857, toutes les parties en cause furent envoyées devant H. O. Carré, écr., juré, examiner le différend.

"Sur les plaidoiries a faire droit sur le rapport on soutenait:

"Pour la douzaine de St. Sampson et la veuve Falla, que la délivrance des cinq quartiers de froment de rente des légataires résiduaires, le legs fait à la douzaine et celui de la veuve, étaient l'un et l'autre une disposition à titre particulier; en conséquence, cas avenant que leurs legs devinssent perdus ou caducs, les légataires fussent tenus de les faire bon et remplacer sur leurs propres biens au cas que ceux du testateur fussent insuffisants.

"Pour les légataires résiduaires on maintenait que, dans aucun cas, leur garantie envers les légataires particuliers ne dut s'étendre au-delà de la valeur des immeubles composant les biens du testateur, que le legs était dû par le bien du testateur, et non par la personne du légataire résiduaire ou exécuteur.

"M. le Lieut.-Baillif Carré dit: C'est ici une question nouvelle, prenant son origine dans la loi de 1840, qui a introduit un nouveau système dans notre droit héréditał en permettant la disposition, par dernière volonté, des biens immeubles, qui par la loi de Normandie était sévèrement prohibée, d'où naissait des droits et obligations particuliers au système de disposition testamentaire des immeubles. Les légataires, tant particuliers que résiduaires, ont élevé des prétentions extrêmes au sujet de la garantie des legs; mais les difficultés qui en naissent peuvent facilement se résoudre en refléchissant aux principes qui régissent notre droit héréditał, tant en matière de ventes d'immeubles que de saisie, par la voie judiciaire des immeubles. On prétend, pour le légataire particulier, que non-seulement tout le bien du testateur lui est garant pour son legs, mais que le bien immeuble propre du légataire résiduaire est aussi garant en cas de perte de tout ou de partie de son legs particulier—prétention tout-à-fait insoutenable en refléchissant que la garantie du légataire résiduaire est dû, non par lui personnellement, mais par le bien immeuble même du testateur; l'obligation de garantie résultant du legs est réelle de sa nature, et non personnelle au légataire résiduaire. La garantie due au légataire est particulière, et tout autre que celle due par l'héritier, qui est personnelle et va au-delà du bien qu'il accepte en cette qualité, ou celle qui résulte de la garantie en fait d'achats et ventes d'immeubles, qui n'est pas toujours limitée par l'abandon des biens acquis et vendus. D'un autre côté, le légataire résiduaire prétend non-seulement n'être tenu en aucun cas au-delà du bien du testateur pour le paiement du legs, mais qu'il a le droit de se mettre au lieu et place du testateur et distribuer parmi les légataires les biens ou rentes à eux légués comme pouvait le faire le testateur lui-même; en un mot, qu'il le représente. Cette prétention est aussi insoutenable, en ce que, par ce moyen, le légataire résiduaire pourrait se décharger envers le légataire en lui donnant une rente sans valeur, une purement illusoire, ce que la loi ne peut envisager comme devant être le vœu du testateur, que l'on doit supposer vouloir avoir légué une bonne rente et sous ce rapport une bonne rente doit être donnée en paiement.

"MM. Le Mottée, Collings et Tupper s'étant prononcés dans le même sens,

"La Cour rend la décision suivante: En faisant droit sur le dit rapport, la Cour renvoit les dites parties devant H. O. Carré et Jean Le Mottée, écuyers, jurés, commis de la Cour, sur £3 tournois, pour, devant les dits commis, faire la délivrance du dit legs aux fins de l'action, après que la Cour a jugé que les dits légataires résiduaires doivent faire la dite délivrance sous la garantie, en ce qui les regarde, des biens seulement qui composent le résidu des dits acquêts du dit feu Thomas Falla, sans préjudice aux garanties des légataires à titre particulier les uns envers les autres, les dits intervenus en cause présents."

by means of which the heir is not bound to pay the creditors of the deceased a greater sum than he received from his succession—a principle borrowed from the Roman law,* and which, being deemed advantageous in those jurisdictions where the heir and legatee were personally bound to the extent of their quota for the debts of the deceased, became quite indispensable in other jurisdictions, as in our own and in Normandy, where he is not only personally bound *ultra vires* for his portion of the debts, but *in solidum* for the whole of the debts, engagements, and liabilities contracted by his ancestor.

On examining the principles which obtain on the subject of the benefit of inventory by our laws (conformable, in this respect, to the Norman laws) whereby the succession of the deceased is bestowed on the nearest heir who will take to the estate absolutely and at once pay the debts, in preference of the nearest of kin, we find another example of undue severity, repugnant to the principles of affection on which the laws of inheritance profess to be founded; for why should the boldest or the more distant heir be allowed to exclude the nearest?† In practice, however, the principle is not attended with much evil, the liabilities contracted by the absolute acceptance of an inheritance being too varied and extensive to warrant any one's taking to it without the precaution of an inventory; so that the rights of all are in this manner protected, particularly those of the nearest of kin; as they almost invariably obtain possession of the estate who, after taking an inventory, collect the assets and dispose of the whole among the creditors, according to their respective preferences or priority of claims. The creditors have no right of action personally against the heir, nor has

* The modern law on the *bénéfice d'inventaire* is the Ordinance of the 16th of January, 1843, passed under the late Bailiff Guille, which abrogates the Ordinances of the 19th of October, 1649, and the 30th of April, 1739. This ordinance materially abridges the delays of the ancient ordinances, without affecting the efficiency of the more modern regulations or the precautionary object they have in view, to secure the heir against the liability of being held responsible beyond the value of the deceased's succession.

† By the French code the nearest of kin, who accept a succession by means of an inventory, are not excluded by more distant relations, who offer to accept absolutely.

the latter any claim on the estate until the whole of the debts are liquidated.

The residuary legatee, and the legatee for a given portion of the deceased's property, are now entitled as the heir to the benefit of an inventory. Their liabilities being still great, it is but fair they should possess some means of guarding against them, and after ascertaining the state of the succession they may abandon it—"n'est héritier ni légataire qui ne veut"—in which case they can only be held responsible for the amounts derived from it—or, as it is generally termed, *pro modo emolumenti*. As to the residuary legatee of real property and the legatee for any given proportion *à titre universel*, it would not appear that the benefit of an inventory as regards them was required, they not appearing in any case responsible towards the testator's creditors for any amount beyond the value of their legacy, to make good the deficit that might follow from the inadequacy of the testator's property to meet the liabilities due on it.

The last article of the modern law on wills refers to the obligations of the legatee to deliver to those to whom he has become indebted, in consequence of the property bequeathed being burthened with certain liabilities, the muniments or titles by which the creditor may obtain payment of his rent. The heirs being as much interested as the creditor of the rent in making the legatee pay such rents, they may deliver the title deeds of their own authority and at the legatee's expense, if he refuse this satisfaction to the rentholder within a reasonable time.

ARTICLE XXVI.

Within six months from his being put in possession, the legatee shall deliver to each of the rentholders to which the property bequeathed to him is indebted a copy, under the seal of the bailiwick, of the will, or of the part thereof that concerns him. If he is not the sole universal or residuary legatee, he must deliver a copy, thus authenticated, of the *bille de partage* or other document, correctly defining the part of the estate bequeathed to him, and the debts due upon it. In default of his doing so within the said period, the heirs, in order

to discharge themselves of their responsibility towards the rentholders, may make the delivery of the said instruments; and in that case shall recover all the expenses they may be at, and half the amount thereof besides, from the legatee. The rentholders themselves may also, after the same period, procure the same instruments and exercise the same right of recovery against the legatee.*

The right of the rentholder to obtain his title deeds free of expense, and at an early date, is obvious. He should not be allowed to suffer from any change which, independently of him, has occurred in the person of his debtor. Hence his unquestionable right of coming on the heirs, or indeed at once on the legatees—who, being debtors of his rent, in fact detain a portion of his real property—to make them give him a suitable acknowledgment to that effect. Where the legatee is a universal or residuary legatee—that is to say, *qui sustinet personam defuncti*—and that the testator, from leaving no heirs sufficiently near—in favour of whom he is, in certain cases, bound to leave the whole, and in others a certain portion, of his real property—has bequeathed all such property to strangers, it is submitted that, in this case, the rentholder could not come upon the heirs for their title deeds, they in fact being excluded from the testator's inheritance. The rentholder must then look to the legatee alone for his titles, or get them made out at such legatee's expense; for an excluded heir has no more claim than the most perfect stranger on a deceased's estate, who has thought proper to select his own heirs. In the absence of a residuary or universal legatee, the following remarks of

* "Tout légataire, à quelque titre que ce soit, six mois après sa mise en possession, est tenu de placer à la disposition du rentier des droits ou titres devenus indispensables par le changement de propriétaire.

"ARTICLE 26.—Dans six mois après sa mise en possession, le légataire livrera à chacun des rentiers auxquels le fonds qui lui est légué est redevable, copie, sous le sçeau du bailliage, du testament ou de la partie qui le concerne. S'il n'est pas seul légataire universel ou résiduaire, il devra aussi livrer une copie, authentiquée de la même manière, de sa bille de partage ou de toute autre pièce qui définisse exactement la partie de l'héritage léguée qui lui appartient, et autres redevances dont elle est chargée. Faute à lui de le faire dans le dit temps, les héritiers, afin de se décharger de leur responsabilité envers les rentiers, pourront livrer les dits droits, et auront droit de recouvrer leurs frais, et moitié en sus, du légataire. Les rentiers eux-mêmes pourront aussi, après le dit temps, se procurer les dits droits et exercer le même droit de recouvrement contre le légataire."

the Court's committee are fully borne out by the principles introduced into the law, with a view of securing the rights and obligations which will arise between the heir, legatees, and rentholders, in consequence of the power recognized by the modern law of bequeathing real property.

"If rents are due on the property bequeathed," the committee observe, "it will be necessary to give to each of the rentholders a document under seal, which shall serve as a sufficient title to claim such rents from the legatee. For it is a rule, that a rentholder is not bound to know any other debtor than the one named in the title deed, except only in two cases: that of a *saisie*, which is a procedure where the forms admit of an entire publicity; and that of a *succession*, where the law itself, in indicating who are the heirs, indicates also who are responsible. The bequest of a real estate, with reference to rentholders, ought to asssimilate rather to a sale than to either a *saisie* or a *succession*. Since, then, the rentholders can exact their titles, the question arises, whether it is on the legatee or the heir that the obligation should be imposed of guaranteeing those rights? This duty generally devolves on him who wishes to charge another with a service for which he himself is responsible; nevertheless, in this particular case, the committee have thought it just to consider this expense as a charge attached to the objects bequeathed, rather than burthen the heir, to whom, had there been no will, the law would have conveyed the whole of the succession, free of all charges of this nature."

Notwithstanding its being here laid down in such general terms, that the expense of furnishing the rentholder with titles shall fall on the "legatee, as a charge attached to the object bequeathed rather than on the heir;" yet should the testator impose this charge on the heir, as he may, the heir and not the legatee will then be bound to bear the expense which the change in the titles may require; for it being in the testator's power to deprive his heir altogether of his estate, it is only reasonable that he should not be deprived of the faculty of imposing upon him the conditions he may think proper respecting its acceptance, of which this expense may be regarded as one.

It may be right to state that these defects in the law, respecting the undue liability of heirs and legatees, do not proceed from the Court's committee, but from ancient usage; and though greater simplicity might be desirable in the forms of drawing up wills of real property, by dispensing testators who are willing to make holographic wills from appearing before a public officer to attest their wills, yet considerable credit is due to that committee for its judicious regulations on the manner in which it has secured the execution of such wills.*

* The committee was composed of Mr. John Guille, lieut.-bailiff, Messrs. Carré and Le Retilley, jurats, Mr. De Jersey, Queen's procureur, Mr. De Saumarez, Queen's comptroller, and Advocate MacCulloch. Their report is dated the 5th of April, 1839, and was adopted by the States and Council with few modifications.

REDEMPTION OF REAL PROPERTY.

The faculty allowed a third party, on the score of relationship, to redeem real property once sold, and, by interfering between the vendor and purchaser, permit him to annul a legitimate bargain concluded between them, is what is here denominated "right of redemption," or, as we have it, *droit de retraite*. It is not difficult, at the onset, to perceive how much opposed to all just principles is this misnamed right of redemption, and how it absolutely interverts that fundamental principle of legislation, which directs that all contracts voluntarily entered into and honourably executed should be upheld as irrevocable. Of all defects in our system of real property, *retraite* is the greatest; and whatever definition may have been given it by civilians, it might in practice be defined a faculty, allowed by law to one relative, to annul agreements entered into by another and a third party, on his perjuring himself with impunity, with the expectation of deriving, from the real property thus obtained, a larger amount than that for which it has been disposed of between his relative and the lawful purchaser. Impressed with the evils of the system, the committee of the petitioners prayed the legislature to abolish *retraites* in all sales which took place by public auction and *coram judice*, and it so far succeeded as to get the system abolished in the latter, though not in the former instances—a restriction which the judicial authority has great reason to deplore, almost every term the Court of Heritage assembles.

The abolition of *retraites*, in cases of sale by public auction *coram judice*, is thus decreed by the following article:

ARTICLE XXVII.

The right of redemption is abolished, with regard to all real property disposed of by judicial public auctions.*

Real property, on being sold, is alone liable to be redeemed by the relatives of the vendor. We say sold, for if the real property were merely exchanged for ground rents or other real property, without any sum of money having been paid to the vendor, it could not be redeemed, as its representative in value would still be said to remain in the vendor's family, by means of the annual rent they would receive in exchange for their property. Rents are held in Guernsey *pro tanto*, absolutely to represent the annual value of the real property on which they are created, or in exchange of which they are given, and these when sold are also liable to be redeemed by the relatives of the vendor without any regard as to the manner in which they were acquired, whether by inheritance, gift, or purchase. As *retraites* were only allowed on the presumed affection which a relative is supposed to entertain for his relative's property, and to secure the estates in the family, it is evident none but inherited property should be allowed to be taken under *retraite*, if indeed any whatever should be tolerated.

The relative who wishes to redeem must not be beyond the seventh degree to the vendor, and must belong to that branch or stock whence the property descends if inherited; and if acquired property, then the nearest in degree excludes the more distant, without any reference to the line, whether paternal or maternal. In equality of degree each relative takes *pro rata* as he succeeds, without distinction of sex—that is, the male relatives may have a double portion where their number is equal or inferior to that of the females who demand the redemption. The right to redeem is always determined by the proportion of inheritable blood possessed by the respective claimants in relation to the vendor. Though it may be stated as a rule in regard to redemption,

* "Le retrait lignager est aboli dans toutes ventes devant justice.

"ARTICLE 27.—Le droit de retrait lignager est aboli dans le cas de vente d'immeuble devant justice."

that the nearest relative excludes the more distant, this must be understood to mean where such more distant relative is not entitled to the right of representation, as would be the case where a brother should offer, in conjunction with a nephew, to redeem, the latter would be debarred were his parent living, as the brother would be in the second and the nephew only in the third degree of relationship; but were the nephew's parent dead, then by claiming the right of representation he could come on a par with the vendor's brother to redeem the property sold by his uncle.

Thus Nicolas, the vendor, has two brothers, John and Thomas, and two nephews, William and Henry; the former descended from Thomas and the latter from George, deceased.

Nicolas.	John.	Thomas.	George, deceased.
		|	|
		William.	Henry.

John, the brother, and William and Henry, the nephews, claim the right of redemption. It is evident that William has no claim, being barred by his father, Thomas, who is nearer than he to his uncle John, and Thomas being alive he cannot represent; but Henry may represent his deceased father George, and claim the same right as his uncle John, the latter being in parity of degree to Nicolas with George, whom Henry represents in the collateral line.

Formerly females were excluded by males in parity of degree, because as they could not then inherit, neither could they redeem.

But though perjury and fraud should still continue to infect the system of *retraites*, we shall in future at least be spared the pain of beholding justice indirectly countenancing them and destroying her own deeds of sale; *retraites* in sales *coram judice* having been absolutely abolished, and the good effects thereof already become apparent.

In truth, the system itself is fundamentally vicious, and, if tolerated, should be restricted to heirs in a direct line and to real property inherited. What advantages can compen-

sate for the evils it entails, for the bad feeling it creates in families, the litigation and amount of guilt—not to say of crime—it engenders? Were any further proof of its injurious tendency required, besides the scandalous scenes which from time to time present themselves in the Court of Heritage, it would be the solemn denunciation of the principle by one of the most eminent civilians of the age, who states that in modern France, where the system has been abolished, with the sole exception of the faculty left to a co-heir to redeem from a stranger who has purchased the hereditary portion of another co-heir, on returning him the amount of his outlay, that faculty has been attended with a greater amount of litigation and of a worse description than that of any other principle recognized by the code.*

Parents may now redeem the property of their children, being admitted by the modern law to inherit from them, and the husband, *causa uxoris*, may likewise redeem the property sold by the wife's relatives, and that too not only in the absence of, but even in direct opposition to, the consent of the wife; which, it must be confessed, constitutes a strange anomaly in a legislation which forbids the husband's selling the slightest portion of his own real property without her consent.

On the 1st of February, 1842, it was unanimously determined by a full Court, that after a permit or authority from the Court, granting the owner of real property his application to sell it *coram judice*, the relatives of the vendor could not afterwards avail themselves of the *retraite* or right to withdraw it. The members of the Court, in expressing themselves, declared the terms of the twenty-seventh article to be general, and applied to all sales before justice, and should not be merely restricted to the sale of property belonging to minors and interdicts, whose property can only be legally disposed of by judicial public auction.

Of late years, the Court has refused to grant permits for sales by judicial public auctions on the application of private individuals, because some owners, whose property had been

* Toullier, tome 4, ch. 6, sec. 2, Nos. 417, 418, p. 415.

thus offered for sale, after bidders had presented themselves refused to sell unless at an advanced price, and thus put the commissioners of the Court, deputed to see that the formalities be duly observed, to what was deemed an unnecessary inconvenience, and doubtless in some instances it may have been so; but this inconvenience, one might have supposed, would easily have been counteracted by requiring such a compensation to the commissioner as would prevent any but parties who were really anxious to sell from applying for such permits, which were frequently found to operate advantageously for the disposal of real property, and more particularly so after the Court had decreed that real property, thus sold, was no longer liable to be withdrawn through *retraite*.

It cannot be denied, that these judicial permits were somewhat incompatible with the system of *retraite*, and that whilst the latter continued it would have been an anomaly that the Court should have have granted permits, which so materially affected the right of relatives to redeem, and on that ground they were discountenanced.

RETRAIT FONCIER.

RETRAIT FONCIER is a right conferred on the owners of real property to redeem, preferentially to all other persons, such corn rents as are owing on their own real property, when such rents have been sold to third persons. It is also known as the *retrait propriétaire*, to distinguish it from the *retraits lignager* and *feodal*, which exist for the relatives of the vendor and the manorial lord.

This peculiar system of redemption is comparatively of recent date, having been introduced by an Order in Council of the 22nd of July, 1847, confirming an ordinance passed by the Royal Court on the 18th of January, 1847, and approved by the States on the 7th of May following. It has, however, long existed in Jersey, and was instituted with a view of mitigating the evil effects arising from the system of perpetual or irredeemable rents, which has so long obtained in the Channel Islands.

The object of the *retrait foncier*, as intimated in the preamble to the ordinance, was to enable landholders and proprietors of real property of every description to free their property from the accumulation of those perpetual rent charges known as irredeemable rents, and which so injuriously affect the value of landed property, and more particularly house property, so much more liable from its nature to fluctuate in value, owing to the expense it entails in the shape of repairs, wear and tear, and other casualties, to which it is more particularly exposed. To this end, the faculty was bestowed on the owners of lands and houses, to free themselves from the liability of paying these annual rent charges, by affording them the opportunity of redeeming them whenever sold by their owners to third par-

ties.* The debtor of the rent, ou exercising this faculty of redeeming it, binds himself not only to repay the purchaser of the rent the amount of the price he paid for it, with interest at the rate of five per cent. from the date of the registration of his contract, but one-thirteenth of the value, over and above the cost price of the rent, together with the expenses laid out for drawing up the title-deeds, all which were necessarily incurred through the purchase. The arrears of rent which fall due after the registration of the contract of sale belong to the party redeeming the rent.† To prevent the purchasers of rents from being exposed, through this faculty of redemption, to any lengthened uncertainty, it is provided that the debtor of the rent shall exercise his privilege of redeeming it within a year and a day of the date of the registration of the deed of sale.‡

To provide a further remedy for the purchaser against the uncertainty of a withdrawal, he may cause the owner of the land on which the rent is due to be served with an action or legal notice, intimating that unless he avails himself within a fortnight of his right to redeem, he, as purchaser of the rent, will be appropriated of his bargain and thus become absolute proprietor. On the receipt of this action or notice, the owner of the land is bound to enrol himself at the Greffe and demand the redemption within a fortnight, on pain of his being debarred; § or the debtor of the rent may

* And to such an extent is the principle of liberation carried, that by the fourth article of the law the debtor of the rent for its redemption or withdrawal is preferred to the relatives of the veñdor and of the feudal lord of the manor. "Le propriétaire du fonds sera préféré pour son droit de retrait aux lignagers du vendeur et au seigneur feodal."—Art. 4.

† Art. 1 of the law on the *retrait foncier*. "Lorsqu'une rente est vendue, le propriétaire du fonds pourra la retirer et en décharger son fonds, en payant à l'acquéreur le prix, avec treizième et loyaux coûts, et aussi l'intérêt depuis l'enregistrement du contrat de vente, sur le pied de cinq pour cent par an. Et aura le dit propriétaire retrayant droit aux arrérages échus depuis l'enregistrement du dit contrat."

‡ "ARTICLE 2.—Le dit droit de retrait sera prescrit par le laps d'an et jour, à compter de l'enregistrement du contrat de vente de la rente."

§ Art. 3. The respective rights of the debtor of the rent and of the purchaser are fixed by the third article, which also points out the time and manner whereby each party may exercise his right. "Le propriétaire du fonds pourra intenter cause pour obtenir le dit retrait en toute Cour, tant en vacance qu'autrement: pourra aussi l'acquéreur de la rente intenter cause contre le

intervene in the cause *en retraite*, which the relative of the vendor may have entered with a view to its withdrawal; and the Court—the bailiff presiding, with Messrs. Le Retilley, Métivier, and Moullin, on the 8th of March, 1864—decreed that the claim of the debtor of the rent, demanding the withdrawal in virtue of the fourth article of the Order in Council of the 21st of July, 1847, was preferential* to that of

propriétaire du fonds en toute Cour, tant en vacance qu'autrement, à voir dire qu'il sera approprié de son marché, faute au dit propriétaire du fonds de retirer la dite rente dans quinzaine du jour de l'acte obtenu; lequel dit propriétaire sera alors tenu de se faire enrôler et de demander le dit retrait dans la dite quinzaine, à peine de déchéance. Et sera cette cause terminée par un seul défaut."

* In *re* the sale of the estate of Les Réveaux, on which there was a rent owing by Taudevin and wife of five quarters two bushels and two denerels; and the estate having been adjudged to them through a *retraite* on the score of relationship, they afterwards claimed to withdraw the rent of these five quarters two bushels and two denerels due on it; and the Court decreed that, as owners of the estate and debtors of the rent, they had a preferential claim to its redemption over all other parties claiming either on the score of relationship or as feudal lord.

The following note of this case was taken at the time:

"HERITAGE COURT, March 8, 1860.—Before the Bailiff, and Messrs. Le Retilley, Métivier, and Moullin.

"Mr. Peter Taudevin, in right of Sophia Henrietta Brouard, his wife, claimed the estate of Les Réveaux—which on the 17th December, 1863, had been sold by Mr. Frederick Lenfestey and Judith Brouard, his wife, to Mr. Nicholas Brouard, of the Madeleine—and which consisted of a house, garden, and five fields.

"On the action being read, no difficulty was raised by Nicholas Brouard, the purchaser, as to the right of Taudevin and his wife to redeem the estate sold him by Lenfestey and his wife—Sophia Henrietta Brouard being the relative of Judith Brouard, one of the vendors; and the Court accordingly adjudged the Réveaux estate to Taudevin and wife, on their paying the price at which the property had been sold, together with the additional thirteenth and cost of deeds.

"On this estate there was a rent of five quarters two bushels and two denerels due to Mr. Nicholas Brouard, of the Madeleine, who had purchased it of Mr. James Brouard. For this rent there were two competitors—Mr. Peter Taudevin and Sophia Henrietta Brouard, his wife (who, as relatives of James Brouard, the vendor, claimed to exercise their rights of withdrawal), and Mr. Frederick Lenfestey, in right of Judith Brouard, his wife, who also claimed to withdraw on the score of relationship, contending that that as Judith Brouard was sister (and consequently a nearer relative than Peter Brouard's wife, who was only a first cousin of the vendor), he had a prior right to demand the *retraite* or withdrawal.

"Mr. Taudevin then claimed the withdrawal of the rent in virtue of the fourth article of the law passed on the 31st July, 1847, which is as follows: 'The owner of the property on which a rent is due shall have a preferential claim over the relatives of the vendor, as well as the lord of the manor, for the withdrawal or redemption of the same.' The Court, on that ground, unanimously decreed that Mr. Peter Taudevin was entitled to withdraw the rent and liberate himself from future payment."

the relatives of the vendor, who demanded the redemption or withdrawal on the score of relationship.

And where a rent had been sold and the property on which it was due was subsequently disposed of, and the purchaser claimed through the *retrait foncier* to exercise his right of redeeming the rent, the Appeal Court, on the 11th of July, 1853 (in *re* Allez *v.* Brehaut), decreed that he was entitled to redeem that rent and thus liberate himself from its future payment, notwithstanding that the party so claiming only became purchaser of the land subsequently to the sale of the rent, doubtless on the ground that as the heirs of Le Maître (the sellers to Allez) had done nothing to debar them from exercising the right of redemption, Allez, being in their place, was entitled to the same privilege. The following were the facts of this case :

On the 22nd of April, 1852, Mr. Thomas Brehaut bought of Mr. John Marquand, procureur of Mr. Quesnel, among other rents, one, due by the heirs of Mr. Philippe Le Maître, of two bushels and four denerels of wheat rent, due on his property at the Canichers.

On the 17th of June, 1852, Mr. Bredthafft Allez purchased of the heirs of Mr. Philippe Le Maître the house and land situated in the Canichers, on which the rent was due.

On the 26th of March, 1853, Mr. Allez claimed to withdraw the rent and exercise the *retrait foncier*, on the ground of his having purchased the property on which it was due.

To this action Mr. Thomas Brehaut, the purchaser of the rent, replied that whereas Mr. Allez was not proprietor of the land on which the rent was owing on the 22nd of April, 1852, when Brehaut purchased the rent—Allez's purchase only dating from the 17th of June following—he had no right to withdraw the rent; and on the 19th of March, 1853, the ordinary Court decreed, that on that ground Mr. Allez was not entitled to exercise the *retrait foncier*. But on the 11th of July, 1853 the Court, on appeal, unanimously reversed the decree of the ordinary Court of the 22nd of April, and admitted Mr. Allez, as purchaser of the

land on which the rent was due, to exercise the *retrait foncier* and redeem the rent of two bushels and four denerels that were due on it.*

Notices or actions on the part either of the owners of land or of the purchasers for the redemption of rents are summarily treated, the first decree obtained being final, and the parties at liberty at any time to exercise their respective rights as well during as out of term, as may be seen on referring to the third article of the law.†

The *retrait foncier* is not allowed in sales *coram judice*, or sales before justice.‡ The debtor of a rent having, by such sales, an opportunity of liberating himself, if he do not avail himself of it he may reasonably be presumed to have foregone the privilege he might otherwise have exercised by claiming to redeem his property.

The Order in Council did not apply to any contracts passed previously to its registration on the 31st of July, 1847.§ This order was originally in force for ten years

* The following is an abridgment of the decision itself:

"Jugement du 11 Juillet, 1853, devant M. le Baillif, et Messrs. Jean Le Marchant, H. O. Carré, Harry Dobrée, Edgar MacCulloch, J. T. De Sausmarez, James S. Dobrée, Jean Le Mottée, et Alfred S. Collings, Ecuyers, Jurés.

"Sur l'action de M. Bredthafft Allez, preneur à rente de M. Edouard Le Maître, d'une maison, terres, édifices et jardins, situés proche le Beauregard, aux Canichers, en la paroisse de St. Pierre-Port, par contrat du 17 Juin, 1852, à cause de retrait foncier, s'étant fait enrôler, contre M. Thomas Brehaut, à voir dire et juger par jugement de la Cour qu'il fut mal jugé et bien appelé par Allez de la sentence de la Cour du 19 Avril, 1853, par lequel l'action d'Allez contre Brehaut [pour le marché en héritage fait par lui de M. Jean Marquand, un des procureurs de M. Jean Michel Quesnel, entre autres rentes, d'une de deux boisseaux quatre denerels de froment de rente, à recevoir du dit Edouard Le Maître, par contrat du 22 Avril, 1852, à quoi recours, le fonds sur lequel la dite rente est due appartenant au dit M. Allez, aux fins d'Acte du 26 Mars, 1853] fut rejetée et aux frais: la Cour ayant admis l'exception proposée par Brehaut, qui soutenait qu'Allez n'avait droit d'exercer le retrait attendu qu'il n'était propriétaire du fonds lors de l'acquet de Brehaut. De cette décision Allez appela en jugement, et la Cour, sur appel, cassa la sentence du 19 Avril, et renvoya les parties aux cours ordinaires plaider au fonds, ayant rejetté l'exception proposé par Brehaut, qui fut mis aux frais d'opinion uniforme."

† For this article vide page 167, note.

‡ "ARTICLE 5.—Le droit de retrait foncier ne pourra être exercé à l'égard d'aucune rente vendue à l'enchère devant justice."

§ "ARTICLE 6.—Cette loi sur le retrait foncier ne sera pas applicable aux rentes vendues au moyen de contrats passés et enregistrés avant sa promulgation par son enregistrement sur les records de cette île, après qu'elle aura reçu la sanction de sa Majesté en Conseil."

only, but by a subsequent Order in Council of the 25th of June, 1857 (registered in July following) it became permanent.

Though the *retrait foncier*, as a means of redemption, may not ostensibly have had the effect of materially relieving real property from the incubus of perpetual wheat rents, yet its operation so far has been attended with beneficial results—greater, indeed, than might appear from the comparatively few cases in which it has been resorted to, from the circumstance of debtors of rents having thus possessed a means of liberation, of which many have availed themselves, who formerly could not have done so, through that unwillingness which too often prompted the owners of rents not to part with them to their debtors unless at an advanced price, which the latter were reluctant to give, and not unfrequently declined purchasing. Through the *retrait foncier* this annoying imposition is counteracted, and the debtor of the rent who wishes to redeem is not so completely, as formerly, left at the mercy of the party to whom it is due for the liberation of his property.

ON HYPOTHECATION AND DOWER.

The term "hypothecation" is derived from the Greek, and literally means an object on which another is placed; and effectually, an hypothecation is a lien imposed on a person's property with a view of obtaining security for the fulfilment of an obligation. Hypothecations are of three kinds, the legal, the conventional, and the judicial; the first are such as the law itself grants on certain occasions, independently of the will of the parties, such as the wife's dower on her husband's estate; the second arises from the mutual consent of the parties, as that given by a bond or acknowledgment, which, being registered, immediately acquires an hypothecation; and the judicial arises from an Act of Court being taken on any action to recover moneys due, which, being registered on the records of hypothecation, operates in the same manner as the legal and conventional hypothecations. The twenty-eighth article, which abolishes the legal hypothecation which existed in favour of daughters-in-law on their fathers-in-law's estate, is thus conceived:

ARTICLE XXVIII.

A married woman shall have no hypothecation for her dower on any part of the estate of her husband's ancestor (notwithstanding he may have consented to the marriage), unless the said ancestor have expressly granted her the said hypothecation by a special judicial contract.*

By the custom of Normandy, on a parent's consenting to the marriage of his son, a daughter-in-law acquired a right

* "La bru n'a plus de plein droit d'hypothèque légale sur les propriétés réelles des parens de son mari.

"ARTICLE 28.—Femme mariée n'aura d'hypothèque pour son douaire, sur aucune partie de l'héritage de l'ancêtre de son mari (malgré qu'il ait consenti au mariage), à moins que le dit ancêtre ne lui accorde expressément la dite hypothèque par un contrat juridique."

of dower over one-third of the whole real property which would have fallen to her husband as his heir, so that by having consented to his marriage, the parent was frequently debarred from selling his own real property, as no purchasers could be found when their titles to a considerable portion of the enjoyment was thus subject to be disturbed by a person whom common sense and common justice equally debarred from all claim to it. In Normandy, where the children had an acquired right from the day of the marriage of their parents to one-third of the whole real property at any time possessed by them during the marriage,* some reason might be conceived why a female who had married a son thus favoured by the law should be placed on the same footing as the other members of his family, and that she should be as much favoured for her dower as her husband for his inheritance. But maintaining to the daughter-in-law so extraordinary a privilege in Guernsey, where neither sons nor daughters ever possessed any such legal hypothecation on their parents' real property, constituted another of those anomalies for which there is no accounting, and which, as a matter of course, was abrogated on the revision of the law. By the fifteenth and last article of the petition it was submitted, "that a daughter-in-law should no longer have an hypothecation on the real estate of her husband's parents any more than the husband himself—that is to say, no other but what his parents might think proper formally to grant him, and that they might be at liberty either to sell or hypothecate their estate as they pleased, without being bound any longer to call upon their daughter-in-law to give up any portion of her dower;" in one word, the petitioners demanded that the legal hypothecation of daughters-in-law should be abolished.

The Court's committee approved of this proposition, and stated that they saw no reason why the daughter-in-law should retain a lien over the property belonging to her

* This legal portion of the children over their father and mother's real estate was known in the Norman law as the "douaire propre aux enfans," and consisted of one-third of the real property possessed by the parents during marriage.—Art. 339 and 404 of the Custom of Normandy.

husband's parents, when her husband himself possessed no such lien, and that it was going too far to presume that parents had tacitly consented to such an extraordinary imposition on their real estates to their daughter-in-law, by merely acquiescing in the marriage of their son.

On the 14th of June, 1852, it was determined (in *re* widow of Frederick Janvrin De Lisle *v.* Richard De Lisle, son of Frederick De Lisle) that the right of dower of the daughter-in-law, in her father-in-law's succession, was in no way affected by the twenty-eighth article, which had only abolished the hypothecation for dower which formerly existed in their father-in-law's succession; but that the right of the widow to her own dower was in no way affected through the abolition of this hypothecation.* Thus, where it appeared that Frederick Janvrin De Lisle (who died on the 25th of August, 1850, he being at the time eldest son of Frederick De Lisle, who died on the 31st of May, 1851) and the widow of the son claimed her dower on her father-in-law's real estate—which claim was opposed by the children of Frederick De Lisle, who maintained that as Frederick Janvrin De Lisle, their eldest brother, had died before his father, his widow was not entitled to any dower—the Court held that Mrs. Josephine De Lisle, the eldest son's widow, was entitled to her dower on her father-in-law's succession, notwithstanding that the son had died before his father; and that the twenty-eighth article of the Order

* "Le 14 Juin, 1853, devant M. le Baillif, et Messrs. MacCulloch et De Havilland. Héritiers De Lisle *v.* Veuve du Fils De Lisle."

The bailiff, in putting the case before the Court, said : "D'après la loi de Normandie, contenue en Terrien, la veuve a un droit de douaire sur tout l'héritage, non-seulement de son mari mais des parens de son mari, qui lui ont survécu, et la veuve du fils par le prédécès de son mari prend en la succession de son beau-père le tiers en usufruit des biens qui fussent dévolus au mari s'il l'eut survécu. L'article 28 de la nouvelle loi n'a rien changé à cet égard en abolissant l'hypothèque ou le lien que par l'ancienne loi la femme avait pour son douaire sur l'héritage de son beau-père. Les termes mêmes de l'article lui paroissent très-clairs: 'Femme mariée n'aura d'hypothèque pour son douaire sur aucune partie de l'héritage de son mari.' Conséquence naturelle, il n'y a que l'hypothèque ou lien pour le douaire qui soit affecté par la nouvelle loi. Quant au droit de la veuve pour son douaire il reste toujours intact, suivant la loi actuelle."

In this opinion Messrs. MacCulloch and De Havilland concurred. From this decision an appeal was entered, but was not followed up by the party disputing the right of dower.

in Council of 1840 had only abolished the hypothecation which formerly existed in favour of widows for their dower, but in no manner affected the dower itself, which always consisted of one-third of the enjoyment of that portion of the real estate which would have devolved to the son on his father's estate, had he survived him.

The 359th article of the custom of Normandy in 1840 disappeared from our system of inheritance. It indeed constituted such a singular anomaly, and its text was so complicated and obscure, that many well-informed persons to the very day of its abrogation doubted of its existence. It was as follows: "Si le père ou aïeul du mari ont consenti le mariage, ou s'ils y ont été présens, la femme aura douaire sur leur succession bien qu'elle échée depuis le décès de son dit mari, pour telle part et portion qui lui en eût pu appartenir si elle fût avenue de son vivant; et ne pourra avoir douaire sur les biens, que le père, la mère, ou aïeul auraient acquis, ou qui leur seraient échus depuis le décès du mari."

It is therefore very certain that the daughter-in-law had a lien on the real estates not only of the parents but of the grandparents of her husband, who had consented to her marriage, and some had even carried their pretensions so far as to claim this dower without being subjected to the debts of such parents and grandparents that had even been contracted before her marriage, notwithstanding that well-recognized maxim that in law no one can be said to possess property until all his debts are paid: "bona non sunt nisi deductoære alieno." So that a parent, after a son had married with his approval, was placed in a complete state of guardianship. Not only could he neither sell nor hypothecate his property, but his own *bonâ fide* creditors were likely to fall the victims of marriages which they could not foresee, and with the consequences of which they were as much acquainted as with the laws of the Medes and Persians. To so many difficulties did the law of Normandy on this subject give rise in ascertaining: first, what should be considered a parent's consent; second, at what period

the right of the daughter-in-law should be considered to have been acquired; on what property it should be exercised; was the date to reckon from the death of the husband, or that of the parent whose property was thus subjected to hypothecation? it being stated that property acquired by the parent after the dissolution of the marriage was not liable — all these questions presented so many difficulties, that Basnage denounced this 359th article as the "plus mal conçu et le plus obscur de toute la coutume; l'explication en est si difficile que toutes les Chambres du Parlement assemblées n'ont pu convenir de son véritable sens relativement aux effets que le consentement du père peut produire à l'égard de la femme du fils, et de savoir quand, comment, et sous quelles conditions elle peut demander douaire sur les biens du père de son mari."* It was, however, recognized as a general rule that the daughter-in-law was entitled to her dower, not only on her husband's succession but also on the succession of his parents and grandparents, for the enjoyment of one-third of the whole real property which would have devolved to the lot of her husband had he survived them.

A question has been put how far the modern law affects the rights of daughters-in-law, married at the period of its promulgation, to their dower on their father-in-law's estate. After mature consideration, we come to the conclusion:

1. That all daughters-in-law who held their right of dower by virtue of a conventional agreement or marriage contract to which their fathers-in-law had been a party, will not be affected by the modern law.

2. That all daughters-in-law, even though they should have been widows at the time of the law's coming into operation, if their father-in-law survived the 3rd of August, 1840, are not entitled to a dower on any estate he may have disposed of even previous to that date.

3. That all daughters-in-law married at the above date, and who held their right of dower by virtue of the old law, as contradistinguished from a marriage contract, are not

* Basnage's Commentary on the 359th article.

entitled to dower on the estate of fathers-in-law who have survived that period: and that because holding their rights from the law it was in the power of the present legislature to abolish the decrees of its predecessors in reference to all rights that were not absolutely and irrevocably acquired at the date of its promulgation, as was the daughter-in-law's dower in the above instance, and that according to the well-known axiom that nothing is more natural than that the authority which grants certain privileges, or imposes certain burthens, should have the power of abrogating them: "nihil tam naturale est quam eo genere quidquid dissolvere quo colligatum est."* Otherwise the present generation could irrevocably bind posterity, and thus place absolutely beyond its control the power of governing itself according to such regulations as might, in future ages, be deemed more conformable to its wants and desires than those which at present obtain.

Nor are laws the only regulations which are thus controlled. Agreements, whether verbal or written, are changed, modified, or destroyed by a similar process—that is, they vanish or are superseded by other laws, agreements, or contracts, which governments or private individuals may think proper to enter into or promulgate. And however much these changes may affect some individuals, none can complain that the law takes a retrospective effect whilst rights absolutely and irrevocably acquired are not affected by it, in contradistinction to those which are still pending—that is to say, which are not yet but may eventually be acquired, and which may therefore be affected by a change in the law. And this is conformable to the rule: "Nihil tam naturale est quam eo genere quidve dissolvere quo colligatum est. Ideo verborum obligatio verbis tollitur. Nudi consensûs obligatio contrario consensu dissolvitur. Omnia, quæ jure contrahuntur contrario juré pereunt."† The law by which perpetual entails were limited within certain degrees by the Chancellor De l'Hopital, and that by which parents were allowed to sell all their property—

* L. 27, ff. De Regulis Juris. † L. 27, ff. De Divor. Reg. Jur. Antiq.

notwithstanding that by the law of Normandy, repealed at the revolution, they could never dispose of more than two-thirds, the remaining third being vested in the children at the date of the marriage of such parents*—are memorable instances in which the above rules have been judiciously applied by the supreme courts of judicature, without in the slightest degree infringing on the adage, that laws can have no retrospective effect.

But those widows who have enjoyed their dower since their father-in-law's decease, and previous to the third of August, 1840, cannot be disturbed; for the law, having no retrospective effect, cannot destroy such acquired rights.

* This portion, reserved for the children, was called the "Tiers Coutumier de Normandie," and consisted, as Basnage states, "dans la propriété du tiers de l'immeuble destiné pour le douaire de la femme et acquis aux enfans du jour des épousailles." See article 399, "Douaire propre aux enfans," and commentary thereon. See also the 404th article, by which the same right was bestowed upon the children over their mother's estate as they possessed by the 399th over their father's.

ON BEQUESTS AMONG CHILDREN.

In a former chapter on wills, we saw what power a testator possessed of devising his property among relatives and strangers; in the present, we shall examine his power of bequest in reference to his children, and which is regulated by the twenty-ninth article, which should have been the fifteenth — that is to say, placed immediately after that which regulates the power of bequeathing generally. Not having been demanded by the petitioners, the twenty-ninth article was introduced by the Court's committee, who considered the custom which granted a widow mother the power of bestowing on one child a greater share of her property than on another, whilst the same power was under any circumstances absolutely refused the father, an anomaly, which it certainly was; but to abrogate this anomaly the committee were surely not reduced to deprive the mother of a power which it is right she should possess, in order to lay her under the same impolitic restrictions as the father. It would, on the contrary, have been much wiser to have assimilated their powers by releasing the father from his fetters and bestowing on him the same faculty as a mother possessed, or it would have been the wisest plan to have at once granted both of them the faculty of absolutely bequeathing one-third of their property, as they thought proper, among their children, as they may among strangers. The Court's committee ascribe the anomaly which formerly existed to the decisions of the Court, whose members were induced to confirm this power in the mother, in order that she might be enabled to distribute her property as she pleased among her own and late husband's children, rather than re-marry, and thus bestow

on a stranger her personal property, which in consequence passed beyond their control. Notwithstanding the grounds on which the Court thus established a jurisprudence opposed to the principles of the law, their motives were unimpeachable and their views as laudable as they were just; and however illegal their decisions, because opposed to the positive decrees of the law—which they are ever bound to obey, notwithstanding previous erroneous decisions to the contrary—they still commanded respect and a ready compliance, because conformable to the spirit of the times, which revolts at the idea of the parents being, with regard to the distribution of property among their offspring, treated like as many evil spirits, to whom the slightest latitude cannot be granted, through a misconceived fear of some turning it to a bad purpose. But what singular instances of human frailty do not even courts of justice sometimes exhibit; its members, with the honourable intention of avoiding the consequences of an unjust law, established an unsound jurisprudence; and yet, when an opportunity presents itself of giving full scope to these laudable intentions by the introduction of a wise and just law, we find them formally consecrating a system wehrein justice is more frequently honoured in the breach than in the observance, and which their own decisions had turned into disrepute. The course followed by the legisture, and recommended by the Court's committee on this occasion, presents as singular an anomaly as is anywhere recorded in the annals of legislation; for though we frequently see jurymen avoid the severity of penal enactments by acquitting the guilty rather than subject them to unreasonable punishment, and sometimes find even judges modifying, not to say evading, the unnecessary restrictions imposed by the civil law, and still more frequently a great portion of the community not only openly transgressing but priding themselves on the transgression of such regulations as violently thwart their feelings and desires, yet all these indications of a wrong and unjustifiable system are commonly considered as the forerunners of a change in

conformity with, and not in opposition to, their desires, as was the case when the first clause of the twenty-ninth article abrogated the wise and just, however unsound jurisprudence which the Court had, by a series of uniform decisions, managed to consecrate.

We are aware that many persons entertain a less unfavourable opinion of the arbitrary restrictions established by the Norman law than of the extreme latitude granted by the law of England to parents over their property; but is there no just medium to be found between these extremes, and is it because a parent should not be allowed to give away the whole of his property to one child that he should not be permitted to bestow on a single one of them the smallest trifle without being accountable to the others? But it may be said, difficulties present themselves on every side: under such circumstances how are we to proceed to find the safest rules for determining our judgment, if it be not to the laws of the most civilized people, which have all to a certain degree, and some even to an unlimited extent, recognized in parents the power of bequeathing their property among their children? But, without referring to Montesquieu and Pascal, who declare property to be a creature of the civil law, or to Basnage and Heinecius, who anticipate greater evils than benefits from the institution of wills, we shall support our views respecting the policy and justice of placing a certain portion of property at the absolute disposal of parents, without any reference as to the parties, whether their children or others, who may be the immediate objects of their bounty, by the authority of Emerigon, who sets forth the following criterion to go by in judging of the excellence or defects of human laws: "La tranquillité publique," says he, "la paix des familles, la nécessité de prévenir les procès,* portent souvent le législateur à faire des réglements qui, malgré leur impuissance à prévenir toute injustice particulière, procurent le plus

* We have seen that compelling parents to bestow on children an equal share of their property, without any regard to their respective wants, station in life, or advantages, other than pecuniary, which some have received above the rest, was not the most likely manner to preserve tranquillity in families.

grand bien ; ce qui suffit pour qu'on doive s'y soumettre sans répugnance. Le droit naturel n'est pas alors violé ; il est simplement modifié, pour ce que l'intérêt de la société civile l'exige."* And quoting from D'Aguesseau he observes : "Il en est des lois comme des autres ouvrages humains ; on n'en voit point qui n'ait quelque imperfection, ou qui ne soit susceptible de quelque difficulté. Toute la sagesse du législateur, et toute la perfection de la loi, consistent souvent non pas à faire une disposition qui soit exempte de toutes sortes d'inconvéniens, mais à préférer celle qui en a le moins."† "Nulla lex satis commoda omnibus est ; id modo quæritur, si majori parti, et in summam prodest." So then, the wisdom of the law will be best appreciated by its tendency to prevent litigation, as the wisdom of statesmen is best evinced by their opening the widest field for the exertion of the human powers, and emanating laws which, in the highest degree, secure the happiness of the greatest number of individuals for the longest space of time.‡

Now the rule laid down in the first clause of the twenty-ninth article, which fetters the power of the mother as the law does that of the father, so far from checking litigation, will have a tendency to increase it by augmenting those fictitious sales and exchanges, or, more properly speaking, those disguised donations between parents and children, whereby parents bestow the whole of their property under the form of a sale, from the impossibility in which they are placed by the law of giving, either by will or donation, to any of their children the smallest portion of their property, without being accountable to the others.

The twenty-ninth article is as follows :

* Emerigon, Des Assurances.

† D'Aguesseau, tome 9, page 412 de ses œuvres.

‡ Since the promulgation of the reformed law of 1840, no less than three attempts have been made to bestow upon a parent the power of bequeathing one-third of his property among his children, as he may among strangers, but hitherto without success. The power of bequest by parents is viewed with great distrust, more particularly in the country parishes, and to their opposition must be attributed the limited authority which still continues to fetter parents in reference to the patrimonial division of estates.

ARTICLE XXIX.

A mother, in the same manner as a father, shall not be at liberty to give, by will, to one child more than to another. Fathers and mothers may order the proportion of their married daughters to be placed in trust, and the dividends to be paid to such daughters during their coverture; well understood that if they survive their said husbands, the capital shall be transferred to the said daughters, and that if they die before their husbands, the capital shall be transferred to their heirs, unless the said daughters should, in cases where this is allowed, have willed away the said capital.*

Before we proceed to examine the nature of the restrictions imposed by this article on the parents, it may be proper first to examine what children are here alluded to, and who by our laws are reputed legitimate children.

The children referred to in the twenty-ninth article are legitimate children—that is, all that are born in lawful marriage, or before marriage when a lawful marriage has eventually taken place between their parents, and at the time of whose birth there existed no legal impediment to such marriage, legitimation by subsequent marriage being admitted in Guernsey and throughout the Channel Islands. Incestuous or adulterous natural children cannot therefore at any time be rendered legitimate. The children are also reputed legitimate in law when born after marriage, though such marriage should have been void from any obstacle unknown to either of the contracting parties at the time of its celebration—as, if one of the consorts was already married. These marriages are here known as putative marriages—that is, contracted *bonâ fide* by either of the parties, to one of whom at least the impeding obstacle must

* "Aucun parent ne peut désormais par acte de dernière volonté augmenter l'hérédité d'un de ses enfans au-delà de sa légitime portion; il lui est néanmoins permis de placer la portion de la fille mariée en fidéi-commis durant son mariage.

"ARTICLE 29.—Mère, de même que père, ne pourra par son testament donner de ses meubles à l'un de ses enfans plus qu'à l'autre. Les pères et mères pourront ordonner que la proportion de leurs filles mariées soit placée en fidéi-commis, pour en être les dividendes payés aux dites filles pendant qu'elles seront couvertes de mari; bien entendu que si elles survivent leur dit mari, le capital sera transféré aux dites filles, et que si elles prédécèdent leurs maris le capital sera transféré à leurs héritiers, à moins que les filles n'aient dans les cas permis testamenté du dit capital."

have been unknown: "sufficit enim bona fides alterutrius conjugum." It is incumbent on him who alleges the bad faith of his opponent to prove it, and if he fail in doing so, the children born during the putative marriage, and during the period that the consort who is of good faith conceived there was no obstacle to its continuation, are treated in every respect as legitimate—that is, they inherit in the same manner as if there had never existed any obstacle to the marriage of the parents. The dower and other advantages which may have been stipulated by a marriage contract, or which arise from the law in the absence of such contract, continue in favour of the consort who is of good faith, notwithstanding that the marriage is void.* It does not, however, appear that a putative marriage would have the effect of rendering legitimate a child born previous to its celebration, though one of its parents may have contracted such marriage in good faith, an exception which evidently shows that those born after such a marriage would be legitimate; because, as the Chancellor D'Aguesseau observes: "La loi récompense l'innocence telle qu'elle se trouve dans celui qui contracte de bonne foi et par erreur de fait un mariage défendu; mais que la loi récompense une personne qui a voulu mal faire, parce qu'elle a cru faire un moindre mal, c'est ce qui ne peut pas être écouté."† All these questions may be seen treated at length in the written pleadings in the affair of Marie Jeune,‡ as also the authority due to public registrations in reference to the rights conferred by acts of birth, marriage, and death, as also in what cases and how the validity of such acts may be discussed.

The twenty-ninth article contains two very distinct propositions: the first in reference to children in general, and the

* So decided by the *Parlement* of Rouen on the 22nd April, 1704, in *re* Dumont *v.* Masson. Jean La Gripière had, during the lifetime of a former wife (Anne Dumont) married one Lucy Masson; this marriage, though decreed to be void, was yet declared to have the effect of conferring on Lucy Masson a right of dower, and on her children issued from her marriage with La Gripière precisely the same right to their father's estate as the child of his lawful marriage with Dumont.—See Basnage, article 235.

† Tome 4 de ses œuvres, p. 277.

‡ Guernsey Records, June, 1830.

second in reference to married daughters, whose portions during marriage may be put in trust by their parents. With regard to the first, that no mother any more than a father can bestow any greater portion of her property on one child than another, it is untenable; as if all were born with the same faculties, enjoyed through life the same advantages, and treated their parents in a manner to deserve and possess equal claims on their bounty and affection. The second clause, by which parents in certain cases exercise a discretionary power over their married daughters, by placing the portion of their inheritance in trust beyond the control of their husbands, is by no means sufficient to control the evils arising in consequence of the power of which they have been deprived by the former clause; though even this, as far as it goes, may be considered an amendment to the law by which a parent has no other means whatever of rescuing his daughter's portion from the grasp of her spendthrift, over-speculative, or improvident husband, than by imposing similar fetters on all his other children; or, in other terms, condemning them all to a punishment which only one may have deserved, and to whom alone it should be restricted.* On calmly reviewing the nature of

* So decided on the 27th December, 1845, in *re* Gallienne *v.* exécuteurs Brehaut, passed before the bailiff, and Messrs. Carré, H. Dobrée, and T. Andros; when it was decreed that the father could place the portion of one of his married daughters in trust during her husband's lifetime, subject to her receiving the interest during her coverture and the capital in the event of his death, notwithstanding that his other married daughter had not been subjected to the like restricton.

The following are the action and judgment:

"Sieur Thomas Gallienne, à cause de Rachel Brehaut, sa femme, fille de feu le Sieur Pierre Brehaut, actionnait le Sieur Jean Bichard, exécuteur du testament du dit défunt, en date du 12 Septembre, 1844, à voir juger que la clause du testament, par laquelle le défunt ordonne que le tiers du résidu de sa succession mobilière soit mis au nom de deux fidéi-commissaires, qui seront nommés par son executeur, pour en être le revenu payé annuellement à sa fille Rachel, pendant sa vie, et après son décès, que le principal revienne à ses enfants, ou en cas de décès d'aucun d'eux laissant enfans, que ces enfants aient la portion de leur père ou mère décédé, sera cassée et annullée, et que le dit tiers du dit résidu sera livré à Thomas Gallienne, à cause de sa femme, la dite clause étant contraire aux lois et coutumes de cette île; le dit défunt ayant par le même testament légué à Carterette Brehaut, son autre fille, femme du Sieur Pierre Lucas, un tiers du résidu—sa portion de la succession mobilière sans aucune restriction."

On this action judgment was given against Thomas Gallienne, "qui est à silence, en ce qui regarde sa prétention que son beau-père n'avait pas le droit

such restrictions, one would almost suppose that our forefathers and some of their descendants had been legislating for barbarians, and not for a civilized community. As to the idea that some fathers-in-law may be tempted to take advantage of this power to impose unnecessary restrictions on their sons-in-law, it may be fairly ranked among the over cautious preventives of those who would absolutely deprive man of the power of willing, because some of his fellows turn it to a bad purpose. The great corrective of most evils of this description rests in investing the parental authority with the absolute power of distributing a certain portion of his property among children. Nor can any sound reason be alleged, why parents should not possess this power of absolute disposal over one-third of their property, so as to bequeath it to their children as they may to strangers. In persisting to deprive them of all power in this respect, we again find revived the spirit of those barbarous laws which treated parents as convicts, by debarring them from all participation in their offspring's inheritance.* It is on beholding such legislative enactments and the source whence they sprang, that we are forcibly reminded of the great truth proclaimed by Fenelon, that authority seldom takes either religion or laws into its keeping but to disfigure them—an idea which has been thus elucidated by Dr. Channing. "Government," says he, "confers little positive benefit. Its office is, not to confer happiness, but to give men opportunity to work out happiness for themselves. Government resembles the wall which surrounds our lands—a needful protection, but rearing no harvests, ripening no fruits. It is the individual who must choose whether the enclosure shall be a paradise or a waste. How little positive good can

d'ordonner par son testament que le tiers du résidu venant à sa femme fut placé en fidéi-commis, sans ordonner en même tems que le tiers du dit résidu venant à Carterette Brehaut, son autre fille mariée, le fut également; en même tems la Cour juge que le dit fidéi-commis ne peut s'étendre au-delà de la durée de son mariage avec le Sieur Gallienne, et que lors du décès de l'un ou de l'autre des dits mariés le capital du dit résidu sera transféré en conformité aux dispositions de l'article 29 de la loi promulguée le 3 Août, 1840, les intervenus en cause présens."

* Vide the thirteenth article.

government confer! It does not till our fields, build our houses, weave the ties which bind us to our families, give disinterestedness to the heart or energy to the intellect and will. All our great interests are left to ourselves, and governments, when they have interfered with them, have obstructed much more than advanced them. For example, they have taken religion into their keeping only to disfigure it. So education, in their hands, has generally become a propagator of servile maxims and an upholder of antiquated errors. In like manner, they have paralysed trade by their nursing care, and multiplied poverty by expedients for its relief. Government has been a barrier against which intellect has had to struggle, and society has made its chief progress by the minds of private individuals, who have outstripped their rulers, and gradually shamed them into truth and wisdom."*

But the law having passed and its decrees being imperative, it must be followed; and its inconveniences, however great, must be endured until it is constitutionally repealed: "hoc quidem perquam durum est, sed ita lex scripta est. But, however much individual cases of hardship of this nature may excite sympathy for them who succumb, it must never be forgotten that they ever constitute the great harbingers of all reform; it is by their instrumentality that private individuals are prompted to exertion, and enlisting their services in the cause of justice, at last obtain from rulers redress for their wrongs.

Hence the source of those unnatural suits which so frequently, at the death of parents, arise among their issue—to annul contracts the former have voluntarily entered into during their lifetime with those who were chiefly indebted to them for their welfare—so far from being exhausted, will, on the contrary, revive with the additional restrictions imposed by the above article, which now fetter the mother in the same degree as the father, and the pernicious consequences arising from which have been greater than have followed from any other unprincipled features of the ancient law.

* On the Life of Napoleon, pp. 69, 70.

What reasons can be assigned to subject parents, who enter into engagements with their children with regard to their property, to be brought to an account by the latter, whose unjustifiable power to annoy renders them, during life, a still greater scourge to their parents than even the thoughts of the unjust lawsuits which will ensue among them at their death? It would indeed be difficult to imagine an evil which in a greater degree disturbs the peace of families, foments litigation, and destroys parental authority, than these unnatural restrictions. Nor does this law in any way secure the main object for which it was created—that is, the more equal distribution of the parent's property among his children, for whilst some receive a better education, and others enjoy a more advantageous establishment, some there are who have only known their parents but to serve and obey them, who were the source of their prosperity as the companions of their manhood, and their solace at the decline of life. Will it be seriously pretended that justice is done, or that an equal distribution of property takes place among children thus unequally provided for, by the division of the patrimonial estate in equal proportions among them at the parent's death? Will it not, on the contrary, appear that they who have remained under the paternal roof have only been working for the remainder, with whom they divide the fruits of their own industrious and economical habits; or, in other terms, they divide their own earnings with others who, enjoying better prospects, have amassed wealth, which they keep exclusively for themselves?

Hence arise those divisions of patrimony during the parent's lifetime with a view, in some measure, to check the inequality which thus occurs in the condition of the children; divisions which deprive parents of all control over their fortune, place them at the mercy of their children, and in point of fact reduce them to a state of beggary.* These divisions, however, consecrated by a long train of judicial decisions, are as diametrically opposed to the Norman law

* These patrimonial divisions have been here naturalized under the name of "partages par avance de succession."

as to the law of all civilized states,* which uniformly not only followed the axiom, "viventis nullus hæres"—that is to say, that in the lifetime of the author there can be no heir—but some have solemnly decreed, "qu'on ne peut même par contrat de mariage renoncer à la succession d'un homme vivant, ni aliéner les droits éventuels que l'on peut avoir a cette succession;"† because as no inheritance is open but at the death of the author, until then none of his heirs can be looked upon as free agents when contracting in the presence of a parent, to whose desires and commands their own will must be morally subservient, and consequently incapable of that degree of freedom which the law requires of all contracting parties to any agreement. As to the irregular jurisprudence, it might be easily reformed by a tribunal whose members would be determined to abide by the law instead of their own notions of equity, and who would act for themselves instead of being absolutely swayed by the erroneous decisions of their predecessors, who apparently did not always consider themselves bound to subscribe their opinions to the law's decrees; in one word, by a tribunal who would follow the

* Basnage thus puts the question: "Si le père, qui est le maître de son bien, et qui peut en changer la nature, désirant rendre égale la condition de tous ses enfans, et pour éviter une vente ou un changement qu'il pourrait faire de son bien, l'aîné renonce volontairement à son droit d'aînesse, cette renonciation serait-elle valable? Plusieurs docteurs l'ont estimée valable. . . . Mais quelque liberté apparente que le fils pût avoir, on doit toujours présumer que cette renonciation n'a point été entièrement volontaire; car on ne présume jamais que l'on renonce sans quelque contrainte à l'espérance presque certain d'un bien à venir; ces renonciations sont un effet de la crainte et du respect paternel;" and the reason of this is because the right of succession is held from the law, rather than from man's will, therefore cannot be interfered with by the heirs during his parent's lifetime, even by mutual consent of the parties: "attamen jus succedendi non sit beneficium patris, sed legis, non potest à patre auferri, transferri, diminui, vel disponere in præjudicium primogeniti." These principles Basnage moreover confirms by adducing two decisions of the *Parlement* of Rouen, by which it was decreed, that the father's patrimony being divided among his heirs during his lifetime could not debar the children from exercising their respective rights at his death; in one word, that such patrimonial divisions were illegal. "Il est si mal aisé," says Basnage, "de donner atteinte au droit d'aînesse durant la vie du père, que ni l'avancement de succession, ni le partage que les enfans en auraient fait, ne priveraient pas l'aîné de choisir un nouveau préciput, ou de ne le prendre point, si les choses ne se trouvaient pas au même état au temps de l'échéance de la succession, et que sa condition fût devenue meilleure qu'elle n'était lors de l'avancement de succession."—Basnage on the 337th article, and commentary thereon.

† Art. 791, Code Civil.

conscience of the legislator, not that of their predecessors: "non exemplis sed legibus judicandum."

A more anomalous legislation or jurisprudence, in reference to patrimonial divisions, can scarcely be conceived than that which sprung up shortly after the law of 1840 came into operation, as may be seen from the decisions rendered in the affairs of Le Gallez, Berrisford, Gallienne, Desperques,* and others; where parents were not allowed the slightest discretion in reference to bequest among their children, whilst grandparents were suffered arbitrarily to deprive both children and grandchildren of, it might be, the whole of their inheritance, by selecting any particular grandchild as the object of their caprice or bounty; all which might have been so easily obviated by allowing parents, through testamentary bequests, to dispose of one-third of their property among their issue, as they may among strangers.

The thirtieth and last article of the modern law on inheritance refers to cases where the ancient law on this subject still continues to operate, and to which in consequence the modern law does not apply. These are: the more equal distribution between sons and daughters; the extension of the *barrières* of the town; and the right of eldership or *préciput* which a son who, at the law's promulgation, had attained his fourteenth year, may still take in the succession of both his parents, notwithstanding the seventh article, which, for the future, restricts the son to a single eldership in either line of his parent's or grandparent's inheritance.

Article XXX.

Articles I, II, and VIII shall not apply to families in which the eldest of the children,† living at the opening of the succession, shall have attained the age of fourteen years when the present law is promulgated. Article VII shall not apply to eldest sons having attained the age of fourteen years at the same period.‡

* Le Gallez and co-heirs, April 17, 1841, and Lenfestey *v.* Desperques, February 14, 1842.

† It should be, "of the sons."

‡ "Les cohérédités, où le fils ainé au 3 Août, 1840, aura atteint sa quatorzième année, ne sont point régis par la nouvelle loi, c'est-à-dire, que dans ces successions, le vingtième, le double préciput, ainsi que l'ancienne division

This article is wrongly construed, for the original law states "eldest son"—who may not be the eldest of the children, as stated in the above article—as will evidently appear from the thirtieth article, sanctioned by the States, and from the original draft in French presented to the legislature, and which, as the translation, received its formal sanction, as appears from its registration here on the 3rd of August, 1840; wherein it clearly appears that the reserve is only made—or, in other terms, the repealed law only continues to affect families—where the eldest son at the above date attained his fourteenth year. So that the modern law, which provides a more equitable distribution of lineal inheritances than the ancient law did, with regard to real property situated within as without the barriers—which are the subjects to which its first, second, and eighth articles refer—comes into operation in all families where the eldest son living at the opening of the succession shall not, at the above period, have attained his fourteenth year. Any other construction put upon this clause would verge upon the ridiculous, for by the substitution of the term "child" for "son" it would follow that a daughter aged above fourteen years at the date of the law's promulgation, and who, on that account, would be entitled to greater protection of this sort than if she were younger, would be subjected to additional hardship, for a cause for which the legislature has deemed her entitled to additional protection. This error in the construction of the English clause must no doubt be attributed to the translation having been made from the project inserted in the report of the Court's committee, which was in this respect modified by the States, who substituted the term "sons" for "children"—"l'aîne des fils," not "des enfans." Besides, the whole context of the article demonstrates that the intention of the Court's committee itself was to limit the reserve to the sons only of a certain

par tiers en ligne directe des immeubles situés tant en dehors qu'en dedans des nouvelles barrières restent dans toute leur force.

"ARTICLE 30.—Les articles 1, 2, et 8 ne seront pas applicables aux familles dans lesquelles l'aîné des fils, vivant lors de l'ouverture de la succession, aurait atteint l'âge de quatorze ans lors de la promulgation de la présente loi. L'article 7 ne sera pas applicable aux fils aînés qui auront atteint l'âge de quatorze ans à la même époque."

age; otherwise, what necessity was there of reserving it exclusively to those who had attained that age and who should also be living at the opening of the succession, unless it was to protect the daughters, who would materially suffer from a different construction, as a younger brother under the age of fourteen would thus enjoy advantages which it was the evident intention of the legislature he should not? The terms "living at the opening of the succession" are also material in another point of view, as will appear from the following case. Suppose in a family there was, at the date of the promulgation of the law, a son aged fourteen (consequently entitled to the benefit of the repealed law if he succeeded), but that he died before the opening of the succession—that is to say, previously to the death of his parent, whose property was about to be divided. His younger brother, who had not attained the age of fourteen at the above date, would divide the succession, not according to the old law, as his elder would have done, but according to the modern law—that is to say, he will only be entitled to a single eldership in either line of his parents, and to no more than a double portion over his sisters in the inheritance, and to no eldership whatever if the real property be situated within the precincts of the new *barrières*. So then, there are two conditions required for a son to be entitled to the reserves set forth in the thirtieth article: first, he must have attained his fourteenth year when the law was promulgated; second, he must be living at the opening of the succession of his father or mother.* But though brothers who had not attained the

* So decided on the 27th of June, 1855, in the affair of the children and grandchildren of Nicolas De Garis, du Bourg. And again, on the 3rd of November, 1857, in the succession of the children and grandchildren of the late Joseph Berrisford, when the Court decreed that the infant children of the late Charles Frederick Berrisford, eldest son of Joseph Berrisford, were not entitled to represent their deceased father Charles in their grandfather Joseph's succession, as their father would have done had he survived Joseph Berrisford; the Appeal Court deciding that Charles, the eldest son, "n'étant vivant lors de l'ouverture de la succession de son père Joseph:" the second condition contained in the thirtieth article had not arisen, and consequently his children were not entitled to the reserve there set forth, which would have availed Charles for his eldership had he been living at the time that his father Joseph Berrisford's succession fell in. On the 11th of July, the Ordinary Court had decreed in favour the children of Charles, on the ground that they could represent their father in their grandfather's succession, but the Appeal Court reversed the de-

age of fourteen at that date could not profit by the old law, yet it might have been supposed that, though under that age, in right of their deceased parent, they could, by representing him, divide with their uncles their grandfather's succession, because they succeed to their father's rights, who, having attained his fourteenth year when the law was promulgated, his rights of inheritance were always reserved to him *quoad* his uncles. The contrary has, nevertheless, been decided, and in three different cases—that of Mr. De Garis, du Bourg, the children and grandchildren of Mr. Joseph Berrisford, and the children and grandchildren of the late Mr. Peter Nicholas Maingay, wherein it was decreed that, according to the terms of the thirtieth article, "vivant lors de l'ouverture de la succession," the infant children of the parent predeceased were not entitled to represent him in their grandparent's succession, and reap those advantages which would have accrued to their parent had he survived the grandparent. Yet, strange to say, that had the children of Edwin died before their father, or had he left no issue, his brother, the eldest surviving son of Mr. P. N. Maingay, would have succeeded to all the advantages conferred by the old law in reference to the eldership, of which the children of Edwin, through the death of their father, were deprived. So that the object of limiting the advantages reserved to the eldest son within the narrowest limits, and making it personal to himself, was only attained by incurring hardships much more to be deprecated; that those it was the object of the legislature to remedy, and which would have been so much more satisfactorily obviated by limiting the reserves

cision as incompatible with the second clause of the thirtieth article of the law of August, 1840. And more recently on appeal, on the 16th October, 1860, in the affair of the children and grandchildren of the late Peter N. Maingay, when the heirs of the late Edwin Maingay, eldest son and principal heir of the late Mr. Peter Nicholas Maingay, the Court decreed, in conformity with the decision of the Ordinary Court of the 4th of February preceding, that the children of Edwin Maingay—whose father died before their grandfather, the late Mr. Peter Nicholas Maingay—that they, as his grandchildren, were not entitled to represent their father in the succession of their grandfather, as Edwin would have done had he survived his own father, Peter N. Maingay. Consequently Mr. Peter N. Maingay's succession was divided according to the modern law of 1840, not according to the old law, under which Edwin, the eldest son, had he lived might have claimed.

in favour of those eldest sons only who, at the date of the law's promulgation, had attained their majority or completed their twentieth year, as proposed by the petitioners.

So that while the old law continues in operation, which will be the case for some years hence, inheritances will be differently divided in the same family; fathers will divide with uncles according to the ancient law, whilst sons with brothers and sisters will divide according to the modern law.

Having in the foregoing pages alluded to the cases of Gallienne and Berrisford, as evincing the anomalies into which the Court's committee fell in their attempt to obtain a more equitable division of patrimonial estates by limiting the power of parents over their children, those of Le Gallez* and Desperques might be adduced to show how feeble this attempt at limiting the power of parents again proved to meet the most crying evils of the present system; which, whilst it withholds all latitude of disposal to parents, suffers grandparents arbitrarily to deprive their own children and grandchildren from all share in their inheritance by means of testamentary bequests, which a grandparent may still make in favour of one or more grandchildren, to the prejudice of the remainder of his issue, whether children or grandchildren.†

A question may arise: Would the eldest son, who had not

* In this case Rachel Queripel (Widow Le Gallez) made a will, whereby her property was very unequally distributed among her children. The will was dated the 8th of August, 1839. The testatrix died on the 7th of March, 1841. The twenty-ninth article of the law—which, it was contended, should govern the case—came into effect on the 3rd of August, 1840, and by it a widow mother is prohibited from giving by testamentary bequest any greater portion of her property to one child than to another; and as the testatrix died after the promulgation of the law of 1840, the Court decreed that the will came under its operation, and modified it in accordance with its provisions, by causing a more equal distribution among the children than would have been the case under the system it had repealed.

† As was evinced in the affair of Desperques *v.* Lenfestey, whereby the children and grandchildren of the testatrix brought an action to annul the will of their grandparent, Carterette Robert, on the ground that she had deprived some of her own children and grandchildren of their inheritance in favour of other grandchildren. The Court, on the 14th of February, 1842, held that the law, which forbids a parent from benefiting one child to the prejudice of another, does not apply to a grandparent; and in consequence the will of Carterette Robert was confirmed, and her children and grandchildren left without a remedy. From this decision an appeal was entered, but was not followed up.

attained his fourteenth year on the 3rd of August, 1840, after having taken his eldership in his father's succession and divided that inheritance with his brothers and sisters, be debarred from taking, through the representation of his father, the eldership which would have devolved to his father had he survived his own parent? From the text of the seventh article it would appear that the grandson could, after taking his eldership in his father's succession, also take that which would have devolved to his father in the grandparent's succession; but in that case, as the grandson represents his parent, and takes the eldership *quoad* his uncles and aunts (his father's co-heirs), he will have to account to his own co-heirs (his brothers and sisters) for this eldership, either by dividing it with his consanguine brothers and sisters, or if he prefers absolutely retaining his grandfather's eldership, he may do so by accounting to his own co-heirs for the value which he has already taken in his own parent's inheritance. Such is the sense in which the following terms in the seventh article, in reference to the eldest son's rights, must be understood: "it shall be optional with him to divide it with his consanguine brothers or sisters, or keep it to himself on bringing back the value of that which he already possesses" —i.e., the eldership he has already received from his father's succession.

After having thus levied an eldership in his paternal grandfather's succession, could the eldest son take another in his mother's or maternal parent's succession? It would not appear that he could by the modern law, for this would be giving him two elderships with regard to his own co-heirs, which he cannot now have, the grandparent's succession devolving with the parents, which it always does when the grandson represents his parent, both these successions then forming but one with regard to his brothers and sisters, but one eldership can be raised on both; and an eldership having been already raised by the eldest son, he cannot take another eldership in his grandmother's succession to the prejudice of his father's co-heirs (his uncles or aunts), who have already lost that of their own father; nor could he take that of his

mother to the prejudice of his own co-heirs (his brothers and sisters), the eldest son having already taken, through the representation of their father, that portion which would otherwise have devolved to them from their paternal grandfather. So then, by causing an evaluation to be made at the time of the eldest son's taking an eldership on his parent's or grandparent's line of succession, he may, on accounting for it to his co-heirs, take that which would afterwards fall in from either of his paternal or maternal grandparents, in reference to the succession of his uncles or aunts (his parent's co-heirs); for though the eldest son is now only entitled to one eldership, he is always entitled to take that which best suits him. The same may be said of his own co-heirs (his brothers and sisters) with regard to his own parents, either in the paternal or maternal line, in either of whose successions the eldest son, by taking the precaution of making an evaluation of the eldership he first raises, and and on accounting for it to his co-heirs, he may take whatever eldership may fall in from his parent's or grandparent's succession, provided that in every case he is restricted to a single eldership.*

A question has been put whether real property, acquired by parents since the promulgation of the modern law, will be divided among their children above the age of fourteen at that date according to its provisions, or according to the old law. It would have been desirable that it should have been divided according to the provisions of the new law, but the reserve having been made in favour of sons, who at its promulgation shall have attained their fourteenth year, to divide the future inheritance according to the old, without any distinction as to the period when the real property belonging to it was acquired, it cannot be doubted but that such property will be divided according to that law.

The reasons assigned for putting off, in certain cases, the immediate operation of the changes lately effected in the law of lineal inheritance were, that they might too severely affect the prospects of eldest sons who had attained a certain age, and whose state in life had been materially affected by the

* See commentary under art. 7.

reasonable expectations afforded them of deriving certain advantages from the late law of inheritance. Nor were these reasons altogether unfounded, particularly in a place where by far the greatest portion of the real property of every inheritance was bestowed on the eldest son. The committee of the petitioners represented that the age of twenty, instead of fourteen, might be fixed upon as that whereby a reserve in favour of the sons might be definitely adopted, but their suggestion was overruled; though it is difficult to conceive how, before that age, children could have definitively made up their minds or settled their future prospects in reference to their portions of inheritance.

The second clause of the thirtieth article, which reserves to the eldest sons of fourteen years their former right of taking two elderships, is too clear to require any comment, and with it we close the commentary on the modern law of inheritance and wills, as sanctioned by Her Majesty in Council on the 13th of July, 1840, and registered here on the 3rd of August following—an order which has done much to amend the law of real property in Guernsey. But to accomplish the main ends for which all laws are established—that is to say, the security of titles, the advancement of property, and its transmission in accordance with its owner's affections and commands—the legislature should abolish the system of guarantee, place at the disposal of parents a certain portion of property that might be bequeathed to their offspring or strangers, do away with all that worse than useless paraphernalia of distinctions, which still encumber real property, under the denomination of *propres* and *acquêts*, and at once enable the landowner of the present day to free his property from impolitic restrictions, as his ancestors did, in former times, their persons from ignominous shackles. Such is our conviction of what may and should be done, a conviction founded upon what has been elsewhere advantageously done; and from a perusal of the foregoing pages it will be seen that, since the law of 1840 came into effect, legislation in reference to real property has had that tendency, as is shown by the shortening the periods of prescription, the more extended

powers of bequest granted to the owners of real property, the faculty of redemption allowed in certain cases to debtors of irredeemable rents, and the further curtailing the delay in cases of *saisies* or expropriation of insolvent owners, all which so far have been attended with beneficial results.

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