AN ESSAY

ON THE

LAWS OF REAL PROPERTY

IN GUERNSEY,

AND

COMMENTARY

ON THE PRESENT LAWS OF

INHERITANCE AND WILLS,

INCLUDING NOTICES OF

GUARANTEE AND EXPROPRIATION OF REAL PROPERTY, PRE-EMPTION, HYPOTHECATION, AND DOWER.

WITH AN

APPENDIX

CONTAINING

THE ORIGINAL PETITION FOR THE REFORM OF THESE LAWS—THE DEFENCE OF THAT REFORM—THE REPORT OF THE COURT'S COMMITTEE—THE REPORT OF THE PETITIONERS—AND THE LAW AS ADOPTED BY THE PRIVY COUNCIL.

BY

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A M. VATAR,

DOYEN DE LA FACULTÉ DE DROIT DE RENNES.

A M. LESBAUPIN,

ANCIEN PROFESSEUR DE DROIT ROMAIN, EN LA MEME FACULTÉ.

MESSIEURS,

Souffrez qu'un de vos élèves vous présente ce faible opuscule en témoignage de sa profonde reconnaissance. Il vous le doit comme les seuls survivans des professeurs de cette faculté où se trouvaient les Toullier, les Carré, les Labigne Villeneuve, et les Aubrée, et qui vous compte encore au nombre de ses ornemens, lors même que vous y ayez cessé vos actives fonctions. Vos leçons ont en quelque sorte présidé à sa confection, et sans elles il est douteux que l'on se fut jamais hazardé à présenter à ses semblables aucune de ces doctrines qui doivent constituer leurs plus surs guides dans les transactions les plus importantes de la vie. Mais assistés d'elles, ou, en d'autres termes, de l'Histoire de la Sagesse et de la Vérité, ces compagnes inséparables de la Raison écrite, qui, par vos travaux et votre organe est si souvent devenue la Raison vivante, nous n'avons plus hésité à prêter notre faible ministère à opérer la refonte d'une législation qui n'était pas moins opposée à la saine politique qu'à la justice, cette source de toutes les lois. Si vous daignez, Messieurs, jetter les yeux sur les pages qui suivent, vous y rencontrerez sans doute de grandes lacunes, mais pour pouvoir nous mettre à même de les effacer, il faudrait, Mr. Lesbaupin, appeler à notre secours cette science et cette érudition qui ne se sont point éclipsées en présence même du Pothier et du Lamoignon modernes, ou bien, Mr. le Doyen, il faudrait posséder une partie de ces lumières de jurisconsulte qui se sont fait pas moins remarquer dans le temple de la justice, que de la chaire professorale. En dire davantage serait infailliblement s'exposer à choquer la modestie de Savans moins jaloux d'exciter l'admiration de leurs semblables par l'ascendant de la science, qu'à mériter leur reconnaissance par l'exemple de leurs vertus.

Guernesey, ce 28 *Juillet*, 1841.

PREFACE.

The Order in Council of the fourteenth of July, 1840, registered on the Records of this Island on the third of August, having very materially modified, not to say improved, the Law of Real Property in Guernsey, more particularly in reference to Inheritance and Wills, and having, it is to be hoped, laid the foundation of further improvement, the following Commentary was undertaken with a view of pointing out how the Law actually stands, and what further changes it would be desirable to effect. To the Committee of the Inhabitants who first proposed to reform the Law, and to the Court's Committee who sanctioned the greater number of the proposed changes, the Island must for ever be indebted for ensuring the success of a measure which, even at this short period of its existence, has already secured to them no inconsiderable benefits. We have given under the head of an Appendix the Reports of the different Committees and the arguments on which they are based, as a

reference to enable the reader the more surely to ascertain the object of the proposed reforms. Were any stronger proof of the policy and justice of the measure required, than by a comparison of its principles with those it has repealed, it might be found in the step voluntarily taken by the authorities and inhabitants of the Island of Alderney, who prayed the legislature to mete out to them the same boon as it had conferred on this Island ; an act as creditable to their feelings as to their discernment, and which was accordingly granted on the eighth of May last. But the measure of Law reform will not be complete, nor answer the reasonable expectations of the inhabitants, until their titles of real property are secured against the present custom of Guarantee,—until all the worthless distinctions between inherited and acquired real property are swept away,—and until a parent obtains the faculty of bequeathing at least as great a portion of his property among his children, as he may among strangers.

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A COMMENTARY,

&c. &c. &c.

OF INHERITANCE.—

THERE are two modes of acquiring property.—One natural, regulated by the law of nature and common to all mankind, the other peculiar to each nation, and regulated according to its own laws. Among the natural modes of acquiring may be enumerated *occupation* or *jus primi occupantis* which commences at the moment of a person's taking possession of an object with a view of exclusively retaining it, and ceases from the moment he has abandoned it or given up all idea of exercising any further act of ownership in reference to it;*— the most simple mode of proprietorship of which we can form any conception. Among the second, may be enumerated sales, inheritances, and wills, which though common to all nations, are yet governed by certain rules or laws peculiar to each, with which all citizens are supposed to be acquainted, and which sometimes from not really knowing they suffer severely. Property may also be acquired either for a valuable consideration or gratuitously; inheritance and wills, of which it is intended here to treat, are acquired in this manner. I shall begin by inheritance as the most simple and natural mode, and moreover as the first in the order followed by the new law of which the following pages are intended as a brief commentary.

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

* Quâ ratione verius esse videtur, si rem pro derelictâ a domino habitam quis occupaverit, statim eum dominum effici. Pro derelicto autem habetur, quod dominus eâ mente abjecerit ut id in numero rerum suarum esse, nolit; ideoque statim dominus ejus esse desinit. Inst. lib. II, tit. I, § 47.

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 follow, as inscribed in the Order in Council dated the 13th of July, 1840, and registered here on the 3d of August following.—The first of which refers to the abolition of the *vingtième* or twentieth portion of real property which, in certain inheritances, sons took over daughters.

CHAPTER I.

Article I.

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 boundaries of St. Peter-Port, which always devolved to the sons, whenever their number did amount to, or 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, in which was included his eldership by right of primogeniture, besides the remaining

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

† *Abolition du Vingtième et Conservation du Préciput.*

Article I.—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.

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. The system was altogether most vexatious and unjust, and could not for one moment be tolerated upon a revision of the law; it was therefore from the commencement unanimously settled by the Committee of the Petitioners, that its abolition should be demanded, which was acceded to by the Court's Committee, and by the States. 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

* Well might one of the ablest parochial officers in the Island, Mr. John 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 never existed 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 energetically told that their system of inheritance and wills was the best ever formed, and the work of ancestors, perfect models of human wisdom.

† The clearest idea that can be given of the *Vingtième*, is to be found in the APPROBATION DES LOIS, made in 1482, the twenty-fourth year of Queen Elizabeth's reign. — " Le fils 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,

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the sons always divided it to such an extent among themselves, that the daughters were left with merely a nominal portion. In point of fact, as far as the rights of inheritance were concerned, daughters were considered in law as not much better than illegitimate children; treated in the zenith of feudalism as little better than beasts of burthen, their lords afterwards considered they had advanced mighty strides in the career of civilization, when they condescended as gallant chevaliers to treat them as human beings; yet even then were they refused all participation in their parents' inheritance.*

Commerce, however, which so powerfully assisted in emancipating mankind, had also the effect of improving their condition; hence their right in time, became gradually established to share the personal property, such as all monies, furniture, cattle, and the like, as contradistinguished from real, in equal portions with their brothers, a principle which obtains under the new as under the old law, only that the married daughter will be no longer debarred, as formerly, by the fact of her marriage, from all participation in the ***personal property*** of her parents' inheritance.

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 succeed 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 the other of the parents.

* Vide the pertinent remarks of the Court's Committee on this subject, Appendix, letter C, p. 32.

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 favor of the eldest son over *certain kinds* of personal property to be found in the inheritance, but not over all kinds of such property; —for instance, money, cattle, and other personals 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. This eldership had almost fallen into desuetude throughout the island; and considering it in point of fact abolished as it should have been, the Committee of the Petitioners took no notice of it. What more powerful reason could indeed be assigned for discontinuing such an eldership, than its tacit abrogation, and comparative insignificance throughout the island? What matters whether a law be repealed by the formal and positive injunctions of the legislature, or by the more powerful, because more unanimous and equally significant assent given to its extinction for a long lapse of time by the mass of society, *quid interest an factis an verbis, gens voluntatem suam declaret.* By the new law however, the eldership on personal property though restricted to one seventh of the *household furniture,* may at present in many instances amount to no inconsiderable sum; and one would have supposed, that the spirit of the former law would have been much better preserved, and the desires of the inha-

* *L'aînesse sur les Meubles est d'un Septième.*

Article 3.—Dans les successions mobilières, l'aînesse sera un septième des meubles meublants, après le 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.

bitants generally much better answered, had the local authorities solely adhered to the last clause of the third article, and restricted this eldership to all the family portraits, pieces of plate, and other objects presented to the parents or ancestors, for distinguished services, by public bodies. These, added to the eldest son's other advantages, might have been deemed a tolerable compensation for his pains and trouble in making up the accounts of the estate, and furnishing his co-heirs with the titles necessary to exercise their right and discharge their obligations. Under any circumstances, they might have been deemed an ample compensation for the best piece of furniture, the armorial bearings, the saddle and spurs of the ancestor, which even in the rural parishes constituted the only advantage the eldest son could claim over his co-heirs.

The principle of one seventh of the furniture as an eldership having been sanctioned as law, it must now come into uniform operation. Its introduction into the new law was doubtless greatly facilitated by the remarks of the Court's Committee,* which however abstractedly correct and forcible, were more than counterbalanced by the usage that prevailed against any considerable advantage existing in the shape of an eldership on personal property, more particularly throughout the town parish.

The suggestion of the Committee, of allowing the father to will his furniture, was a wise one, and should have been adopted, more particularly after the principle of an eldership on personal property had been sanctioned; the loss sustained on the removal of furniture from the place to which it has been adapted, and particularly after a certain number of years standing, being very great, and besides such property procuring to the co-heirs little benefit, it would have been wise to have allowed the father to have disposed of it by will, without his even enjoining his eldest son to make compensation for it to his co-heirs; he being the fittest judge whether or not any compensation should be granted, and also of the child who was best entitled to this mark of personal consideration, whether the eldest or any other.

* Vide Appendix, letter C, page 33.

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 agreeable to the custom and spirit of the old law; but instances having occurred in inheritances, 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 as set forth in the Petition,† and as sanctioned by the Committee of the Court,‡ at whose suggestion it now forms the fourth article of the law; and is too clear to require any comment. There can now be no longer any doubt upon the mode of apportioning the different lots in an inheritance, whether composed solely 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. *Legis tantum interest ut certa sit, ut absque hoc, nec justa esse possit*, says Bacon.§

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.

What the Préciput, or Eldership taken by the son on real property, is, shall be now examined.

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

* *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.*

En succession directe, lorsqu'il n'y aura que des filles à partager; la plus jeune fera les billes, et elles choisiront suivant leur aînesse.

† Vide Appendix, letter A, p. 31. ‡ Vide Appendix, letter C, p. 34.

§ Aphorismus Sus: — De Justitiâ Universali.

|| *Le Préciput est restreint à un seul Enclos.*

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.

præcipio, to take before hand ; 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 inheritance, 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 considerable value, and which all disappeared in the eldership. Thus, suppose an inheritance in which are four houses, one of which has a garden, out-houses, and field adjoining, valued £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 on inheritances, he would have obtained 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.

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

The extreme injustice of such a system was a subject of much consideration with the Committee of the Petitioners, who with great force of reasoning represented it to the Court's Committee when assembled to ascertain the object and wishes of the Petitioners in September, 1838, and with success; for in the first clause of the fifth article of the new law, which with a mere verbal alteration reproduced the fifth article of the Report of the Court's Committee,* we find the third article of the Petition fully confirmed by its being expressly declared that the *Préciput* of the eldest son shall not extend beyond a single enclosure, notwithstanding such enclosure may not contain the quantity of land usually assigned for the *Préciput*. Thus limiting the eldership to a single enclosure, in the foregoing case, three of the houses would now fall into the inheritance, 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 is not, as in some other cases of lineal inheritance, deferred, where the eldest son shall have attained his fourteenth year on the 3d of August, 1840, its existence as a principle will only have 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,

* Vide Appendix, Letter C., p. 35, and Article 5 of the Committee's Report.

the latter was therefore fixed upon for the basis of an ordinance then intended to be framed, but which never was. This principle has however been introduced into the second clause of the fifth article, and is now the law of the island, having been sanctioned by the legislature.

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? The latter appeared certainly the most equitable, and Mr. Thomas Le Marchant in his excellent treatise on our laws, deemed that, in law, such compensation should be given; on the other hand, he admitted that such compensation had not been allowed up to his time, and as it had been the invariable rule not to grant any compensation, the Court decided the case of Robin v. Robin, on this principle.*

Besides uniform custom, there was one great reason for thus deciding that the adjacent buildings, situated without the precincts of the ***Préciput***, should be valued as bare ground only, which was, that from the subdivision of the estate, they were no longer required by the eldest son for the cultivation of his farm; those situated within it, were even more than he required; there could therefore be on his part no hesitation to demolish them and throw into cultivation the ground on which they stood, rather than pay the value of such tenements, and

* The sense of all the Douzaines in the island was recorded at the Chief Pleas after Michaelmas, in 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 Baillif and eight jurats, from which there was no appeal.*—Re Robin, *des Grandes Capelles.*

this he declared to the Court he would do, were they to give judgment against him. After mature consideration, and after also taking the sense of the Douzaines throughout the island, as to the extent and nature of the *Préciput* throughout the different parishes, the Court unanimously declared that these tenements, adjacent as they were to others serving as appendages to the cultivation of the farm, should be considered as *bare ground only*, as is all other ground comprised within the space allotted to the *Préciput* and *Vingtième*, consequently gave judgment for the eldest son.

By comparing the principle consecrated by the first clause of the fifth article of the present, with the system that prevailed under the old law, we again find that a total change for the better has taken place. Under the former, the eldest son began by selecting the most valuable tenements situated on the *smallest portion of land*, in order to take the greatest *number* possible, and frequently succeeded in getting ALL, as he generally reserved the most valuable and extensive portion for the last fractional part of the number of perches of land allotted to him as an eldership; whereas if he had commenced by this latter portion, the quantity being sufficient to make up the number of perches required, he would have been entitled to no more, and must have left the remaining houses to his co-heirs, as it now would be his interest to do; for on his selecting either spot he can go no further. It therefore becomes his interest at once to select the best, being thus restricted *to a single enclosure.*

As the fifth article may be said to refer more particularly to elderships on real property situated in districts within the precincts of what may, properly speaking, be called the town, the following may be said to refer to the eldership in rural districts.

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 Douzainiers 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 Douzainiers.*

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 equilization 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 where the estate is situated, would be authorized to assign him this third; *unicui que 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

* ***L'aîné a toujours la faculté de prendre le tiers de l'héritage en indemnisant la co-hérédité.***

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.

his estate, from the circumstance that farms of a certain extent are proportionably cultivated at much less expense than smaller ones, the Douzainiers 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 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. Formerly, as may be seen from the *Approbation des Lois*, page 15, the *Vingtième* out of which the *Préciput* was originally taken, was always raised, not from such portions of the estate as the Douzaine or eldest son might think fit, but from the nearest spot whence the son or sons commenced to take their *Vingtième;* of which it is said: "Les fils ayant commencé à " prendre leur vingtième en un lieu, doivent prendre tout ce " qui leur peut venir sans aller en d'autres terres si le lieu peut " suffire; sinon aux terres les plus prochaines se doivent " fournir." Bearing in mind this passage, the Committee of the Petitioners proposed that, if there was not sufficient land round the principal dwelling to make up the third after the eldership had been raised, that in such a case the elder son should take the remainder on the nearest spot, as formerly; unless on that spot there happened to be raised buildings or tenements; in which case, he should be bound to take the remainder from the naked ground, where the surplus could be made up.*

The Committee of the Court modified this proposition,† by recommending that the Douzaine shall have the faculty of assigning the portion of land whence the third should be made up; always however with the proviso of subjecting the eldest son to return a fair equivalent, either in rents or money, for its value, which principle has been consecrated in the second clause of the sixth article.

It is therefore easy to perceive that this third is by no means

* Vide Appendix, letter A, p. 11, art. 7. † Vide Appendix, letter C, p. 35, art. 6.

granted as a *gratuity* to the eldest son. He is always bound to account for its value to his co-heirs, at a rate set upon it by the Douzaine, which as in all matters of this kind, if found too high or too low by the interested parties, may always be referred to the judicial authority; for however desirable may be the object of preventing the subdivision of estates, it has not yet attained such peculiar favour as to cause the claims of nature and justice to be altogether set aside on the score of public policy, or the decided opinions of some political economists.

Having seen that the eldership or *Préciput* can only be raised on a single enclosure, as well in the town as in the country parishes, we shall now see in what it consists,—a subject become of the greatest importance, particularly since the restriction of the eldership to a single enclosure.

The enclosure to which in law the eldest son is restricted, in reference to his eldership, consists 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.

The following article consecrates the principle that, in future, the eldest son is only to have ONE Préciput on the estates of his parents, and points out the manner in which it is to be raised.

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

* *L'aîné ne peut désormais lever qu'un seul Préciput dans chaque lignée de ses parents; le choix lui est toujours réservé en observant certaines précautions.*

Article 7.—Le fils aîné ne pourra lever de Préciput sur la succession hérédi-

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 grand parents. This is comformable to the fourth article of the 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 grand parents 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's and grandfather's estate; 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 grand parent, of such line; or its value in rents or money, 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

tale du survivant de ses père et mère, à moins qu'il n'ait fait évaluer par les Douzainiers 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 Douzainiers, 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, 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.

* Vide Appendix, letter A, p.p. 4 and 10, Art. 4.

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 grand parents, 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 comformable 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 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 that of both relatives falling in at the same time. When a single eldership could be thus deemed sufficient in the inheritance of both parents, it might be easily presumed that one was quite enough under any circumstances, and so it is

Vide Appendix, letter C, p.p. 34 and 35.

settled by the seventh article, in conformity to the desires of the Committee, whose remarks upon this subject are extremely pertinent.

The remedy which has been adopted is a proper one, and is the same as that proposed by the Petitioners in the case of the daughter who has received her marriage portion, and who accounts for it on her claiming to share in the division of the *personal* property of her parents; retaining it however, without any interference on the part of her co-heirs, if she abstains from all claim to such property.

CHAPTER II.

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

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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 sea 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.†

This article contains two very distinct propositions;—the mode of subdividing property within the barrières or precincts

* 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 droite 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 la 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-Durand; et de là traverser aussi les terres en droite ligne jusqu'au coin de l'Est de l'écluse de la Charrotterie: 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.

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 it indeed 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 any where 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, where the town parish, whose inhabitants it wholly concerns, may in truth be said to be wholly unrepresented, and as a matter of course set aside by the Privy Council, before whom no one appeared to defend their interests, though many of its inhabitants had some hundreds, not indeed to say thousands, at stake, by the augmentation of value which in consequence of the principle would have occurred in their property, the predominant feeling being to equalize children whenever state policy is not opposed to this principle. Viewed from whatever point, whether sound policy, justice, the ancient custom of Normandy, of such high authority on so many points with some of our authorities, every thing in the shape of argument favours the principle of equal division of property situated in towns, though a similar mode of division would have an injurious tendency if applied to rural districts, from the too extensive dismemberment of estates to which it would ultimately lead. The feelings of the inhabitants upon this subject, cannot be better expressed, than by the general, not to say universal, desire manifested by proprietors of lands, gardens, and dwelling houses, in the precincts of the town, to be included

* Vide Appendix, letter D. p.p. 49, 50 and 51.

within the barrières, and the example of some honorable men, who disdaining to take advantage of an unjust and unwise law which excludes sisters from their just portion of such inheritances, have admitted them to share on an equality with themselves. How long will the law render the just alone sufferers, and support such as would take all to themselves, in their extravagant notions respecting the necessity of favouring one sex to the prejudice of the other, when neither the statesman, the political economist, the divine nor the lawyer can furnish the slightest reason for so doing, with regard to real property thus situated? Commerce and Agriculture, those main sources of public prosperity, require very different rules in the transmission of property to co-heirs. Commerce needs neither the sacrifice of feeling entailed by primogeniture, nor that any peculiar advantage should be granted to any one child over another; on the other hand the extensive subdivision or piecemealing of land is the bane of Agriculture. Where such a marked difference exists in the nature of things, is it then so very difficult to introduce a corresponding one in the nature of the laws by which they should be governed? Does not the wisdom of rulers eminently consist in thus subjecting to different laws, properties which from the nature of things require such different rules to enhance their value? Is the idea that *uniformity* of law should reign throughout town and country to overrule the dictates of justice and sound policy, which have prescribed a difference in such laws, a difference too which has existed both in Normandy and the Island,* from time immemorial, where property in towns has never been subjected to *primogeniture*, as the following article, the 270th, of the ancient custom clearly demonstrates?

"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

* See the Approbation des Lois of 1582, quoted on page 3, where it will be found that it is only with regard to real property situated beyond the precincts of the town, that is to say, without the *barrières*, that *Primogeniture* exists.

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

"although the daughters have no claims on farms and build-"ings 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.*

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 had done 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 the co-heirs in lineal successions, in the manner provided in the 2nd Article, that is to say, the sons shall take two-thirds, 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.

Another reason adduced by the Court's Committee for not subscribing to the principle demanded by the Petitioners, of an equal division of such lands without distinction of sex, was that the sons who might feel inclined to continue their father's business, would be put to very considerable inconvenience, had they to pay their co-heirs, in return, too heavy rentals, or hypothecations on such property.

Were the sons obliged in any case to take to their parent's property, this argument might be entitled to some weight, but such is not the case; they may accept or repudiate their parent's inheritance as they please, and if neither they nor any of their co-heirs choose to accept that portion of it, more particularly that situated within the barrières, all are then at liberty to dispose of it for the common account of the succession, as provided by the ninth article, wherein it is stated that each heir, according to seniority, will have the

* Respecting these rents, Basnage, in his Commentary on the 270th Article, 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."

choice of the property situated within the barrières, commencing by the sons, and on their refusal, proceeding to the daughters.

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It is also difficult to see how an equal division among the co-heirs generally, should have a tendency so much to overburthen with rents this kind of property, when the principle of equitable division among the sons has not thus far produced such a result. The great number of rents lost on houses in town, of late years, has been occasioned, not by the subdivision amongst many co-heirs, but by the gradual depreciation of this kind of property, through decline of trade at the peace, and the preference universally given by strangers and affluent persons to houses with gardens situated in the suburbs of the town, and to others in the country, which for many years have in consequence fetched a comparatively high rental. To these causes, and not to the principle of subdivision, must be attributed the depreciation of property thus situated, and the consequent loss of rents constituted thereon, at a time when their value was so much more considerable. No property has so much suffered in this respect, as stores and vaults, notwith-

* Vide Appendix, letter C, p. 34.

standing that for accommodation and excellence, those of Guernsey are not surpassed by any in Europe.

So far indeed from the principle of equal division having the effect of depreciating property, it would, on the contrary, tend to raise it considerably, as parents then would find a safe, commodious, and equitable means of investment for their children, instead of laying out their capital in foreign stock, where many are tempted to invest their fortunes, less on account of the rate of interest it yields, than through the more absolute ownership it vests in the holder, and the more equitable manner in which it is divided among co-heirs.

That the inducement to divide real property more equitably among co-heirs is very great, may be easily perceived, from the anxiety of proprietors of every description, in affluence or otherwise, to get their property included within the limits of the barrières, and the general feeling of disappointment evinced by many who have not succeeded in getting theirs so included. It cannot then be doubted that the proposed system of equal division was a wise and just one. Demanded by the vast majority of house proprietors in town, and supported as it was by the ancient law of Normandy, could it be supposed that it would be defeated on the bare ground that it had a tendency to overburthen their property with rents?

But is there then no remedy for this comparatively trifling disadvantage? A few moments reflection will decide. What difficulty would there be in abolishing the system of creating *perpetual* wheat rents on such property, known as *rentes foncières*, most of which fluctuate with the price of corn, when it is physically impossible it should yield any grain in return, and rendering all such rents essentially redeemable at a certain fixed rate, say twenty pounds per quarter? This would prevent town property from becoming overburthened with rents, and arrears, which generally terminate by crushing the owner. *Garanties* or *warranties*, the great bane of our system of landed tenure, would thus become simplified, and lose much of their pernicious influence, as each would be induced to lay out a portion of his means in relieving his property as soon as it became in his power to do so. Among

co-heirs, particularly, the system of purchasable rents would in many instances prevent the creation of those irredeemable rents, the pernicious influence of which is so justly dreaded, by all the co-heirs then finding it their common interest to take their shares in money instead of *assignable rents*, which, in the course of years, so frequently turn out a loss either to the assigner or the assignee.

In this way, justice would be conciliated with sound policy, the female sex would divide in equal proportions with the male, and the heir to whose lot such property would fall, would always have it in his power to discharge the hypothecations on it, at his leisure, or in other terms to render it his own; for whilst the rents or hypothecations remain, it may in reality be said to belong rather to his co-heirs, than to himself. At least one would no longer hear the injustice of one system assigned as a reason for upholding the bad policy of another, nor be condemned to listen every now and then, to the useless lamentations of sufferers, whose loss entirely proceeds from their own passive submission to the cause of their wrongs.

Were any further arguments required to show the justice and policy of a more equitable division, they might be found in the Baillif's words, which though set forth merely with a view of extending the barrières beyond the limits proposed by the Court's Committee, will equally apply to promote the principle of an equal division of property situated within their limits:—'In Town,' said the Baillif, in his notice of convocation of the States,* for the purpose of deliberating on the reform of the laws of inheritance, 'where the fortune 'of fathers is often totally laid out on the land which belongs 'to them in houses and mercantile establishments, there would 'be the greatest injustice in granting the whole to the eldest 'son. It was this consideration that gave rise to the distinc-'tion between properties situated within and those situated 'without the barrières, a distinction become as a drop of 'water in the sea since the town has so considerably ex-'tended, and which renders the extension of the barrières 'absolutely necessary, and at least to the extent proposed by the

* Billet d'Etat issued the 7th of February, 1840, convening the States for the 14th of that month.

'eighth Article* respecting which as complete unanimity 'reigns among the inhabitants, as it is possible it should upon 'any subject. Never were more futile reasons adduced than 'against this measure. Houses and commercial establish'ments, it is said, would become burthened with rents by their 'repeated subdivisions among co-heirs, as if rents created 'thereon could ever be more advantageously laid out than in 'relieving their wants and enabling them to set up in business 'to obtain a livelihood: as if any co-heir could be compelled to 'accept any portion of inheritance burthened beyond its value; 'and even supposing any portion was thus overburthened, 'would not justice require that the loss, as the gain, should 'be equally distributed among all? At any rate can reasons 'sufficiently powerful be adduced, to put a whole family 'pennyless out of doors, which might be possessed of the 'means of living in comfort, for the purpose of supporting 'in affluence an eldest son whose accumulated wealth may 'have caused him to contract habits of laziness?'

It may now be fairly asked, could more powerful reasons be adduced to engage the legislature to grant the claims of the proprietors requiring the equal division among their children of houses and lands so situated? Notwithstanding their earnest wishes, supported by the vote of the Town Douzaine, who may be presumed to be as competent judges as any on the merits of such a question, their claim was rejected by the Court and States without an effort being made to support it before the supreme tribunal of the legislature, where it must have triumphed had they only been heard in its defence. So that at present, real property situated within the barrières continues as formerly to be divided among co-heirs without the privilege of primogeniture, that is, the sons take two-thirds and the daughters one-third, without however in any case the portion of a son now exceeding double that of a daughter or that of a daughter ever exceeding a son's portion.

In fact the distinctive feature between the first and eighth articles should not be forgotten, no *Préciput* or eldership has ever been allowed to either sons or daughters upon pro-

* This Article, as amended by the States' Committee, now forms the 8th Article of the modern law.

perties situated within the barrières; nor have any of the privileges of primogeniture existed in Guernsey any more than in Normandy on such properties, only that now the sons in most instances still take two-thirds to the daughters' one-third, whereas in Normandy all co-heirs in parity of degree ever divided it in equal proportions without any distinction of sex.

It would be superfluous to trace the present limits of the barrières, that having been done already by the second section of the present article. By comparing these limits with those set forth in the 8th article of the Report of the Court's Committee,* it will be seen how much the States have extended them. It is true that between the 5th of April, 1839, when that Report was framed, and the 14*th of February*, 1840, when the States definitively adopted the present system of the barrières as ratified by her Majesty in Council, public opinion had become more decidedly than ever pronounced in its favour; and it only required of the States to grant the principle of the equitable division within these limits, and that every parent should have the faculty of disposing of one-third of the whole value of his property as he pleased among his children, to have satisfied the great majority of inhabitants, and to have put off the further consideration of law reform for a century to come.

It cannot be too often repeated that it is less the number of rents created on town property than their irredeemable nature that has contributed to its depreciation, to mitigate which the system of *retraite*, or right of redemption, which might be more appropriately called, abuse of redemption, should be modified, and thus one great incentive to create them on property will disappear, as purchasers would no longer be so frequently disposed to buy real property for rents of this kind, with a view of preventing the relations of the vendor withdrawing it for themselves, as they may now do, whenever it is sold for money, or redeemable rents, however inconsiderable the amount of the former, or number of the latter.

Restricting the number of *retraites* by only allowing them

* See these limits traced in the eighth Article of the Report of the Court's Committee, whose object appears to have been merely to include the commercial parts of the town within the barrières. Appendix, letter C, p. 44.

after sales of real property *inherited*, added to the circumstance of rendering all rents created on houses which have not one vergée of land attached to them, essentially redeemable, would further tend to mitigate, if not indeed remove, many of the evils of *guarantees*, the great bane of our system of tenure, the ancient *bail à rente* of France before the Revolution, but which, like many other institutions that originated in distant ages, when owing to the scarcity of a circulating medium lands were rather *exchanged* than sold, have disappeared from its code of laws, and been replaced by a system of hypothecation much more simple in its administration, and better suited to the habits and interests of a great mercantile community. It must however be stated that such powerful reasons do not exist for abolishing corn rents on lands as on houses, as the rents on the former may be truly said to represent in reality its annual value, for which parties are at liberty either to exchange or sell their *agricultural* property.

The subject of *guarantee* deserving, from its intricacy and importance, a more minute consideration than it would be proper here to give it, shall be reserved for a separate chapter, when its origin and its consequences shall be developed, as this could not be here done without carrying the present chapter on LINEAL INHERITANCE WITHOUT PRIMOGENITURE, to a greater length than would correspond with the circumscribed limits of this Commentary on the amended law of inheritance. The object of entering into further details will be to show the pernicious influence of guarantee on our system of landed tenure, particularly with regard to property situated in towns, with a view to supply a remedy, without which, notwithstanding all its vaunted advantages, it can be considered but as of very doubtful utility. Indeed the very bulwarks of real property are sapped at their basis by the insecurity which must ever attend a system wherein the purchaser of real estate, and the subsequent purchasers, can only consider themselves safe after a possession of forty years, that is to say, after the expiration of the term prescribed by the Statute of Limitations, as necessary to secure a good title against all the indirect liabilities to which such estate is subject.

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 chooses the first lot, the second shall be first offered to the second, 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.*

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 proprietors in common and joint proprietors, 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

* ***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 Douzainiers 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 co-héritiers refuseront de prendre à la dite évaluation, seront licités publiquement pour le compte de la co-hérédité.

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* chooses the first lot, the second shall be offered to the next in seniority, and so on in rotation. If the eldest son refuses 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 estate.

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 clause by which 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.*

In fact there is quite as much reason for thus preventing the division of houses among co-heirs, as there is for preventing the subdivision of furniture which has long been adapted to a certain locality; these subdivisions profit little to the co-heirs when shared amongst them, whereas to the person in actual possession the loss may not unfrequently be a serious one:—thus are proper means provided by the amended law for each co-heir to suit himself.

That discrepance which existed between partitions of real property in rural districts, where the eldest son took every thing, and those in town where the liability of property to subdivision among co-heirs became a frequent subject of discontent, has been set aside by the modern law, which in every instance, provides not only against the dismemberment of estates, but also for a more equal distribution of real property among co-heirs, and these together constitute its main features in regard to lineal descent.

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 secured to the married daughter, who has neither received a marriage portion from her parents, nor been provided for by a marriage contract, one of the grossest and most unwarrantable injustices of the old system is removed,

* *Les filles mariées partageront de droit dans la cohérédité en rapportant à partage leur Dot, laquelle leur sera exclusivement devolue 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.

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 share 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

* Vide Appendix, letter A, p.p. 4 and 10, Art. 6.

expedient to place the principal beyond the controul 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

* Vide Appendix, letter E, p. 63, Art. 29.

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.

CHAPTER III.

OF INHERITANCE IN THE COLLATERAL AND ASCENDING LINES.

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 to 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 relationship, so eagerly sought after by all nations claiming any pretension to

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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 in 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 38th 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 inheritance it is as advantageous as could be expected, yet in collateral inheritance 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 relative's inheritance. 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

* Vide Appendix, letter A, p.p. 7 and 8.

Collateral inheritance 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 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 said 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 and cousins who descend from the same grand parents, and on that account were styled *Cognats* or *quasi* CONGENITI, all having the same origin: *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

* L. 10. Sec. 3. ff. De Gradibus. † L. 1. Sec. 1. ff. *unde cognati.*
‡ 19 Table, Vol. 1. p. 247, according to the civil mode of computation.

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

James————*the grandfather and common ancestor.*
|
Robert—Henry——*his two sons, father and uncle to John.*
| |
John—Nicholas——*John's first cousin.*

From John to his father, is one degree, from Robert to the grandfather James, *the common ancestor*, is two degrees, 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.†

* 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*.

† See for the mode of computing degrees under the fourteenth article.

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 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.

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

* L. 10. S. 10. ff. De Gradibus.

as the civilians have it *jus concurrendi cum proximiore 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 described 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 grand uncle's inheritance, and that *ad infinitum*. Thus, suppose Nicholas

* *Dans les successions collatérales, le sexe feminin n'est plus exclu par le sexe masculin en parité de dégré, et notamment aux* PROPRES, *où l'on hérite par souche.*

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.

dying without issue leaving James, Robert, and Sarah, his brothers and sister, 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—James—Robert—	*Richard*——	*Anne*—and Sarah.
de cujus.	deceased	deceased
	William, Joseph and Mary.	Henry and 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, which 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 :—

	Q.	B.	D.		Q.	B.	D.
Thus—To James	3	1	2				
To Robert	3	1	2				
To William, Joseph, and Mary, representing their deceased father *Richard*	3	1	2	These quarters, bushels and denerels will be thus sub-divided:			
				William	1	0	$2\frac{2}{3}$
				Joseph	1	0	$2\frac{2}{3}$
				Mary	1	0	$2\frac{2}{3}$
				Quarters	3	1	2
To Sarah	2	2	0				
To Henry and Elizabeth, representing their deceased mother, *Anne*	2	2	0	Of these two quarters and two bushels Henry would take two thirds, being the brother	1	2	4
				His sister Elizabeth, the remaining third	0	3	2
				Quarters	2	2	0
Quarters	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 a *fortiori* would it 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 evenhanded justice reigns.

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*. Thus has disappeared, in part at least, the misnamed *dignité du sexe* from our system of inheritance; before its reform perhaps the most disgraceful and incongruous ever tolerated in a civilized community.

The system which at present prevails in collateral successions to *real property inherited* is in every respect similar to that which obtains, in lineal inheritances, to real property of every description, barring the right of primogeniture. Demanded by the tenth clause of the Petition, it was adopted *unâ voce* by all the constituted authorities, and ultimately sanctioned by the legislature, who, it may be said have, in substance, promulgated, that, in collateral inheritances, the male sex shall never exclude the female in parity of degree, that sisters shall inherit 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 grand nephew 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 grand father, to place himself in the first or second degree of relationship, to include his grand uncle, 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 neices 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.*

* *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 leurs descendants n'excluront pas les femelles ou leurs descendants,

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 inheritance;—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 per-* "*sonal or real, would be shared in successions in a direct* "*line;*" it will be seen that in collateral successions property of every description, real and 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;

en parité de dégré, mais les plus proches parents du décédé, en parité de dégré, 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 dégré 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.

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*——*Anne.*
deceased deceased
| |
Mary and 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 terms 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 Richard's

* 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 on an equality of degree, has excited much discussion

estate be divided in the same manner among his nephew Henry and neices 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 neices 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 neices, 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*:

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 Accurse to that of Azon on this subject.

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 Mons. Touillier, one of the most eminent writers of any age on civil law.—Liv. 3. Tit. 1. Chap. 3. *Des successions*. No. 190. Tome 4. p. 213. "C'était autrefois, says he, à l'école et au barreau une grande question de savoir si, dans ce cas, les neveux qui se trouvent en dégrés 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 interprêtes, 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."

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.

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 the greatest philosopher of modern times.†

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 grand nephews as well as nephews might inherit of their uncles and aunts in the event of the death of both their parent and grand parent, 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 three hundred and fourth 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*

* 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.

† Bacon, De officio judicis.

‡ Appendix, letter D, page 52.

§ See the Report of the Court's Committee under the 11th article of the Petition. Appendix, letter C, p. 40.

*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 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 grand uncles, 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.

But the law excluding grand nephews and grand nieces, who have lost their parents and grand parents, from their grand uncle's succession to *certain properties*, when there are uncles and cousins living, it must be followed; and the only remedy

* Nov. 118. cap. 3.

† 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 aux 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.

left to children so situated, is for their relatives to render them heirs by a will, since the legislature has thought proper virtually to exclude them, as heirs at law. These grand nephews could however always succeed to any inherited real property, *or propre*, of their grand uncle, notwithstanding the loss of their parent and grand parent, 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 grand nephews 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.

James de cujus——George——Mary——Henry
deceased deceased
| |
Titius and Thomas   *Richard*
deceased
|
Robert and Paul.

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 the sixty 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 females, 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 grand uncle George, through their father Richard and grandfather Henry, who, had *either*

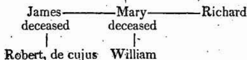
of them lived, would have divided equally with George in James's inheritance.

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:



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, however, be denied that there is quite as much reason to allow William the benefit of representation to succeed with his

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

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 an 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.*

In fact, the system of representation, as the remover of injustice, and apparently as the offspring of civilisation, for it may be gradually observed extending its ramifications throughout the law as nations become more humane, and consequently more enlightened, cannot be too powerfully supported as a principle, whenever that can be done without infringing on legislative decrees.

The thirteenth article being absolutely detached from collateral successions, and referring more particularly to the rights of parents to the property of their children, it will be reserved for a separate Section.

SECTION 2.

ON INHERITANCE IN THE ASCENDING LINE.

Preliminary Remarks, setting forth the striking 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 that parent's instrumentality and bounty.

* Vide Appendix, letter D, p. 67.

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 an 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.*

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* Vide Appendix, letter D, p. 62.

In fact as the late system of collateral inheritance was strongly impregnated with that barbarous spirit which pervades rude states, whose notions of government and personal security seem to consist in erecting the law of the strongest into a system; so did this spirit also prevail throughout inheritances in the ascending line, the parent being in every case deprived by law of his offspring's inheritance. In examining the revolutions which have taken place in the system of inheritance, as well in ancient as in modern times, it would appear that mankind in all ages had been doomed to pass through the ordeal of most unnatural and unjust systems in their progress towards civilization, and that it is only long after they enjoy its blessings that they become in any way inclined to exchange their institutions for others better suited to their wants and habits, as may be seen in the reforms effected at various periods in France in the Roman law, and in the French civil law, chiefly during the sixteenth century, most of which now constitute the law of that country, as definitively settled in its Code.

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'Aguessau, 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.**

In fact, 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 rust 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 118 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.

* *L. 6. ff. De jure dotium. L. 4. Cod. Solut. matrim.*

The different systems of inheritance which at various periods prevailed at Rome, from the promulgation of the Twelve Tables to its final reform by Justinian, who admitted indifferently the female sex to divide with the male, form some of the most complicated features in the annals of jurisprudence. At one time neither parent inherited from his children; at another the father was admitted exclusively of the mother, sons sometimes excluded daughters; at others they jointly participated; even grandchildren who had lost their parent were not always allowed to inherit from their grandparent, whose children were deemed nearer a kin than grandchildren, and consequently preferred. The feudal law of the middle ages was no less replete with subtleties and still greater incongruities, inheritances to certain kinds of property in the same province being absolutely different to that which obtained in other kinds of property. In fact the history of all nations proves that as civilization advances the laws of inheritance become less complicated, less arbitrary, and in consequence more conformable to the dictates of justice and humanity; then it is that REPRESENTATION, the great remover of unnecessary hardships, by tempering justice with principle, assumes the ascendant, by setting aside undue severity, without diminishing the force of principle. The history of those gradual reforms introduced into the system of inheritance, in its different stages, from a comparatively rude to a civilized state of society, presents as inextricable a labyrinth as is any where to be found, and if it be borne in mind that no two of any state perfectly correspond, the attempt of finding out the best may well be given up as unattainable; the prevailing notions of rulers and people upon this point at different periods, being still more greatly diversified, than even those they entertain respecting the best system of government, and the degree of power to be vested in the executive authority.

Whoever reflects on this tendency of rulers to improve the condition of the laws, as civilization progresses, will not be surprised at the declaration set forth by the Court's committee in reference to the twelfth article proposed in the Petition, *qu'on ne peut trop approuver cette proposition.* Now, by the second clause of that article, it was demanded that parents

should inherit all the personal property as well as the real property purchased by their children, besides being entitled to the enjoyment during life of the real property inherited by them, a proposition conformable to the law of many states, even where the principle of affection has been in great measure sacrificed to political considerations on the subject of inheritance. The illustrious DOMAT, after stating that the Roman law acknowledged the right of parents to succeed in preference to all collateral relatives, observes that even in the provinces of France, governed by their own particular customs, of which Normandy was one, most of them left parents and ascendants the right of succeeding to all the personal property and real property purchased, as well as inherited, by their children, from their own line; and to the usufruct, or enjoyment, of the real property ***inherited, even from a different line*** from that whence the parent himself was descended; in order, it was said, to reconcile the natural claims of parents with the principle that property should return to the stock or family whence it sprang. "*Ces coutumes,*" says Domat, (the customs here alluded to were laws or usages peculiar to the Northern and Western provinces of France before the revolution, which were styled *pays coutumiers,* in contradistinction to other provinces, mostly in the South and East of France, called *pays de droit écrit,* where the Roman law chiefly prevailed) "*laissent aux ascendans les meubles et acquêts de leurs descendans, et les propres venus de leur estoc. Ce qui a ce double effet de conserver les propres dans les familles d'où ils sont venus, et de pourvoir à ce que l'équité demande pour les ascendans.*"*

The foundation of this right of parents and grandparents to inherit from their children, has never been more admirably exposed than in this truly great civilian's own words, and they who would attempt to reconcile the institutions of feudalism in matters of inheritances with the precepts of either natural or revealed religion would do well to ponder on them. After stating that there are three orders of succession;—the first, that children should inherit from their parent,—the second, that parents should inherit from their children,—and the

* Lois civiles, Liv. 4. DES SUCCESSIONS. Sec. 4. page 302.

third, that heirs in a collateral line should also inherit,—Domat observes—"that this second order by which ascendants or parents are allowed to inherit from their children, is not a natural 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 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

* 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.

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."*

What a contrast do not such principles present with the institutions of feudalism! 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 expressions " était Chrétien en philosophie " comme Domat était Chrétien en législation;" of the latter he observes—" Domat, ami et presque élève de Pascal,† n'hé- " sita 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 décou- " vrit le monde, la société, ses lois, sa fin. Et, chose admi- " rable! 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;

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

† Pascal and Domat were both born at Clermont, in Auvergne: Pascal, born in 1623, 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. Monsieur Touillier, the rival of the latter, was then a promising young barrister, and lived to see his work esteemed the most renowned of the day, having attained the age of eighty. Since the death of 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.

"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'Evangile 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 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,

* Chap. 12. Sur Domat. Pages 111 et 112. Introduction à l'Etude du Droit.

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:

First,—That ascendants shall inherit only from the last of their descendants;

Secondly,—That the male parent is always preferred to the female, in parity of degree;

Thirdly,—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;*

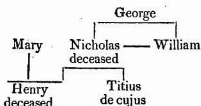
Fourthly,—That parents who take the precaution of securing an acknowledgment from their descendants or *donees* shall inherit exclusively of all others to such property. This shall form the subject of a distinct section.

* *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 dégré. 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.

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 monies, 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 thirteenth 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 twelfth proposition of the Petitioners been adopted without any modification, the mother 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 following 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

* 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 only is known by the generic term *propres*, personal property though inherited without any regard to its value or amount being known as meubles et acquêts.

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.*" Article 66,* now the 57th of the French charter, but modified since the accession of the present King of France and the Revolution of July, in cases of high treason only.

The reason that has been alledged to prefer the thirteenth article of the Committee's Report to the twelfth of the Petition, is the desire to conform as much as possible the modern law of the Island to the reformed laws of Normandy, in order that these might in some respects still continue as a guide for the judicial authority to frame its decisions; this may be easily seen from the following remarks contained in the Report, wherein it is stated that it is "impossible not to approve of the propositions contained in Article twelve, that fathers and mothers be admitted to inherit from their children. Our local usages, by which they are always excluded, appear to us singularly unjust and unreasonable. It is also directly at variance with the ancient custom of Normandy. We are of opinion that it would be proper to follow the principles which the latter custom had established on this subject."†

As to the thirteenth article of the Petition, the Court's Committee refused to entertain it, alledging its incompetency; and moreover that as an individual, who had no relations within the degree of second cousins in the line whence such property came, could, by the law as now adopted, always dispose by testamentary bequest of his real property inherited, there was no longer the same reason, as formerly, for requiring a change in this part of the law.—

"The change proposed in the thirteenth article of the Petition does not," says the Court's Committee, "appear to us to be of our competency, the fiscal revenue being interested therein. It will perhaps be better to leave things as they are, particularly as the article which we recommend, with regard to the

* Sixty-sixth Article of Louis the Eighteenth's Charter.

† See the Report of the Court's Committee, Appendix, letter C, p. 40.

faculty of bequeathing real property inherited, will, if adopted, always present a means whereby this defect in the law may be supplied."*

From the above remarks it will be seen that the crown no longer excludes a parent from any 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 can result from the rejection of the thirteenth article of the Petition, recommending that the heirs of one line should succeed, preferably to the crown, to the real property which a deceased owner has 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 her 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

* Appendix, letter C, p. 40.

† Bacon, on the maxims of the common law of England.—Article 11th.

than the fancy and caprice of lawgivers;* and which he 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. Cet 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 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."†

Doubtless, society has the right and power to select its own constitution, and to change or modify the rules or laws by which it is misgoverned, but this, like all other great and salutary rules when abused of, entails the more disastrous consequences, precisely as its wise application would have secured the more lasting benefits; *optimi curruptio pessima*. Hence the abominations which proceed from all systems of law and government which have no more solid foundation than the fancy, the ambition, the vanity of rulers; the more guilty that during the prevalence of that period, emphatically known as the dark ages, they prostrated the most sacred rights of society, and some, even in more recent times, have

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

† Pensées de Pascal.—*Supplément, première partie*, Art. 12.

become so far infatuated with some of these systems, as to question both the right and power of posterity to unrivet the very manacles by which in those days it had been attempted and hoped to retain their persons and property in universal bondage. Hence arose the system of ***retraites***, or abuse of redemption, with its usual concomitants, perjury and fraud; ***escheats***, with its cries and lamentations; wardships, *primer seisins*, reliefs, with their innumerable extortions, and last, though not least, the inability to will real property, which destroyed the main attributes of ownership; all which constitute irrefragable proofs, how, during many centuries, "les tours ***d'imagination*** et la *fantaisie*, pour ne pas les qualifier l'ambition et la vil cupidité des législateurs ont présidé à la confection des lois."

On reviewing the source of so much iniquity and crime, and on examining what has been done by the amended law to remove them, one cannot help thinking that more might have been accomplished, by further restraining the abuses of retraites, and limiting them solely to the sales of inherited real property; that parents should have been entitled, under any circumstances, to *enjoy* the real property inherited by their children, to the prejudice of more distant relatives, particularly, as observed in the Report of the Court's Committee, that in these days the ties of relationship only subsist between near relatives.*

Should, in fact, another case similar to that of Miss De Rozel occur to-morrow, that is to say, of a person dying intestate possessed of real property inherited from the paternal line, neither her mother nor her maternal relatives, however closely united, such as her maternal uncles or aunts, could inherit any portion of it—it would escheat to the crown; and were the owner a minor, no will could be made; and thus again would be renewed the scenes which the Petitioners had fervently hoped might have been banished for ever from this bailiwick, of the mother having, through the visitation of HIM whose ends are inscrutable, not only to mourn the loss of her offspring, but likewise to deplore the loss of her fortune. The same rule will also apply to the father and his relatives similarly situated; and all these abuses must be perpetuated

* Appendix, letter C, p. 37.

for no other purpose than that of maintaining the puerile and impolitic distinction between the inheritance of real property purchased and real property inherited! Such nevertheless continues to be the reformed legislation of a free and religious community in the nineteenth century, emanating too from constituent authorities elected by the people, as their fittest representatives to fill the most important and arduous municipal and judicial offices!

That instances of great hardship have occurred, and may yet occur, will be seen from that part of the order in Council registered here on the twenty-fourth of October, 1840, by which Miss De Rozel's estate is ordered to be sold for the benefit of the crown, with a proviso that one-third part thereof, should it not exceed one hundred pounds sterling, should be given to the Misses Le Roy, who were intimate with the deceased, and who had petitioned the government to grant them the property thus escheated.

This property consisting of a house and garden, situated at Havelet, is supposed to be worth about twenty quarters, or four hundred pounds. The claims of the heirs, who petitioned, have been set aside, though upon what ground has not transpired. Yet with such an example before their eyes, the local authorities of this said-to-be-privileged community countenanced this horrible law of escheat, rather than allow the heirs of the other line to inherit respectively from each other, on the extinction of heirs in either line.

Neither the Court's Committee, nor the States, would listen to the proposition, that the heirs of one line should inherit from the other on the extinction of all its members;* indeed it cannot be said that ever the proposition was fairly submitted to the States, who, in their present defective form, have only to deliberate on what their President deems proper to submit to them, and which, in the present instance, was the project of the Court's Committee, who had rejected the proposition, without substituting any other in its stead. It was in vain that the Petitioners, in their second Report, entreated the authorities to submit this important proposition before Her Majesty in Council, in a proper form. But without

* Appendix, letter C, p. 40.

their share of representatives in the local legislature how was it possible they could expect that their propositions on this subject, or indeed upon any other, should meet with that attention they deserved? The members of the Court's committee having declined noticing the thirteenth article, not conceiving themselves competent to entertain it, the Petitioners, trusting that their benevolent Sovereign would deem it the glory of her reign to entertain the peace of families, by granting them the right to succeed to each other's property so long as the ties of relationship subsisted between them,* again besought the Court to submit the matter to the States; but to no purpose.

In the mean time Miss De Rozel's property was disposed of. The claims of her heirs having been rejected, and the petition of the Misses Le Roy so far admitted, as to obtain for them one hundred pounds out of the proceeds; and the law officers of the Crown, with the Queen's Receiver, deeming it advantageous for the public revenue that the real property escheated should be publicly disposed of, the Procureur, the Comptroller, and Receiver, on the twenty-fourth of October, 1840, presented to the Court, to be registered on the public records, an order in Council which had been obtained so far back as 1838, setting forth—that a house and garden situated at Havelet, forming the real estate of the late Miss Charlotte Mary De Rozel, containing thirty perches, not quite a third of an English acre of land, had escheated to the Crown in the year 1835, in default of heirs,—that they were so much in want of repairs that they had ever since been untenanted, and that it would be advantageous to dispose of the same for money or rents, or partly for money and partly for rents,—they were authorised to dispose of them accordingly, as also to dispose, in the manner prayed for, of the Queen's Mill, with two vergées of land, situated in the Catel parish.†

* Appendix, letter D, p.p. 53 and 54.

† 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 Honorable the Lords of the Committee of Council for the affairs of Guernsey and Jersey, dated the 23rd of February instant; in the words following:

This order was registered as a matter of course, and thus was again consecrated one of the worst principles inherent in the legislation of the dark ages, the more disgraceful that the contrast between the public feeling of the age when the doctrine of escheats originated and the present, is the greater. Will it be credited that within a few short months, the same officer registered on the public records of this island, the munificent donation of £300 from Peter Martin Carey to the De La Cour fund, and an order in Council debarring the natural, though not legal, heirs to the owner of real property to a similar amount? After this well may learned gentlemen talk of laws being the images of the feelings, ideas and manners of the people they govern.

Let it not be assigned as a reason that a person leaving no relatives within the degree of first cousins may always bequeath even 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 to provide suitably for their most deserving parents, relatives or friends. Besides, has not a parent greater claims on its child, than a first cousin, without any regard as to the source whence

[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.

his property sprang? Under any circumstances it can never be politic to interdict the willing of real property, whether inherited or purchased, under a system which allows the crown to succeed before a parent to a child's property.

Under all these circumstances, it is evident that nothing could have been more just or politic than to have made no distinction whatever between the right of bequeathing real property inherited, and the right of bequeathing real property purchased; and to have admitted the heirs of the paternal line, according to proximity of degree, to inherit from those of the maternal 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 3.

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 indeed 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*

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*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:—

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 advances 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 life time; 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 grand-children, through the apprehension that their death might cause it to be transferred to strangers, probably unknown to him,

* L. 6. ff. de jure dotium. † L. 2. of the C. de bonis quæ lib.

‡ 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.

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 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 maturity, 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 benificent 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 *ipso jure* SUCCEEDS in prefe-

* L. 6. ff. *De jure dotium*. L. 4. Cod. solutione matrimonio.

† As may be seen from the famous treaties of DOMAT and LEBRUN, as well as POTHIER, *des Successions*.

rence to all other relatives to property of every kind bestowed on his descendants on these dying without issue;* but such is not 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.

* Article 747 du Code Civil.

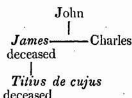
From the above terms of the thirteenth article, it clearly follows that by the modern law the father is not entitled to *succeed* as a matter of course to the advances he may have bestowed on his child, as was the case at Rome, and in France, and as it still continues to be in the latter country, for 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 *proprio jure*, INHERITS the property originally bestowed in the anticipation of his child's surviving him. 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 grand parent 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 descendants' succession. Thus, John bestows on one of his sons, James, an estate and one thousand pounds, which are 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 two hundred and forty first 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; and if the majority of laws and writers, and among the former the seven hundred and forty seventh article of the Code civil and writers thereon, whilst admitting that "*les ascendans succèdent à l'exclusion de tous autres aux choses par eux données à leurs enfans ou descendans sans posterité,*" yet refuse to grant the reversion from the donee's descendant, a fortiori under a law where ascendants do not succeed *proprio jure* to such property, but are only allowed to *prélever*, or raise in preference of all other heirs, the advances made the donee deceased without descendants, would they not be allowed to retake their property after once it had descended to any of the donee's posterity who had survived him, because the very existence of such descent would prevent the fulfilment of the condition on which the reversion was to take place, that is, the decease of the donee without issue.

The only way for the donor to prevent all discussion, is to stipulate that the property is bestowed on the donee and his descendants, and on the failure of the latter that it shall revert to the donor. By this means all questions with the heirs of the donee are set aside, and no fear need ever be entertained of that army of authors and judges again springing up to favour

* Père et mère, aieul ou aieule, ou autre ascendant tant qu'il y a aucun descendant de lui vivant, ne peut succéder à l'un de ses enfans. Article 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 241 of the custom of Normandy are absolutely to the same purport.

the position of either of the contending parties,* nor any opportunity afforded to others to deplore the frailty of the human mind, and the uncertainty of judicial decisions,† as was the case in former ages and even up to the present time. Thus justice may always in this instance be easily reconciled with law, on the donee's taking proper precautions at the onset, though in the absence of such precautions for the reasons already assigned, it does not appear how the question can arise in this jurisdiction.

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 monies 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

* As was stated to be the case by CLAUDE EXPILLY, who, in his work on the ancient laws of the province of Dauphiné, deplores not only the inconsistency of the decisions, but the variety of opinions entertained by authors on this subject; and he might have added the more so, that the question from the near relationship, not indeed to call it parentage, of the contending parties, could never be made the subject of a judicial decision, without harrowing the feelings of both, however strongly each might have considered himself justified in maintaining his position,—après s'être plaint non-seulement de la diversité de la jurisprudence, mais encore de la division qui régnait entre les auteurs :—il disait, " qu'à cet " égard, on aurait pu faire deux armées des auteurs qui avaient adopté des " opinions contraires sur la question, et qu'aussi la question était bien ambigue, " et pouvait être soutenue sans remords *in utramque partem*."

EXPILLY was president of the Parlement of Grenoble at the commencement of the seventeenth century, and was one of the most renowned professors of law of his time.

† BRETONNIER, on the custom of Paris in reference to the variety of judicial decisions on the subject, states : *Après tout cela, disait-il, quel est l'homme de bons sens qui ne déplorera l'infirmité des lois humaines et l'incertitude des jugemens des hommes puisqu'ils sont si remplis de variations et que ce ne sont que ténèbres et aveuglement !*—Liv. 6. questions 8 et 12.

BRETONNIER was a celebrated lawyer of the Parlement of Paris who flourished at the end of the seventeenth and at the commencement of the eighteenth centuries, and is more particularly known as the commentator of Henry's works.

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 raised on it, would not be followed.

From the foregoing remarks upon the system of legal reversion adopted in most provinces of France before the revolution, as well in those governed by the Roman law as in others whereby peculiar customs, this system of reversion became a sort of anomalous succession, which has been sanctioned by the seven hundred and forty-seventh article of the present code, it will be seen that it bears little or no analogy to the custom of Normandy, and still less to the right bestowed upon the parent donor, by our modern law, which in point of fact has rather introduced a conventional than a legal reversion. According to our system the donor's right must depend upon the nature of the convention or contract passed between the parties, whether it occur *coram judice*, as will be the case in reference to real property, or simply between them by virtue of a private agreement, or written acknowledgment presented by the donee to his benefactor. All this will appear more apparent from the definition given by all authors, as well ancient as modern, of such conventional reversion, which is nothing more than a stipulation between the donor and donee that in the event of the latter's dying without issue, the property shall revert to the donor, and which being based upon a private stipulation of the parties, must be every where governed by the same laws, unless indeed where they might have been specially forbidden, which it is difficult to imagine could any where occur,* such conventions having nothing either impolitic or immoral about them.

As before observed, the subject of legal reversion was one of the most difficult and complicated of the French law, and as the ablest writers differed upon its origin, so did they upon

* Le *retour* CONVENTIONEL, it is said, ne diffère en rien dans les pays coutumiers de ce qu'il est dans les pays de droit écrit. Dans l'un comme dans l'autre, ce sont les mêmes principes qui en règlent le sens, et en fixent l'étendue. To show which Domat observes—that the Conventional Reversion is always governed by the private arrangements between the parties, whether they occur between parents and their descent or other persons. Vid. *Lois civiles*, Lib. 2: Sec. 3. Art. 3. and last part of the commentary on the fifth article.

the natural consequences to which it gave rise, which were as varied as the different laws which governed France before the revolution.* With a little attention, however, all difficulties may be avoided.

CHAPTER IV.

ON GUARANTEE.

Preliminary Remarks.

After setting forth the rights which heirs in different degrees may exercise, and the obligations to which they are directly liable, there is one which from its importance deserves particularly to be considered, and that is Guarantee, or the liability to which vendors and purchasers, as well as heirs, are subject. The point of view under which guarantee, as a custom peculiar to this Island, shall be considered, is that by which any real property, either inherited or purchased subsequently to that already possessed by an owner, becomes liable to, or security for, the discharge of all the liabities due on the latter, though at the time of the original purchase the vendors could neither contemplate that their purchasers would have inherited or have purchased that real property which they nevertheless come upon as security for the discharge of the obligations due on that which they have sold. The unwarrantable power thus claimed by the original vendors, has become the bane of our system of landed tenure, and is a remnant of that authority which, during the prevalence of feudalism, sacrificed the rights of all subsequent tenants to

* Upon this subject Pothier, one of the profoundest writers on the Roman law, as on every department of civil and maritime law, states that the system of reversion, as established in the French provinces South of the Loire, *professedly* on the principles of the Roman law, was an invention of modern civilians and interpreters, and that were the Roman civilians to rise from their graves they would not be a little surprised to see their name given to a system of law utterly unknown among them. They were only acquainted with the system by which sums given by parents as marriage portions to their daughters, to enable them to support the charges of matrimony, on the decease of the latter without heirs, thus reverted to the donor. *Traité des Donations entre vifs.* Sec. 3. Art. 4.

Domat, on the *droit de retour*, Liv. 2. Tit. 2. Sec. 3. Art. 4; in his commentary thereon, is far from counteracting Pothier's opinion.

vest undue prerogatives in the original proprietors of land, who, during the infancy of trade and manufactures, and owing to the scarcity of a circulating medium, rather exchanged their lands in consideration of receiving a portion of their annual produce, than sold them outright for money, which comparatively few were enabled to procure.

However expedient the original possessors of lands, who at the same time were the framers and administrators of the law, might have deemed it thus to sacrifice the rights of all future proprietors the better to secure their own immediate rents or rights, certain it is that no legislator in these days could be found who would vexatiously fetter the rights of property to secure the original vendor an undue prerogative, the advantages of which are trifling compared with the enormity of evils it entails in the ruin of whole families, whose property by a more prudent and just system might be fully secured, without in any manner infringing on the rightful prerogatives of the original vendor.

These prerogatives no doubt sprang from the importance which the laws of ancient states gave to the land—an importance which it certainly deserved, and which it was not extraordinary it should possess, whilst it constituted the main source of public prosperity and individual wealth. Hence was the landowner surrounded with a chain of forms and warranties which often rendered it morally impossible to dispossess him, whether any portion of his land was required for the public service on granting him a previous and liberal indemnification, or whether in dispossessing an unjust or obstinate debtor who defeated his creditor by the very number of those forms which had been originally created for their mutual protection.

Of late years the forms of expropriating debtors from their real property have been simplified and diminished in Guernsey. Many of the old forms were in fact nothing more than vexatious and extravagant abuses, which the greater part of time were a means in the hands of an unjust debtor to annoy his creditors, by putting them to ruinous expence and unwarrantable delays. Thus landed property, which it is so politic to surround with every security, in order to encourage those investments which enhance its value and tend to promote

agriculture, was absolutely thrown into utter discredit from the difficulty which a creditor who lent on hypothecation was obliged to undergo before he could recover his loan, and from the little security which a purchaser had of retaining his investment, through the custom of guarantee. To such extreme injustice did the practice of guarantee and the vexatious delays for dispossessing an unjust debtor lead, that all faith in transactions connected with real property was lost. Within the last few years however, the law with regard to the expropriation of real property has been much improved, and the respective rights of debtor and creditor considerably protected; the delays allowed the former being quite sufficient to enable a debtor to recover himself if his affairs are not too far gone, and to afford the creditor a safe and easy means of recovering the amount of his claim,—the former being always enabled to obtain a delay of nine months before he suffers an ejectment, and the latter to recover his whole claim with interests and costs within two years, if the property on which he has taken the precaution to secure himself be sufficient for the purpose.

The custom of guarantee on the other hand—which originally meant, and which every where but in Guernsey still means, that security which the vendor either expressly or impliedly conveys to the purchaser to secure him a good title, but which has been here turned into a means of oppression against the purchaser, by rendering not only the real property he possesses at the time of the purchase whence the liability towards the rentholder springs, but also all the real property he has subsequently purchased, liable to the payment of the rentholder—has not improved in the same ratio as the system of *saisies*, or mode of expropriation of real property; though by the Order of Council of the 20th December, 1825, issued in consequence of lengthened discussions between the Privy Council and the Court, it is clear that all real property purchased subsequently to that for which guarantee is sought, is clearly not liable to such guarantee. But the change to have been productive of any lasting benefit, should have gone one degree further, by restricting the guarantee to that surface alone on which the rent is created, and surely neither the rentholder nor original landholder can complain in taking back their property from their insolvent

debtor such as they parted with it, particularly as they have always the means of securing themselves at the outset of the transaction by their requiring of the purchaser to pay them in cash a proportion of its value; and it is not because such a vendor willingly forgoes this advantage that he is to turn round on less privileged creditors, whose loan to the common debtor may have in fact ameliorated, nay even created, the property subsequently purchased by their debtor, to wrest the whole of such property from them, and even their own real property also, if they attempt to recover any portion of their claims by taking to that of their debtor's property. By the creditor's retaining and taking to the property on which his rent is created, justice is conciliated with sound policy as well as with those principles which obtain on the subject of warranties; but his seizing property subsequently purchased to the prejudice of other creditors is nothing short of legalised dishonesty; and if the privileged creditor complains of hardship in taking back his property and retaining all the advances he may have received from the debtor, besides the ameliorations it may have sustained, how much the greater hardship is not that suffered by the unprivileged creditor who loses both the principal and interest of his claim, which, turned into real property, exists in another shape, and for that reason is doomed by an unjustifiable usage to be set apart as the property of an already overprivileged creditor.

The only remedy against the evils of guarantee is to render all rents payable in kind or cash on houses essentially redeemable, or in other terms, to reduce all claims secured on houses to the condition of simple mortgages and to enact that henceforward that land only on which any rent whatever is created shall be alone liable for its discharge, a principle just in itself, conformable to the principles which obtain on the subject of warranties, as well as in strict accordance with all the consequences which spring out of all the respective agreements and transactions between the parties.

But before measures are proposed by which the present abusive usage of guarantee may be removed, it may be proper to inquire into its origin and consequences.

By guarantee or warranty is generally meant an undertaking by which the vendor insures a good title to the purchaser,

which he binds himself and his heirs to maintain inviolate, whether the sale or exchange of the property transferred consists in houses, lands, or rents, an obligation which is generally found transcribed in every deed of purchase in the following terms, " the vendor warrants this sale, or object exchanged," as the thing may be, " on the liability of all his own estates present and future, real and personal, as well as of those of his heirs."

" *Le bailleur,* that is the vendor, *promet et s'oblige de fournir et garantir le dit bail au dit preneur et à ses hoirs sur l'obligation de tous ses biens-meubles et héritages, présens et futurs, et de ses hoirs.*"

This clause is, in point of law, quite useless, the vendor being at all times at least *impliedly* bound, unless otherwise expressed, to grant his purchaser a good title to the property transferred. Nor can any thing be more equitable than this implied and expressed warranty on the part of the vendor.

But the abuse of guarantee or warranty is made to spring out of the false construction put upon a clause, which usage has introduced into our deeds of conveyance of real property, by which the purchaser binds himself to pay the rents, hypothecations, or monies, which may be still due by him to the vendor, and to others, on the security of his own estates, both real and personal, which he or his heirs now or may hereafter possess :—

" *Le preneur promet et s'oblige de payer au dit bailleur,*" or, " *à la décharge du dit bailleur,*" as the case may be, " *sur l'obligation de tous ses biens-meubles et héritages, présens et futurs, et de ses hoirs.*"

Now it is clear by the Order in Council of 1825, that the purchaser is not at present in an unqualified sense, as he was formerly, bound towards the vendor on the obligation of his *future* real property, that is acquired subsequently to the sale, the vendor being entitled to come on that real property only which the purchaser possessed at the time of the contract as a security for the fulfilment of the latter's engagements, and which is nothing but fair. The terms in the deed of conveyance, extending the purchaser's liability to the real estate subsequently acquired, *à ses biens futurs,* are now in law a nonentity, a mere form kept up as transmitted by our fore-

fathers, who during some centuries were governed by a different usage than the principle consecrated by the order in Council of 1825, which is now the law of this island, and the more steadfastly to be enforced as its decrees are as politic and just as they are binding upon the community.

Such a clause should in fact be erased from modern deeds of conveyance ; it conveys a sense and gives a colouring to transactions which in fact are contrary to all law as well as justice, and its existence in deeds of conveyance, despite the law by which its consequences have been abrogated, can only be accounted for by that mania which leads experienced conveyancers to continue drawing up their deeds according to those antique forms which they conceive will bestow the greatest advantages on their clients, without sufficiently reflecting whether they continue to be sanctioned by the modern as they were by the ancient law. In this, as in many other instances in common with other professional men, their zeal is apt to outstrip their judgment, which, however prone to err, will, when maturely acted upon, eventually serve the ends of justice much more powerfully than all the experience of which they sometimes so justly pride themselves.

The same predilection for antique forms was the cause that for several years after the order in Council abrogating the abusive system of oaths for attachments of personal property, oaths were nevertheless required whenever such attachments were made, until Mr. Trachy did his country and the profession the good service of getting them abolished, since which affidavits are required only where the creditor's object is to arrest the debtor's person.

The liability incurred in consequence of the ordinary warranty which is tacitly implied in all sales of property, is however, very different from that which is understood to be due by the obligation of guarantee as applied to our system of landed tenure; for by the latter the party in whose favour the liability exists, that is the seller, may not only come upon the purchaser's lands and real property possessed by him at the time of the purchase, for the fulfilment of the engagements set forth in the deed of sale, but upon all the purchaser's lands subsequently acquired, though these should have been irrevocably disposed of to third parties.

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How real property thus acquired, and afterward disposed of, by the purchaser subsequently to the original deed of sale, should be made liable to the fulfilment of any conditions stipulated for in such original deed towards the vendor, who, at the time of his sale, could never reasonably contemplate that any such real property would come into his purchaser's possession, can only be accounted for by the subversion of every just principle which obtains on the subject of warranties, which subversion is constantly recurring in feudal institutions, whereby the just rights of creditors, and mortgagees in general, were sacrificed to the claims of the original vendor or rent-holder, who being, as already stated, the lawgiver as well as the judge in all transactions appertaining thereto, surrounded his own property with every privilege which could either augment its value, or secure its enjoyment, though at the expense of all the other creditors who thus fell victims to the ruinous tendency of an exhorbitant privilege by which the rights of the many were sacrificed for the private advantages of the few.

The vendor of a house or land with a reserved rent charge which is to be annually paid to him by the purchaser, who thereupon becomes his debtor, can, in the event of the purchaser's bankruptcy or insolvency, if the transaction creating such rent charge occurred previously to 1825, not only come for payment on the real property which the debtor possessed at the time the rent charge was created, but also on all subsequently inherited or purchased real property, even though it had passed by sale from the hands of the debtor into those of third parties. Thus, A sells in 1824 to B, an estate and a house for a hundred quarters of annual wheat rent, and £1,000 cash. Some time afterwards B purchases another estate, which he sells to C for five hundred pounds. Lands fall in value, and the house sold by A to B falls into a state of decay, and B becomes a bankrupt. The transaction between A and B having taken place previous to the order in Council of 1825, A, after having dispossessed B, can come upon C to make him take the house and lands of B, and to pay him, A, the hundred quarters mortgaged thereon, or renounce all claim to his own purchase, or in other terms, lose his five hundred pounds, by giving A, (who has already had £1,000 from B,) the estate which he, C, has bought from B for that amount.

What may give a further insight into the abuses which flow from this practice of guarantee, is the fact that heirs continue for forty years after the division of real property liable to all the rentholders of the original ancestor, though on several portions of this property no rents whatever might have been due.

Thus a father leaves four sons, among whom are to be divided one estate in the country, two houses in town, and twenty-five quarters of wheat rent. On the estate in the country twenty quarters of rent are due, but being still much more valuable than either the houses in town on which no rents whatever are due, or the fifteen quarters of rent which have fallen to the lot of the three younger sons, the estate is taken to by the eldest, who, through misconduct or misfortune becomes a bankrupt, and his estate no longer worth the twenty quarters due on them. The rentholder in this case may not only come on the estate of the eldest son, but also call on the three younger sons who have to guarantee him the annual twenty quarters, to take their eldest brother's estate, or renounce to their own with all the improvements which may have been made on them. Nor is this the only remedy of the holder of the twenty quarters. Not only can he come upon the real property of the younger sons, though it never formed any portion of their father's inheritance, but he may also come on the *bonâ fide* purchasers, in whose hands the two houses, or the fifteen quarters, may be found; and these purchasers will either have to abandon their respective purchases or pay the rentholder his annual rent, by taking to the real property on which it is due, and which, from the altered circumstances of the times, is no longer worth the twenty quarters due on it. This liability of the co-heirs lasts for forty years, and in former times it was actually decided by the Court that it was to last for ever!

The present usage of guarantee appears not to have been introduced at any one particular time by any legislative decree, but gradually by decisions of the Guernsey Court, one decision necessarily leading to another, and each to an extension of the principle, until the system, in all its present monstrosity, was established. It was unknown in Normandy, nor does it exist in Jersey; and from the number of Guernsey ordinances to be found during the seventeenth century on the

subject of *saisies*, or mode of expropriating debtors from their real property, it is probable it arose about the same time, —guarantee and saisies being intimately connected.

Or it may have originated as the *préciput* or eldership, or as the usage which now generally obtains for married persons to favour each other by acquiring real property in their joint names, which is not only contrary to the Norman law, but also to the common law of nations, which forbids married persons from favouring each other during their marriage,—or as that which until very lately obtained, by which a widow could by will bestow a greater portion of personal property on one of her children than on another, a power which no married person or widower ever possessed in Guernsey, but of which the widow has been deprived by the twenty-ninth article of the modern law :—that is to say, these usages have originated in decisions of the Court, grounded at the onset on *expediency*, which in time became jurisprudence, if not law.

The way in which Mr. Thomas Le Marchant accounts for the introduction of the eldership into the late law of inheritance, may give an idea how, on the grounds of expediency, the fundamental principles of legislation may be effectually destroyed when the ruling authority is interested in their subversion :—"*S'il y avait plusieurs mênages ou manoirs à être mis en lots entre les frères,*" says Mr. Le Marchant, "*et qu'il y en eut un principal, et que l'aîné choisit un autre lot que celui auquel le chef mois est contenu, il ne le pourroit ni devroit avoir par récompence, ce que la loy ordonne devoir estre gardé, tant ès successions nobles que roturières, mais à présent par les* jugements de la Cour *et les* usurpations *des fils aisnés sur leurs puisnés, au préjudice de cette loy, tout le contraire est receu en usage.*"* The foregoing innovations on the fundamental principles of the ancient laws of Normandy and Guernsey are brought forward, not so much with a view of drawing attention to the innovations themselves, as to the manner in which they originated. So far from exercising any evil influence they have had rather a beneficial tendency, restricted as parties formerly were in the right of willing, and interested as all are in preventing the too extensive subdivision of land, as was the case with the préciput. Had the tendency

* Remarques, &c., Vol. 1. p.p. 187 and 188.

of guarantee been equally politic, the amount of property saved to the industrious and independent orders would have been incalculable, and the system of irredeemable wheat rents, as a consideration for the transfer of real property, might then have been continued without entailing those evils which, from the nature of things, and the exigencies of a growing and industrious population, now absolutely require that wheat rents should be rendered redeemable.

But the evils of guarantee applied to our system of expropriation, more particularly when encumbered with those redundant and useless formalities which formerly rendered it next to impossible to obtain payment of any sum due by a landowner for which he had given an hypothecation, will be best seen from the following description of the abuses which arose in the French system of expropriation of real property, which, though unclogged with that most pernicious of all abuses, guarantee, had nevertheless the effect of discouraging mortgages and investments in landed securities.

With a laudable view of protecting minors and wards, the French law surrounded the sale of their property with every degree of protection, and would not allow its being disposed of without being subjected to certain formalities which, however, from their number and extreme punctiliousness, actually defeated the end it had in view, which was facilitating the means of raising loans or sums to supply the wants of the unprotected; purchasers being no where to be found, where so much formality was to be gone through for the fulfilment of an object which might have been obtained on comparatively much easier terms.

But the injurious effects of a complicated system of procedure in expropriating owners of real property from their possessions, the evils which follow from placing too many invidious and multifarious obstacles in the way of a *bonâ fide* creditor's realising the value of his loan secured to him by an hypothecation, and the disastrous consequences which, by marring private credit, they produce on agriculture and commerce, have thus been alluded to in one of the ablest of French publications, wherein it is stated that " On a souvent demandé la révision des Codes Français, et en particulier celle du Code de procédure. C'est en effet celui dont les

imperfections et les lacunes ont été le plus souvent signalées par les jurisconsultes.* On ne pouvait songer, quant à présent, à proposer la révision complète et générale du Code de procédure ; on conçoit qu'une telle entreprise exigerait plus de recueillement et de maturité que n'en comporte la situation actuelle. En attendant, le législateur fait ce qu'il est possible de faire ; il fait pour le Code de procédure ce qui a été déjà fait avec succès pour le Code d'instruction criminelle et pour le Code de commerce : il propose de réformer une des parties les plus importantes de ce Code, celle qui a de tout temps soulevé les critiques les plus nombreuses. Tel est le but du projet de loi soumis à la chambre des députés en 1841. Ce projet se divise en deux parties : la première est relative à la saisie immobilière et à ses incidens ; la seconde a pour objet les aliénations volontaires de biens immeubles qui ont lieu par la voie judiciaire, telles que les ventes de biens appartenant à des mineurs, à des interdits ou à des hospices."

On the impolitic restrictions which fetter judicial sales it is said that " La législation actuelle sur les ventes judiciaires a toujours été critiquée depuis la promulgation du Code de Procédure, émanée le vingt-quatre Avril, mil huit-cent six. Elle présente un labyrinthe inextricable de formalités inconciliables entre elles, ruineuses, inutiles et bonnes tout

* And why ? because the framers of that Code had not, as the framers of the Code civil and of the Code de commerce, the immortal works of the civilians of the eighteenth century, whose doctrines, as there propounded, in many instances without the slightest transposition of either a phrase or a syllable, now form the law of their country. It is true that Pothier, the oracle of his contemporaries and the legislator of their descendants, left, at his death, precious materials behind him whereupon to base an enlightened administration of civil Justice or Code de Procédure, but these were to be found among his "*Œuvres Posthumes*," which, to obtain that high authority which has immortalized his name, required a revision from his master-mind, which, had his life been prolonged, would doubtless have there appeared, as in so many of his other treatises. Unlike that anomalous legislation which varied in different provinces, nay sometimes in the different towns and villages of the same province, because it had no better foundation than the caprice and ambition of petty rulers whose sway it has not outlived, and which Pascal so virulently stigmatised as "*La plaisante justice qu'une rivière ou une montagne borne, vérité en-deça, erreur au-delà*,"—Pothier's works, based upon principles of unerring wisdom, are peculiar to no locality, having no other limits than those of civilisation herself, and to them will also apply what has been so admirably observed of that immutable justice which, irrespective of locality, should govern the actions of mankind :—*Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et omnes gentes et omni tempore una lex et sempiterna, et immortalis continibit, unusque erit communis quasi magister et imperator omnium Deus.*—(Cicero's Frag. lib. 3. *De Republicâ.*)

au plus à favoriser l'esprit de chicane. Elle rend les procédures éternelles, et l'expropriation à peu près impossible. Or, s'il est dangereux que l'expropriation soit trop facile, il n'est pas bon qu'elle soit trop difficile; si l'intérêt général veut que la propriété soit protégée par des garanties sévères, l'intérêt général aussi ne veut pas, que par une protection exagérée, mal entendue, la propriété soit rendue en quelque sorte inviolable entre les mains du débiteur qui l'a engagée.* Ici la question sort du domaine de la procédure et se rattache aux principes les plus élevés de l'économie sociale."

"On se plaint tous les jours du discrédit général où est tombée la propriété territoriale, et du mouvement qui détourne de plus en plus les capitaux de l'agriculture pour les porter avec une espèce de fureur vers les entreprises industrielles. Tandis que les spéculations les plus aventureuses ont la vertu de remuer et d'attirer les écus, la propriété végète et se morfond dans son dénûment et sa détresse; les écus dorment improductifs plutôt que de lui venir en aide. 'Il n'est pas rare,' disait le savant rapporteur de la Chambre des Pairs, M. Persil,† 'il n'est pas rare de voir un capitaliste prêter à un commerçant ou à un industriel, sur billet à faible intérêt ce qu'il refuse au propriétaire qui met à sa disposition, par la voie de l'hypothèque, la plus sûre des garanties. S'il divise son placement, l'argent coûte plus cher à la propriété qu'au commerce et à l'industrie.'"

"A quoi faut-il attribuer ce fâcheux état des choses? Il a sa cause dans l'imperfection de nos lois destinées à régler les conditions et les garanties du prêt, c'est-à-dire, dans les vices de notre système hypothécaire et de notre procédure en expropriation. En apparence, il n'y a pas de garantie plus sûre et plus efficace que l'hypothèque; mais en réalité, l'imprévoyance du législateur a rendu cette garantie incertaine, trompeuse, illusoire; en sorte que l'hypothèque n'est souvent qu'un

* It would almost appear that the writer had before his eyes the intolerable abuses of our own laws respecting the expropriation of debtors from their real property before their reform in 1825, when the legislature abridged the number of delays or defaults in saisies from nine to five, and that the saisi héréditaI, that is, the creditor in possession of the debtor's real estate after that the latter had given up all claim to it, should account for the whole of the receipts and apply the same to the general account of the saisie.—*Page* 18 *of the Commissioners' reports on law reform, issued in* 1815.

† The author of an excellent Treatise on Hypothecations.

piége tendu à la bonne foi du prêteur. Rien de plus difficile que d'échapper à ce piège ; on y est pris de toute manière ; tantôt, dit M. Persil, c'est l'irrégularité d'un bordereau d'inscription qui détruit l'effet de l'hypothèque ou rend un procès nécessaire ; tantôt, l'hypothèque inscrite et publique se trouve primée par une hypothèque occulte et privilégiée dont l'existence était inconnue.* Le créancier a-t-il à grand peine évité ces deux écueils, il ne lui reste plus, si le débiteur ne paie pas, qu'à poursuivre la réalisation de son hypothèque par la vente de l'immeuble engagé. Alors commence pour le malheureux créancier une série de nouvelles angoisses ; il se voit lancé dans les mille embarras de cette procédure qui semble faite pour interdire plutôt que pour autoriser l'expropriation.† Non seulement cette procédure est sans fin, mais elle est pleine de risques pour le créancier ; car en cas de nullité, les frais sont à sa charge. Aux lenteurs de l'expropriation succèdent les lenteurs de l'ordre ou de la distribution du prix après l'adjudication ; malheur au créancier trop pressé !‡ il

* To understand this perfectly, it must be borne in mind that according to the French law there are three kinds of hypothecation—first, that which exists *pleno jure* and which is called *legal*, because it is established by virtue of some formal decree of the legislature, independently of the will of the parties in favour or against whom it is created : such is the hypothecation which in France the ward and the lunatic have over the real property of their guardians—that which the married woman there, as here, possesses over the real property of her husband, and that which in France the government and all other public establishments, such as town councils and charitable foundations legally constituted, possess over the receivers and administrators appointed to superintend the financial department of such establishments—all these parties possess a legal hypothecation over the real property of those who are bound properly to administer in their name and place, independently of the will of the administrator, as contradistinguished from the judicial and conventional hypothecations, which can only be made with the sanction of a Court of Justice, or the express consent of the parties whom it affects. It need not be observed that the *legal* hypothecation chiefly exists in favour of parties who are morally incapable of providing for their own interests, and who on that account are dispensed from inserting them on the public records of hypothecations, but government and public bodies, as well as legatees, who also have a *legal* hypothecation, not only on the real property of the testator, but upon that of the parties by whom their legacy is due, are nevertheless bound to inscribe them within six months on the public records of hypothecation, notwithstanding they partake of the advantages of a *legal* hypothecation, on pain of their losing their priority of inscription, in consequence of others subsequently made.

† This is the general result of all ultra protective measures, they ever defeat the purpose for which they were enacted.

‡ But this is a misfortune which will occur to all indigent lenders, as well on hypothecation as on any other security, it is in fact a predicament in which all debtors are necessarily placed who depend on persons less able than themselves for the fulfilment of their own obligations.

voit fuir indéfiniment, à travers ces interminables évolutions de la procédure, le terme de son remboursement. Telle est la condition que nos lois ont faite aux capitalistes et aux prêteurs sur hypothèque. Dès lors comment s'étonner de la défiance que leur inspire la propriété? Comment blâmer la direction qu'ils ont donnée à leurs capitaux? Les choses en sont venues à ce point que la propriété souffre la première du faux scrupule qui a porté le législateur à la rendre en quelque sorte inviolable. Le réseau des garanties qui l'entoure a tourné contre elle; en la protégeant à l'excès, on l'a réduite à l'isolement, on l'a frappée d'un discrédit qui croit de jour en jour, on a tari la source à laquelle elle est obligée de puiser pour vivre."*

Much on the same idea of fancied security our ancient judicial authorities bestowed upon the prior rentholders and mortgagees superabundant privileges. The consequence was that landed property, the value of which it should ever be the main object of the legislature to raise, as offering all who live on their incomes the means of obtaining a safe and desirable investment, actually fell in value, by the number and impolicy of the restrictions by which it was beset. Indeed privileges of every description, as favours of every kind, cannot be conferred on any race of mortals, or any kind of property, without inflicting fourfold an amount of injury on others. Evenhanded justice spurns them all; and, whether bestowed upon nations or individuals, legal immunities have ever constituted the scourge of mankind.

In fact, the existence of such an extraordinary, exorbitant, and therefore unjust prerogative as guarantee, can only be referred to that cautious spirit with which our forefathers, a hardy and thrifty race, surrounded the occupiers of land whence their whole wealth was derived, and which, by means of innumerable forms and privileges, they so completely protected as to render not only speedy ejectment impossible, but sacrificed all other parties interested in the debtor's assets to the first mortgagee or rentholder, and his representatives, in whose hands the property in most instances originally vested.

* Such is the ordinary result of all monopolies, privileges and impolitic immunities; they ever defeat the ends of agriculture and commerce as excessive punishments do the ends of criminal justice.

Of the truth of these remarks, the number of useless forms and unnecessary delays, by which our system of expropriation of real property was hampered until 1825, are a proof; for then one half of them were abrogated by the legislature in the common interest of debtor and creditor,—the latter being no longer so loath to lend when he enjoys a fair prospect of recovering his debt within a reasonable period, despite all the delays which a needy and unjust debtor may put in his way. Nor is the debtor left entirely at the mercy of a litigious creditor, as he may ever avail himself of a delay of from ten to fifteen months before the final writ of expropriation will be issued against him.

It would have been very desirable that the legislature had abolished the practice of guarantee, as it remodelled the system of expropriation. Apparently struck with the deformity and abuses of the former, they nevertheless allowed it to remain at the earnest entreaties of the Court, who thus prolonged its existence for a few years, by driving the commissioners from a subject which they seem to have abandoned in despair, of introducing as adequate a remedy on that as they really had done on so many other points.

The commissioners, however, did away with one very great abuse which obtained on the subject of guarantee, which was, that all real property purchased subsequently to that for which guarantee is sought, should not be liable to such guarantee.*

* By the following remarks of the commissioners it will be seen that the lengthened discussion ended without their being in the least convinced by the arguments of the Court of the propriety of rendering real property purchased subsequently liable to property previously acquired or inherited, as a fundamental principle in our system of tenure; for the Privy Council adopted the opinion of the commissioners, that with respect to rents created after the date of the order, that is the twentieth December, 1825, all *after purchased lands* should be wholly exempt from liability to such rents, and that notwithstanding it had been strenuously urged by the Court that such after purchased lands should still be considered liable, as will be seen from the following remarks of that body, which were, however, overruled. "The Court state that they will venture humbly to express their doubts whether, with respect to rents created in future, it may be right that after purchased lands should be wholly exempted from liability to such rents. Such a regulation may be very proper in itself, but tacked as it must be to a system where all lands and rents are now differently regulated, and where the chief part must, for a great number of years continue so, there seems some danger of confusion in thus subjecting one part of the rents and lands to one law, and one part to another law. It is not always easy to foresee the effects of such a discrepance in the law; but that some perplexity would arise, is pretty certain: for example, all rents foncières may be transferred by the debtor of rents assignables, to free himself from the payment of the latter, but under the

But this change, to have been attended with any material benefit, should have been followed up by the introduction of a principle that the vendor should have no further guarantee or security for the land or rent sold, than the land itself, or the real property on which such rents were created : in which case every vendor would secure himself before hand for the regular payment of the annual rent in consideration of which he parted with his estate, by requiring a certain portion of the price to be paid in money,—a practice which would be found equally advantageous to both vendor and purchaser, and which would effectually prevent those innumerable and ruinous losses entailed by the present system, which not only so often involves the purchaser's family in utter ruin, but also proves so injurious to his other creditors, whose loans may have gone to augment the value of property which thus devolves to claimants of whose existence they, no more than the debtor himself, had the slightest idea.

Is then a system, pregnant with so much evil and attended with so little benefit, as disastrous to the purchaser as it is to his creditors, to be any longer tolerated in a jurisdiction where the privileges of persons as of property are legally unknown, and where it is constantly proclaimed that the sacred rights of liberty and property can only be inviolably preserved by the individual sacrifice of a small portion for the benefit of all.

Besides, what greater security can the original vendor require than to be paid the full value of his land, and in the event of the purchaser's inability to fulfil his engagements, that he should take back that with which he parted, reserving to himself the original compensation most commonly received at the time of the bargain, with all the improvements which his property may have since sustained, for that at least will he always receive, when the present practice of guarantee shall have been swept away, and the original vendor or rent-holder retake possession of his former property. Can the

proposed regulation the newly created rents foncières would not be entitled to the same extent of guarantee as the older rents, and the question would arise—whether the new rents would be a legal tender in lieu of the rents assignables ?

" Upon the whole, the Court are inclined humbly to recommend to Your Lordships not to introduce this alteration in the law for the present, but to wait for the experience and try the effect of the other remedies mentioned in Mr. Buller's letter, which remedies will, in the humble opinion of the Court, be quite sufficient."—(Concluding remarks of the Court to Council on the subject of guarantee, presented on the nineteenth February, 1825.)

original vendor require more—should he in justice be allowed to claim more—in one word, would it be either wise, politic, or just to sacrifice the rights of all subsequent creditors and mortgagees to his own exorbitant and illfounded prerogative? such being in fact the end of guarantee, as will appear from the following acknowledgment of its evils by the Court, though attributed by them to other causes. They state "that they are as sensible of the many evils that are now felt as those who have petitioned their Lordships, and are equally anxious to apply a remedy."

"It is therefore with real pain that the Court presume to ask what can legislation do in such a case beyond the limitation of arrears already recommended? Can it act retrospectively, and say that a guarantee or mortgage acquired by law,* by custom, and the obligation of the parties† shall be set aside, that one party shall be relieved at the expense of the other? It may be true that the interest of many would require this at the present time, but the rights of property are too sacred to think of violating the least of them by an injustice against any one person in favour of ever so many! No new law can free tenements or persons from the guarantee to which they are now subject, can do any thing towards relieving the present complaints. They indeed arise, we must repeat, not from the old law, but from excessive speculation and other circumstances unconnected with that law."

"Those circumstances could have produced similar evils under any other system; they might have appeared in different shapes without being less real; the same loss would have existed; other countries have, owing to the same cause, exhibited long catalogues of bankruptcy and misery, which might be attributed to the want of the law of guarantee in those countries! with about as much reason as its existence is now accused of causing in this country the evils complained of."‡

* No law ever consecrated the system of guarantee as here practised, which, it cannot be too often repeated, is itself a violation of all law.

† How can parties, either morally or legally, oblige themselves towards anterior vendors, at the expense not only of their subsequent, but of equally legitimate creditors whose transactions are utterly distinct from those entered into between anterior vendors and the common debtor?

‡ See pp. 22 and 23 of the observations presented by the Court on the th. of April, 1820, on the subject of guarantee.

To acknowledge the evils of one system, and adduce, as a means of supporting them, that they would have been increased, under any other is no satisfactory method, though one too frequently resorted to when an unjust system is to be upheld. The doctrine of prospective rights laid hold of by the Court is another of those convenient doctrines which is ever maintained by those who argue against the reform of measures, the workings of which they do not always clearly foresee. But neither of these arguments can admit of the slightest consideration, when brought forward on behalf of a custom the most cruel in its tendency, and unjustifiable in principle, that was ever established, and which is moreover directly at variance with every principle which obtains on the subject of express or implied warranties, which it professes to secure. Besides, only allow the doctrine of prospective rights to be carried out to its ordinary extent, and the course of all improvement, as well in legislation as in other matters, is at once arrested, it being evident that no change, however beneficial, can ever be introduced without injuring some individuals, and the greater the ultimate benefits to be derived and the more serious is the injury it generally inflicts wherever it runs counter to the immediate interests of the sufferers. But if the supporters of the present system consider themselves aggrieved by losing a portion of their excessive privileges in consequence of its abrogation, how much the more have not the sufferers to complain, who, during centuries, have been doomed to abide the pernicious consequences of a system which, contrary to all law and justice, condemned many of them to utter ruin merely for the sake of investing the original rentholder with the prerogative of obtaining five or six per cent on the capital of his rent more than it was actually worth. Is that the object of sound legislation? And will it be said that a community blessed with every advantage of position; protected in its imports, as well as exports, from duties of every kind, by the strong arm of a parental government; enjoying in the market of the mother country the privilege of selling its produce at higher rates than could be obtained for it in any part of the world, cannot justly attribute its prosperity to that benign privilege, which, thanks to its comparative insignificance, can be upheld for the mutual advantage of the

mother country and the islanders, rather than to the existence of the practice of guarantee, which, from its injurious tendency which can neither be foreseen nor averted, constitutes the bane of its system of landed tenure, notwithstanding all the mellifluous declarations that guarantee is the "fundamental safeguard of real property in this Island, and that under its protection has arisen the most favourable system ever framed for all classes in the community."*

It will be the object of the following pages to show—how guarantee immediately affects our system of tenure—how it came to be established—and how it might be in fact abolished without destroying a system of tenure which has existed elsewhere without any such bane having been attached to it.

* "Different inhabitants," say the Court, "probably state great evils which cannot be denied to exist, at least in the Town, and which they no doubt ascribe to the system of guarantee. They may in doing so be like all other men, who, in great calamities, seek for any cause, however foreign to the purpose, rather than acknowledge their own imprudence. The law of guarantee is the fundamental safeguard of real property in this Island. Under that protection has arisen the most favorable system ever framed perhaps, not only for the security of property, which is the bond of all society and good order; but for the interest of those who had no property; for the encouragement of industry and agriculture; for the more general diffusion of happiness and independence, and consequently for the general good."

"Under that protection the original possessors have parted with the land: they have charged it with an annual rent of as many quarters of corn as the purchasers judged they could afford to pay, after a sufficient remuneration to themselves for their labour.

"Thus, without the necessity of cultivating the soil, the one enjoyed the neat income of his estate secured on the estate itself, which he could resume in case of non payment; while the other, on the due payment of the rent charged, became real and perpetual owner, having an interest in the soil far above that of farmers under any other kind of tenure."

See pp. 18 and 19 of the Court's observations on the Question of Guarantee, presented in 1820.

SECTION 2.

Of the different kinds of Rents, and mode anciently resorted to for dispossessing debtors of their real property.

SUMMARY.

Nature of a wheat rent, which, representing the yearly value in kind or the produce of the real property sold, is usually given as the consideration for the real property sold.

Rouillé and Terrien's distinctions between different kinds of rents.

Origin of the rente foncière, *or primitive value of the object, as between vendor and purchaser, and the* rente hypothèque, *created afterwards by the purchaser for loans borrowed at interest; besides these there was the* chef rente *due to the lord of the manor.*

All rentes foncières *are irredeemable as contradistinguished from* rentes assignables, *which may be redeemed by the debtor's making over or assigning to his rentholder* rentes foncières *in their stead.*

The rente hypothèque *may always be redeemed on the debtor's making up the sum borrowed to the creditor, and is nothing more than another name for a mortgage or ordinary hypothecation, which may be redeemed at the debtor's will; his estate being in fact pledged as a security for the debt.*

These were formerly assigned to co-heirs, as appears from an ordinance passed at the Michaelmas Chief Pleas, 1666, *which has fallen into disuetude, but which it would be just to revive, both in the interest of the principal heir as in that of his co-heirs.*

Having thus seen the difference in the nature of rents, *the different modes by which the creditor anciently obtained redress in the event of the debtor's not fulfilling his obligations shall be now examined.*

The object of the Serjeant's searching for three successive days over the debtor's estate was not formerly, as it has now become, a mere form previous to the Sheriff's taking possession of his real property, but was for the purpose of distraining the personal effects, such as the corn, cattle, or money of the debtor, which he was bound to take before he could take to the real property.

Ancient mode of proceeding by sale of the debtor's estate, advantageous in principle.

By the law of Normandy the rentholder might attach the specific real property on which his rent was due without dispossessing him of the remainder, which cannot be done according to the forms of proceeding at present observed in the Island, which tends to prove that guarantee, as here understood, was then unknown, since by our law the last vendor can never take possession of the property he has sold without taking also the remainder of the debtor's property, which is as impolitic as it is unjust and opposed to the conditions of the original contract between him and his creditor.

From the present forms of proceeding in expropriations of real property it may be seen that the land on which the rent was created was that only which was liable for the rent.

The mode pursued in Guernsey in ejecting insolvent debtors from their real property is very similar to that adopted in Normandy. Proofs of this assertion may be drawn from the main principles which obtain on this subject; first, that the saisi or assignee is only bound to sue the subsequent creditors, who alone are responsible to him—second, that at any part of the suit or stage of the proceedings he may declare himself proprietor, both which show that originally the ground on which his rent was fixed was alone liable to him, for if he was seized of estates belonging to his debtor on which his rent was not due, or which was not hypothecated as his security, upon what principle could he be entitled to these other estates to their prejudice? whereas by only taking the land on which the original rent was due, nothing was more just than his thus taking the estate after the debtor had renounced to it, on his paying all the demands subsequent to his own. But the creditor very seldom takes to the estate without causing the creditors posterior to himself to renounce or pay him his claim, the estate being almost invariably insolvent, when proceedings commence, and that being the case it is necessary for the parties to ascertain their respective rights, for which purpose they are sent before a Magistrate, who classes them accordingly, or in the order of the date inscribed on the registry or record of hypothecations. This is also the time that the garants, *or they who owe any warranty, are called in, and that the abuse of guarantee commences to be felt. Some of its evils enumerated.*

From the foregoing summary it will be seen that the object of the present section is to explain the early and present state of the law, with respect to *rentes*, and proceedings in *saisies and guarantees.*

A RENTE is a certain perpetual charge payable yearly, due upon a real estate by the proprietor. We call it a *perpetual charge* to distinguish it from the English rent, or consideration of a lease which is translated by the term *loyer*, and which expires with the lease itself. The owner of the rent has no expectant reversion or future interest in the land, and in this respect it resembles the English rent charge.

Rouillé, our first Norman commentator and best authority, distinguishes two kinds of rents; the *rente foncière* and the *rente hypothèque*, the latter kind he subdivides again into *rentes anciennes hypothèques* and *rentes nouvelles hypothèques*. He is followed by Terrien, who makes the same distinction between *rentes foncières* and *rentes hypothèques.*

The *rente foncière* was so called because it was created on account of the *fonds*, or estate *créé à cause du fonds*; so when an estate was made over in consideration of a rent, the latter was then considered as part of the estate; and when on the division of an ancestor's estate among his heirs, one of the parties took a larger share of the land and obliged himself, for the purpose of equalising their portions, to pay a rent to his co-partners, this too was a *rente foncière*.

The *rente hypothèque* was the rent created by the holder of real property, upon his land, at a certain price paid down in money. This was called *rente volante*, or *rente à prix d'argent;* it formed no part of the *fonds*, it never made part of the original purchase and differed besides from the *rentes foncières* in the following respects.

The arrears of *rentes foncières* could only be claimed for three years, those of *rentes volantes* for five; about the same length of time as the interest could be asked upon a loan. Though the *fonds*, or estate charged with the *rente foncière*, might have been divided and subdivided, the proprietors could come upon all or either of the holders, the rent being due by each *in solidum* for his portion of the land originally charged with the rent.

The *rentes volantes* were always redeemable at the will of the debtor on repayment of the principal; though the creditor could not compel the debtor to redeem them. When made payable in wheat, if the price of wheat far exceeded the interest, it was reduced; nor could wheat be ever exacted in kind; in short, the price given, not the thing sold, was invariably taken into calculation; *rentes volantes* could not be created for goods of any kind, but must be paid for in money.

The *rente censuelle*, or *chef rente*, due to the lord of the manor, partook of the nature of the *rente foncière*.

The only difference between Rouillé and Terrien is, that by Rouillé *rentes hypothèques*, after 40 years, were no longer redeemable, but were considered in the light of *rentes foncières*; whereas Terrien makes no such distinction, the *rentes hypothèques*, being at all times redeemable.

In Guernsey, we have at present the *rente foncière*, the *rente assignable* and the *rente hypothèque*, which terms *foncière* and *hypothèque*, have with us a very different meaning.

The *rente foncière* is every kind of rent for which another cannot be assigned; it can never be repurchased except by mutual consent, or by a special agreement set forth in the contract, and every rent is here considered *foncière*, or irredeemable, which is not proved to be redeemable. The distinction between a *rente foncière* and a *rente volante* is unknown.

The *rente assignable* is when, at its creation, the parties agreed that the debtor should be enabled to free himself from payment of it by assigning another rent in its stead. For instance, A, on purchasing an estate, obliges himself to pay twenty quarters of annual wheat rent to B, ten of these the parties may agree to render *foncière*, and these will continue a perpetual charge upon the estate, except they are purchased by mutual agreement. The remaining ten are rendered *assignable*; and the debtor, on purchasing *foncière* rents from C, may assign C to pay them over to B, in lieu of the ten quarters which he owed him; and thus A discharges his estate as long as C continues to pay regularly.*

All rents created for the purpose of equalising the portions among co-heirs are assignable and were formerly repurchasable, as appears by an ordinance of the Michaelmas Chief Pleas, 1666. Assignable rents become *foncière* at the expiration of forty years.

Rentes hypothèques are a charge incurred by the proprietor of an estate for money borrowed upon it and made redeemable by the contract, otherwise the rent created would be considered *foncière*; they strongly resemble the *rentes volantes* of Terrien; the only difference being that wheat is always paid at the market price, although the sum thus paid in kind may exceed considerably the legal interest of the money borrowed, and that by Terrien all rents created for money were *rentes volantes*. These rents were created by virtue of an ordinance of the Court, dated the twenty-third of April, 1636.

Having stated the difference in the nature of rents between the ancient custom of Normandy and the present law of the

* Or A may borrow £400 of B, and thus create twenty quarters upon his estate. If they make ten of them *assignable*, the remainder will be *foncière*. If they do not mention the kind of rent created it will be considered *foncière*.

Island, we shall proceed to state the difference in the manner of proceeding between the ancient and present law. The holder of a debt was, as appears by Rouillé and Terrien, obliged to seize upon the personal property of the debtor; if he could find none, he then sent the serjeant to the estate with an *exploit*, by virtue of which he seized the cattle found upon the land for the purpose of obtaining payment. The serjeant was obliged to attend three days successively, and search over the estate that nothing might escape him, for so cautious was the old law of depriving the debtor of his real property, that it required every precaution to be taken to ascertain whether recourse to this measure could not be avoided. If the serjeant reported that he could find nothing, the debtor was then summoned to produce any personal property upon which the creditor might execute; and when none could be found the sergeant used to seize the estate into the hands of justice, to take possession of it and cause assignees to be named; so it remained forty days, at the expiration of which notice of the seizure was given for three Sundays following, at the Church porch, immediately after the performance of Divine Service, *à l'issue de la grande messe paroissiale.* The serjeant then published the price at which the creditor had fixed the estate; he further gave notice that the sale would take place at the opening of the subsequent term and that all persons having claims upon it, or wishing to increase the price should then attend. At the time appointed the debtor was still at liberty to pay; if he did not, the sale was confirmed. So much for the proceedings *par décret* in questions of *roturiers* estates; but when *fiefs nobles* were to be seized they were first valued by twelve men, and an additional term granted for the valuation. If at the conclusion of the *décret* it appeared that there were no claims beyond the half of the value, or rather of the price offered for a *fief roturier*, or two-thirds of a *fief noble*, the sale could not take place; this was the form of proceeding between the creditor and the debtor; but third persons might have an interest in the sale besides immediate creditors, and in that case the following form was observed. This opposition could only take place in two cases, when the party claimed the estate in property, or claimed a right upon it. In the first

place if he had been in possession for the year and day preceding the sale, he was allowed to keep it until his title was established, otherwise the sale took place, and his claims, with those of all other individuals, were afterwards inquired into and each was paid according to the date of his title. This was the usual way of proceeding. But there was another, explained in Terrien, and which was exercised by the proprietor of a *rente foncière*, when his deeds did not give him the right to take the debtor's estate immediately in execution; when the deeds were the same as they are in Guernsey. When upon the report of the serjeant it appeared that sufficient personal property could not be found to pay the rent, the rentholder might summon the tenant to declare whether he would keep the estate and pay the arrears, or give it up on payment of the arrears already due. If the tenant appeared and kept the estate, but afterwards neglected paying the arrears; his remaining estates might be taken in execution and sold in the manner already explained, if he gave it up, he then paid up the arrears and the estate reverted to the rentholder; but in case of the tenant's not appearing after three defaults, the tenant was condemned to a slight fine and the rentholder obtained an inquest to prove that the estate for which he sued was really bound towards him in the amount of the rent claimed; and if he succeeded in establishing his claim, the Court put him in possession of the estate, and reserved his right of action for the arrears incurred by the defaulter. When the rentholder was thus put in possession of his original property it behoved him to clear it of all rents and other remonstrances which the late tenant might have incurred during the period it was in his possession; for this purpose he was obliged to publish that all those who had any claims upon the estate, of any kind whatever, and were prepared to pay up his own rent, should make themselves known within forty days, at the expiration of which the saisi again published a second time, for three following Sundays, that those who had any thing to ask upon the estate should take the estate and pay the rent or renounce to their rents and demands and that they should appear on the next court day, where, if they did not appear after three defaults, they were deprived of all claim and lost their rent.

Hence it appears that the different methods of proceeding against the debtor are distinctly pointed out in the old customary of Normandy, the ancient law of the Island. The one by taking the whole of the debtor's estate in execution, which, as above observed, could only be done when there were acknowledged debts above half its amount, when the debtor had already been deprived of his personal property, and after a regular publication and sale; the second, which merely tended to restore to the owner the possession of that property which he had transferred into the hands of the debtor, through which he merely took back what he had already owned, without this proceeding affecting in the least the remaining estate and effects of the tenant.

It will now be necessary to examine the manner of proceeding in Guernsey, to trace it from its early state to the present time, for the purpose of showing that both methods were perfectly recognised by the law of the Island, and that the present *suite en saisie*, or process of expropriation, is nothing more than the original *convocation pour gager ou tenir*, at various times modified by our insular Court. That the sale of a debtor's estate was not formerly unfrequent in Guernsey will be seen from the following account of the laws of Guernsey, drawn out about two centuries and a half ago, which is of undoubted authenticity.* In speaking of the *décret d'héritage pour dettes mobilières*, it states :—that "Tout porteur de lettres obligatoires et exécutoires pour dettes mobilières sous le sceau de l'île ou d'aucune juridiction en icelle par lesquels l'héritage est obligé, doit avec le sergent ordinaire aller au domicile du debteur, ou ailleurs, où entend trouver des biens de l'obligé et iceux prendre par le sergent et les faire exécuter. Et en cas qu'il n'en trouverait pas, il doit semondre le debteur à le saisir de biens.

"Si l'obligé est absent il sera proclamé et évoqué par trois Dimanches à la porte du temple, issue du Service Divin, en la paroisse où l'obligé est demeurant. Et si lui ou autre pour lui ne s'oppose aux dits cris après le rapport du sergent la justice ordonnera un attourné pour répondre à l'action et

* It is styled "Lois et Coutumes de l'Ile de Guernesey accordantes à l'ancien coutumier de Normandie, avec les coutumes locales usitées et approuvées par Sa Majesté et ses très-nobles progéniteurs depuis le conquêt."

défendre la cause contre le demandeur, lequel attourné aura quarante jours pour s'instruire en la cause. Et si les lettres obligatoires sont trouvées valables la justice ordonnera douze hommes, lesquels mettront prix sur l'héritage, lequel prix sera proclamé par trois Dimanches après lequel terme l'héritage sera decreté par justice et après trois autres semaines sera vendu au cri du marché après laquelle vente le défendant aura terme aux prochains plaids d'héritage de payer la dette, et en cas qu'il ne ferait son devoir, la terre ou terres ainsi vendue demeurera au créditeur, ou à l'enchérisseur, à la charge de payer toutes dettes et redevances dues sur le dit héritage si le défendeur ou ses hoirs n'alleguaient chose raisonnable pour annuller le décret."

And indeed that there were two modes of proceeding in these cases in Guernsey, appears by the "Approbation of the laws" confirmed by Council; for although at the chapter ten, book ten, where the commentator is treating of the *décret*, as practised in Normandy, the declaration states that the chapter "is not approved of," still at the very next chapter which arises from the tenth, and which treats of the commissioners or assignees of the estates and their duties, the "approbation" proceeds; "as to the *décrets d'héritage* contained in the eleventh chapter, they should and can be practised among us, using as much brevity and celerity as possible;" and again it adds below "we don't use this chapter, but we don't know why we should not," and indeed the remarks of the persons appointed to approve or reject Terrien are always more than usually confused when treating of the nature of real property and proceedings to recover it, which can only be explained by knowing that proceedings have varied so repeatedly at various times, and there were so many ways of arriving at the same end, that they were scarcely able to distinguish them. This is confirmed too by an order dated 1620, which directs the Baillif, Procureur, and Greffier, to examine the records, and draw out an account of the manner of proceeding in saisie, the method adopted being so confused; but they never made any report.* Having, however, established beyond all doubt

* This experienced the same fate as the order of James I, in 1607, commanding the Baillif and Jurats to draw up a code of laws for the administration of justice and property in Guernsey.

that the method of proceeding by sale was known and practised; we shall proceed to show that the present *suite en saisie* should only affect that part of the estate of the debtor which was especially bound to the rentholder, and that on the same principle his guarantee or pledge for his real property sold, should not extend beyond it.

In Guernsey, as in Normandy, proceedings for rent begin by sending the sergent to the premises with a *prise de biens*, for the purpose of taking the personal property, if any can be found, previous to the creditor's attaching the real estate; but this is now become a mere form. If goods were found the parties were adjourned before the court of Namps, an old word *Namia*,* for goods taken in execution and after the goods had remained nine days on the estate they were sold. If the party could not find any goods the first time, he sent the sergent with an *exploit*, according to the old Norman form mentioned above, which authorised him to search three days for cattle and other personal property, and if none could be discovered the rentholder summoned the debtor to produce enough to pay one year's arrears; if he failed in this, he then obtained a permit to seize the estate immediately bound towards him. The exploit has also degenerated into a mere form in consequence of which the court of Namps, where these proceedings were held, has been set aside,† but the old books of record still remain, and in them the proceedings may be distinctly traced, particularly on examining the years 1662 and 1663.‡ Now the party sends a *prise de biens*, which, being a mere summons, he, at the expiration of a fortnight, sends an *exploit*, here he still specifies every piece

* This word is well known in the English law and is to be found in every law treatise.

† The Court of Namps was held on the days now set apart for the decision of appeal cases.—See ordinance of Chief Pleas after Christmas, held in 1614.

‡ And these forms were conformable to the spirit of our ancient laws, which would only allow the debtor to be dispossessed of his real property, as a last resource, as the wording both of the *prise de biens* and of the *exploit*, as practised to this day, will clearly show; their purport being an order to the Sergent to take in execution the personal property of the debtor, "Sergent.... *Allez aux biens*," and if there were no *biens*, or personal property, then Sergent you must look for them, "Sergent....*Allez exploiter sur l'héritage du débiteur pour ses biens*," and if, after having sought, the Sergent could not find any, then, and then only, was the rentholder or creditor authorised to seize the estate, or real property, of his debtor; in other terms, legally to take possession of that kind of property which in law was deemed most sacred.

of ground upon which he has a special lien according to his deeds, and upon which the sergent used formerly to make search, but it now merely saves a second summons, preparatory to his obtaining a *saisie* or possession of the real estate. Now it is universally admitted that this *saisie* called *mobilière* only gives the creditor the right to take possession of that part of the property specified in his exploit, so that if an individual possessed a dozen separate estates, the rentholder would only be seized of that one which owed the rent before it entered into his hands. This act of *saisie mobilière* gives the creditor a right to let the estate for his private benefit. And that he may obtain the property, as well as the possession, he is obliged to summon his debtor in the court of *plaids d'héritage*; here the very wording of the demand proves beyond all doubt that the action tends to nothing more than to deprive the debtor of that part of the estate of which the creditor is already seized.

This, a translation of one of these actions, will show: "A B *saisi mobilièrement* of a house, a field, and a spot of ground adjoining, situated at the village of , in the parish of , belonging to C D, summons the said C D to make himself tenant thereof and pay the said A B five bushels of wheat rent of the nine last years due him thereon* and other costs and expenses on said *saisie*, the said A B being ready to account for the enjoyment which he has had thereof or renounce to the said estate." At the first default the Sheriff is now named to represent the defendant and three more defaults are allowed him, at the end of which both parties are sent before a jurat or commis of the Court to examine the amount of the arrears remaining due, and to see that the rent received since the *saisie mobilière* is regularly accounted for, and if the balance is not paid on the next day of *plaids d'héritage* the Sheriff *renonce au dit héritage*. Now what is the *said estate* to which the Sheriff has renounced ?—That for which the party was prosecuted. And what was that ?—The house and field and adjoining piece of ground situated in a certain village or parish. It is therefore by the most unac-

* The rentholder may still recover nine years' arrears from the principal debtor, though he can only recover three years' arrears from the garant, anterior to the date of the debtor's expropriation or renunciation.

countable perversion of the law, and in defiance of the very terms of the process, that the *saisi* upon this act obtains possession from the sheriff of all the debtor's estates situated in the Island; that from that moment the debtor is supposed to have committed an act of bankruptcy as far as regards all his real estates; and that even in very many cases on record, some of modern date, his personal property was taken possession of, though his remaining property might have been perfectly unencumbered, and even the estate for which the suit was entered might be double the value of the rent.

A very full confirmation of this position is found in the *Approbation des Loix,* at the very chapter which has been previously quoted.

" Quand au vingt-cinquième chapitre pour tenir ou délaisser quelque héritage à cause de rente qu'on demande dessus, on fait semondre le tenant aux plaids d'héritage pour tenir ou délaisser ledit héritage. Et peut avoir le tenant deux défauts et s'il fait défaut jusqu'à la troisième fois le prévost de Sa Majesté devient partie* pour le défaillant contre l'acteur, et plaide la cause jusqu'à la fin, comme ferait le défaillant s'il était présent, et si le prévost devenu partie, comme dit est, renonce et délaisse les héritages sur lesquels la rente est demandée, le demandeur s'en ira saisi du jour de la renonciation sans aucun relèvement d'arrérages sur celui pour lequel le dit prévost aura renoncé, et s'il demeure tenant il doit payer la rente demandée et les arrérages; quand pour rentes foncières de neuf ans† et le temps du procès, si la rente du dit tenant n'était la plus ancienne, car en cela il ne serait pas tenu à répondre à rente plus jeune, mais pourrait bien le plus jeune acquéreur désaisir le plus ancien en lui payant ses arrérages et demeurant obligé à payer la dite rente pour après."

There never could be a passage more clearly worded; this is evidently the ground work of the present *plaids d'héritage,* yet the suit could only be entered for rents, the holder was only sued to keep or abandon the *said estates* upon which the rent was claimed, the sheriff answered for and afterwards abandoned *that only.* If he kept it, he was solely answerable for the rents of a date anterior to that for which the plaintiff

* The sheriff now becomes party on the first default.

† Three years arrears are now only required.

had sued, nothing existed in the shape of a registry, the only striking difference between Terrien and his *approbateurs* being, that in Guernsey the proprietor of the estate was, when the sheriff had given it up, no longer answerable for the arrears; whereas in Normandy he was still responsible for them: a striking difference in favour of the debtor. Should any thing more be requisite to confirm this interpretation, it will be found in those three fundamental principles on which all proceedings in saisie rest; the first—when, after the renonciation, and whilst the suing creditor is considered the assignee of the bankrupt's estate and supposed to have no greater interest in it than any other creditor, he continued to let it for his private advantage and applied the profits to the sole liquidation of his own claim;* the second—that the saisi was never considered obliged to sue any rentholder or incumbrancer anterior to himself, which regulation necessarily fell to the ground when he took the administration of six or seven estates into his hands, upon which he could have no claim; and the third, that at any period of the suit after the renunciation, the saisi could declare himself tenant, and take the estate to himself, whenever he thought it his advantage to do so.† These rules, if we consider him as the attorney, the assignee, or in any way the representative of the whole mass of creditors indistinctly, are glaring inconsistencies; but, if on the contrary he is viewed as the actual proprietor suing, for his security, the subsequent incumbrancers of that single estate specially bound towards him, and subject only to give it up on receiving the amount of his rent, they are satisfactorily explained.

It follows from the proceedings now adopted, that all persons having claims upon any estate, become immediately after the renunciation interested in the proceedings, and it becomes necessary to ascertain the amount of their claims; a registry‡

* This principle of the ancient law has been very properly altered, the suing creditor no longer lets for his own private benefit, but for the benefit of the creditor who will ultimately become proprietor of the debtor's estate. Thus again are reconciled all the principles on which the system of hypothecation rests.

† This is still daily practised, and is what is technically called *arrêtant les plaids et se faisant tenant*, closing the proceedings and becoming proprietor of the debtor's estate.

‡ This registry is very different from that wherein all contracts as they pass are noted, for persons who regularly inscribe their claims upon this whilst it

is therefore opened at the Greffe, and public notice is given of it at the Church porch and by advertisement. This form was directed to be observed by an ordinance of the year 1625, amended by another of the year 1699. An action is then directed against each of the creditors, who are called *affieffeurs*, who may now insist upon three delays,* and until these are expired the demands of any one creditor cannot be ascertained or liquidated. After the third default they are sent before a magistrate to compare deeds, *opposer droits*, and then each creditor produces the documents or deeds on which he founds his claims. It is at this stage of the proceedings that the *garants* are first called, each creditor, when sent before a magistrate, summoning his *garant* or security to appear with him that he may see that none of the deeds are neglected. The magistrate then makes his report, placing each in order, according to the preference in the date of their registry,—for whatever may be the date of the contract the claim of preference can only take place from the day in which it was registered. Next follows the retrograde offer, whereby each creditor is offered the debtor's estate according to the date of his registry, the last registered being offered the estate first, and on his refusal the next to him and so on according to their respective dates, until one declares his willingness to take to the debtor's estate, or *s'en faire tenant*. Such are the proceedings *en saisie* between, first, the saisi, or suing creditor, and debtor; and, secondly, the saisi and creditors.

We shall now proceed with the *guarantee* and observe the same division as with rents and saisies.

The guarantee or warranty is fully explained in the old Norman and English laws, and we shall find that here, as in the other instance, it is only by a most evident misinterpretation or invasion of the rights of the weaker by the stronger party, that this system has grown up to its present dangerous extent. Littleton, as commented by Lord Coke and Houard, the latter of whom has very ably compared together the old customs of England and Normandy, is, with Rouillé and

remains open, acquire no preference over each other. It now remains open six months when the debtor has voluntarily renounced, or forty days if the debtor have renounced through the intervention of the Sheriff.

* Formerly there were seven delays, four of which were altogether worse than useless.

Terrien, the best authority as to the original extent of the guarantee or warranty. According to Glanville, as according to the ancient and modern French writers, the manner of proceeding in all these cases is distinctly laid down. Guarantee was nothing more than an obligation on the part of the vendor to secure his title to the purchaser of the fief or rent purchased. If any other person attempted to dispute it, the purchaser called on the vendor or his heirs to defend him, and if the heir attempted to enter upon the fief alienated by his ancestor the clause of warranty was pleaded in bar to his action; so where a father had made a feoffement by his deed to another, and bound himself and his heirs to warranty, the son could not enter in possession of the lands in consequence of this clause of warranty; for if the deed had been made without warranty, the son, notwithstanding the transfer, could immediately have taken it. By this warranty the garant was at all times bound either to maintain the *garanti* or person warranted in possession, or to supply him with another fief of the same value, provided he had the means.

But not the slightest trace can be found of the right of the person guaranteed to come upon all the purchasers from the garant of lands which he held at the time or had occupied since this transfer. That this is the fair interpretation which should be given to the clause of warranty in the contracts passed daily in Guernsey, appears from the contract itself, a copy of which clause was given in the preceding chapter. We shall merely draw attention to two points; the first, that by which the party takes the estate, and which declares him to be "present and accepting thereof for himself and his heirs for ever and ever;" not a word is said of assigns; the purchaser in no part of the contract reserves to himself, still less to his heirs, the power of assigning, or in any way transferring the property. It is therefore pretty evident that if upon descending to the son he should sell it, to the prejudice of the grandson, the latter might enter again into possession, except for the clause of warranty which is inserted in every contract, by which the vendor in all cases secures the sale of the purchaser "*sur l'obligation de tous ses biens-meubles et héritages présens et futurs et de ses hoirs*":—this, as stated in the authorities above referred to, might be pleaded in bar to

his action. Words which were evidently meant to apply to all such property as he might possess when called upon, whether held at the time of the sale or obtained since.

In Guernsey, the guarantee is at present of two kinds; immediate and indirect. The garant immediate is the vendor or his heirs, lineal, collateral, or ascending. The garant indirect is the purchaser from the garant direct, or his heirs, at a date posterior to that of the person who sues him. The difference in the extent of the obligation of the garant immediate and the garant indirect is most material; the garant immediate is bound to warranty, or must abandon all his estates, whether he possesses them by a previous title or by a later purchase, or in any other way whatever;—the garant indirect is only obliged to abandon the property purchased from the garant immediate, but at the same time the estate may have been repeatedly transferred so there be an infinite number of garants, and as all estates are equally divided among the heirs according to the custom of Gavelkind, it is impossible, in commencing a *saisie*, to know when it will conclude; and the purchaser of a real estate will never be secure in his property. For, although his vendor may be solvent, still he may possess no other real estate, and in that case should the person from whom the vendor made this purchase be unable to pay his own rents on other estates, then the rentholder will come upon the present holder of this estate, who will be obliged to submit to the loss; so the vendor may have been possessed of other estates, and in that case the persons to whom they were sold may be unable to pay their rents, and then again the purchaser will be the sufferer; or the vendor may have kept his remaining estates in his own hands and as long as he lives may pay the rents regularly, but at his death the property will be subdivided and some of the children may become insolvent, then again the purchaser will become liable.

Having explained the origin and present state of the law, as it respects *rentes*, *saisies* and *garantees*, in the next section shall be suggested remedies for the evils engendered by the present system, remedies which, possessing the advantage of having been long tested under a system of tenure similar to that which obtains here, are more particularly worthy of consideration.

SECTION 3.

On the expediency and practicability of abolishing Guarantee.

SUMMARY.

All rents, whether payable in cash or kind, created for money, *should be redeemable ; and no irredeemable rents whatever should exist on any lands or houses to which there were not at least three vergées attached.*

Guarantee should also be restricted to the lands on which the rents were created, as was the case in Normandy.

Nature of the reforms introduced within the last few years, which have been found most advantageous.

Guarantee is not inseparably connected with the system of tenure here in force.

Nature and effects of an ordinary warranty, under the Roman law and under the ancient and modern French law, exemplified.

Different examples of expressed and implied warranties adduced, as taken from the Codes of these nations.

These compared to the abuses arising from the Guernsey practice of guarantee.

How the abuses of guarantee might be easily and effectually reformed.

Injurious tendency of the old dilatory system of expropriation set forth.

Many of its abuses remedied by the ordinance of the seventeenth of January, 1837.

Its object and purport adduced.

Honorable trait of the late Mr. John Collings towards an unfortunate debtor.

Reasons adduced and means proposed for the unqualified abolition of guarantee.

Pothier's authority quoted to show what the object of guarantee was; and that irredeemable rents created on houses should be rendered redeemable. An edict of Charles the seventh, in 1441, *rendered all rents created on houses within the jurisdiction of the Parlement of Paris essentially redeemable ; Henry the second, in* 1553, *rendered the system general throughout France, and at the revolution, in* 1790, *the system of redeemable rents having been found to operate advantageously, it was adopted by the constituent assembly, and applied to lands as well as houses.*

The titles on which real property rests, can only be perfectly secure where guarantee is restrained within its legitimate boundaries, and where rents are rendered redeemable.

The Guernsey authorities do not appear to have been singular in bestowing on an institution a name the very reverse it deserved.