Having, in the two previous sections, referred to the origin and nature of guarantee, the present shall be devoted to point out the manner in which it operates and the means by which it might be abolished. Extracts from the Court's correspondence with the Privy Council show that notwithstanding every argument urged in its favour by the former several important modifications were nevertheless introduced, which, together with abridging the number of delays in *saisies*, have had the effect of somewhat diminishing the evil. But no effectual remedy can be expected until some further reform shall have been introduced by rendering all rents created for money, as well as all wheat rents settled on houses in town, and indeed wherever situated, to which less than three vergées of land shall be attached, essentially redeemable; and until guarantee be here restricted, as it was in France and ancient Normandy, to that land only on which the rent was originally created. Let not the cry of innovation prevent either the inhabitants or the local authorities from rendering this service to their country, a cry that has been incessantly raised against the most salutary reforms, and no where with less reason than in Guernsey, as may be exemplified in what has occurred from the following reforms in its institutions, most of which are within the recollection of all. Such are the abolition of the *Cour devant plus de Jurés*—the abrogation of delays, not only in regard to the expropriation of real property, but generally in regard to the administration of civil justice—the abolition of oaths in attachments for personal property—the reduction of the arrears of rent in *saisies* from nine years to three—the placing all creditors on the same footing to an insolvent debtor's assets—the rendering of a debtor's after purchased lands not subject to guarantee to the owners of rents or lands with whom he has previously contracted—the revision of the table of costs, which now in most cases where there is no appeal to the Court of judgments from the amount in dispute being under ten pounds sterling, will be sufficient to cover the expences necessarily incurred by the plaintiff—and the reform of the laws of inheritance,—all which have taken place by order of the legislature, and, with a single exception, were most strenuously opposed by the local authorities on the score of innovations, and yet not one

of which would now be allowed to return without exciting, if possible, still greater opposition that did its abrogation when first mooted.*

But perhaps the best way to judge of the effects of an ordinary warranty and those of guarantee, as practised in Guernsey, is to examine them separately, and leave any unprejudiced person to judge for himself, always bearing in mind, however, that the system of landed tenure in Guernsey, the good effects of which have been so loudly extolled, has existed elsewhere without the abuses of guarantee being tacked to it, a fact of itself sufficient to demonstrate that it is not so inseparably interwoven with its system of tenure as not to be abolished without destroying the latter, as might be supposed from the Court's statement, that it is only under the system of guarantee that houses and lands can be alienated for ever without the necessity of any actual payment† in cash, and to the mutual benefit of the parties!

Let us here first adduce the consequences of an ordinary warranty given in Guernsey by the vendor, and which here, as elsewhere, exists, and afterwards shall be given those which from its peculiar custom of guarantee arise against the purchaser; fully to exemplify which it must be borne in mind that by guarantee or warranty is generally understood that security or pledge which, by the nature of every contract of sale or exchange, the vendor gives the purchaser that the property sold really belongs to him, and that he transfers a

* Two very satisfactory reforms have however been lately introduced by the Court, which can exercise but a good effect on property, one passed at the Easter Chief Pleas, in 1836, which enacts that no action will lie for simple contract debts where there is no evidence in writing, after a period of ten years from its creation—another passed at the Chief Pleas after Christmas, in 1837, which decrees that the creditor making himself tenant of his debtor's real property, shall, within three months, if required, be bound to pay all the prior mortgagees ten per cent on the value of their respective claims, and in default of his doing so, reserving to the mortgagee the faculty of dispossessing such tenant, at the next Court of Heritage, of the estate so seized. By this means indigent creditors will no longer be suffered to make themselves tenant of their debtor's estate when hypothecated for more than their value, merely for the purpose of getting possession of the fruits which might be found on the land, or the rents which might be due by the tenants, as they formerly did, to the extreme prejudice of prior mortgagees, who thus beheld the property on which their claims was secured pass to other parties who, either from inability or unwillingness to discharge their obligations, subjected the prior mortgagees to the expence and delay of another suit to expropriate them.

† Remarks of the Court on guarantee, page 10, presented to Council in February, 1825.

good title to the purchaser peaceably to enjoy the same. This guarantee is tacitly implied in all contracts of sale and exchange, though by virtue of an express stipulation the parties may and do sometimes renounce to such pledge, and for better or worse irrevocably accept the object sold or exchanged; the defect or rather the risk attending the uncertainty of the title being taken into consideration in estimating the value of the object transferred.

These principles which flow naturally from the contract of sale have, however, in some instances, been made the subject of positive law. Thus we will find it expressly declared that there are certain guarantees or warranties which are ever implied, and that no express stipulation is required to give the purchaser a right to come on the vendor for any defect which may be found in the title, or fault in the object disposed of, and this whether it be for the whole or part of such object —*sive tota res evincatur sive pars habet regressum emptor in venditorem.**

And again, that all titles given are naturally taken for good, unless, as before stated, the defect in such titles have formed the special object of a private stipulation,—*Non dubitatur, etsi specialiter venditor evictionem, non promiserit re evictâ, ex empto competere actionem.*†

There are, however, other warranties which can never be compounded for by any private stipulations, such as those which arise from the personal defect or fraudulent act of the party in whose favour it is stipulated. Thus there are express, implied, and absolute warranties; all which may be said to have been thus regulated in the Roman law:—the express, which binds us to the faithful performance of any special and expressed warranty or guarantee, which may be either more or less than that implied by law—*Nihil magis bonæ fidei congruit, quam id præstari quod inter contrahentes actum est*;‡ and the natural, or implied warranty which, being essentially just, exists independently of any private agreement, according to the *L.* 6. of the Code *de evictionibus* abovementioned, *non dubitatur etsi specialiter venditor evictionem non promiserit re evictâ ex empto competere actionem.*

* L. 1. De evictionibus, and also L. 10. Cod.
† L. 6. Cod. De evictionibus.
‡ L. 11. Sec. 1. ff. de act. empt. et vend.

And the absolute, to which none can renounce, even by an express condition, the legislator deeming the claims of eternal justice and morality far too sacred to be evaded by the private arrangements of any individuals, *pacta quæ turpem causam continent non sunt observanda*;* the same may be said of the convention by which it would be attempted to screen a party from the consequences of his own wrong, it would be absolutely void: *conventio contra bonam fidem contra que bonos mores non sequenda est.*†

Nor is the Roman law the only one wherein this doctrine on express, implied, and absolute warranties is to be found; for in the following articles of the French code civil, 1625, 1626, 1627, and 1628,‡ we find them applied to sales of both real and personal property,—it being therein expressly laid down under the head of guarantee, that the warranty due by the vendor to the purchaser is to secure the latter in the peaceable enjoyment of the object sold: and to indemnify him against the secret vices, defects, or faults of the object sold, which in law are called redhibitory vices, it being in the nature of such vices to place the vendor and purchaser in the same position as they were before the engagement was contracted: *Redhibere est facere ut rursus habeat venditor quod habuerit, et quia reddendo id fiebat id circo redihibitio est appellata, quasi redditio.*§

These latent vices when unknown to the vendor may become the subject of a stipulation if there be any doubt as to their existence. In fact the contract of Insurance against

* L. 27. Sec. 4. ff. De Pactis.

† L. 1. Sec. 7. ff. De Pactis.

‡ DE LA GARANTIE.

1625.—La garantie que le vendeur doit à l'acquéreur a deux objets: le premier est la possession paisible de la chose vendue; le second, les défauts cachés de cette chose ou les vices rédhibitoires.

DE LA GARANTIE EN CAS D'EVICTION.

1626.—Quoique, lors de la vente, il n'ait été fait aucune stipulation sur la garantie, le vendeur est obligé de droit à garantir l'acquéreur de l'éviction qu'il souffre dans la totalité ou partie de l'objet vendu, ou des charges prétendues sur cet objet, et non déclarées lors de la vente.

1627.—Les parties peuvent, par des conventions particulières, ajouter à cette obligation le droit ou en diminuer l'effet; elles peuvent même convenir que le vendeur ne sera soumis à aucune garantie.

1628.—Quoiqu'il soit dit que le vendeur ne sera soumis à aucune garantie, il demeure cependant tenu de celle qui résulte d'un fait qui lui est personnel; toute convention contraire est nulle.

§ L. 21. De Ædilitio edicto.

either marine or land perils is established on the same principle. These contracts are called *aleatoire*, because attended with risk and uncertainty. The object of going into these details is to show that no mention is made of guarantee, as understood here, in the French law.

All these warranties, or guarantees, being in the nature of the contract of sale and exchange, apply to the Guernsey law as to all other laws, being essentially just and necessary to carry out and forward the legitimate views of the parties to such contracts, their tendency being in every respect to secure the purchaser, not only against the overacts of the vendor, but even against such acts as though perfectly unintentional might yet tend to diminish the value of the object sold, or deteriorate the title by which it is held. Let only these principles and their consequences be compared to those which follow from guarantee, augmented by all the evils of lengthened and disheartening processes and the results of warranty under the common law of nations; and that of guarantee, as understood in Guernsey, will appear in the most striking colours: first, premising that, according to the law of Guernsey, guarantee as to any defect or fault in the title is as clearly due to the purchaser as under any other system, and that the prior mortgagee or privileged creditor on the debtor's estate by virtue of an earlier registry has a priority of claim for his demand, and interest for three years, to all other subsequent creditors; which is nothing but agreeable to the principle on which are founded hypothecations, or securities on landed estates, for the discharge of personal claims or ordinary debts registered thereon.

The ordinary warranty on the part of the vendor to secure a good title to the purchaser, is, as before said, implied in transactions of every kind, as well real as personal. But that of guarantee, as understood in Guernsey jurisprudence, applies more particularly to real estate, and is that by which the purchaser of an estate on which rents are due binds himself and his heirs towards the rentholders, as well as to the vendor to whom any are due, not only on the liability of all the property he possesses at the time of the purchase, but of all other property subsequently acquired, though never in contemplation of either party at the time of passing the contract, and notwithstanding that such property by a sale to

third parties is absolutely placed beyond his controul when the event occurs which determines the original vendor to call on his purchaser to fulfil the conditions of this warranty.

From this guarantee generally spring one or more of the following evils, which, it need not be observed, exercise a fatal tendency on rendering titles uncertain and thereby diminishing the value of real property throughout the Island :—

1°.—From rentholders having, in the event of their debtor's insolvency, the privilege of coming upon all persons who, within forty years, have purchased any real property from him in the shape of either houses, lands, or rents.

2°.—From the assignor of a rent remaining liable on all his real property for forty years towards the rentholder who, on the person assigned to pay it becoming insolvent, then possesses a perpetual lien on his debtor's estate, an evil which would not exist were rents rendered redeemable.

3°.—From the power a rentholder possesses of coming on any real property his debtor may have purchased or inherited subsequently to his obligation to pay the rent.

4°.—From the extraordinary privilege which the rentholder or saisi, after causing the principal heir to renounce to his ancestor's estate on which his rent is due, possesses of compelling the other co-heirs to take to their ancestor's estate and pay him the rent or renounce to all their own real property, including what they may otherwise have purchased or inherited from ancestors in a different line.

Now it is evident that were the system of redeemable rents adopted, parties would not be thus subjected to perpetual uncertainty respecting the tenure of their real property, nor be liable to pay their engagements twice over whenever any considerable fall occurs in the value of land ; an uncertainty which no advantages can compensate, were they even ten-fold greater than those which any one might feel inclined to ascribe to the present system.

That the abuses resulting from the former practice of guarantee were most deplorable, may be seen from the following consequences to which it leads. The animadversions upon them, by petitions to the legislature in 1819, may be regarded as the forerunner of those modifications in the practice of guarantee, which are set forth in the order in Council of

1825. The Petitioners represented, and with great truth, that many proprietors of small rents upon large estates, though registered at a favourable date, were induced to abandon their claims either through necessity from their not possessing the means of immediately paying off all arrears, or through convenience, not wishing for a rent of perhaps five quarters, or for a debt of one hundred pounds, to take an estate burthened with rents to perhaps twenty times the amount.* In the mean time other creditors having nothing to lose, and possessing no other property but a trifling rent of it may be a few bushels, or having a small claim registered at an indifferent date, were known to take large estates, and enjoy their proceeds for several years, to the great detriment of prior mortgagees registered at a favourable date, and of the garants, who were thus subjected to the delay and expence of a second suit in the heritage Court to dispossess these needy creditors from real property which legitimately belonged to such prior mortgagees.†

* No effectual cure for this evil will be found, but by rendering all rents on real property essentially redeemable, in which case the *bonâ fide* and solvent creditor by at once ascertaining the extent of his liabilities, and being resolved to discharge them, will no longer hesitate in taking to his debtor's property and saving thereby a portion of his claim.

† An effectual remedy has, within the last few years, been found by the Court for this intolerable abuse, which is the ordinance passed at the Chief Pleas after Christmas, in January, 1837, which has been before alluded to, and which being very frequently referred to in matters of expropriation of real property, shall be here transcribed. Its object is clearly set forth in the preamble, and the three first clauses, which is to prevent needy creditors taking to the estates of their debtor, to the prejudice of anterior mortgagees, who in many instances lost not only the interest of their claims, but also a considerable portion of their capital after the estate had thus been for some time in the hands of a needy mortgagee, who disposed of its produce and any object which could be immediately turned into money in the manner which best suited his purpose, which was to make the most of it, during the short time he was aware he could enjoy it, to the great detriment of the estate generally. By the creditor's paying ten per cent within three months to the prior mortgagees, on his making himself tenant, these abuses will be remedied, there being no longer the same inducement held out to a needy creditor's taking possession ; besides, the time of his possession is under any circumstances far too short for him to commit much damage.

The two last clauses of the ordinance only refer to that well known principle, so often consecrated by our ancient laws in matters of *saisies*, which is, that a person making himself tenant of his debtor's estate, thereby renders himself personally responsible to pay all the mortgages declared by the Court prior and preferable to his own. To this principle, it is stated in the ordinance, no derogation is intended.

This ordinance is as follows :—

At the Chief Pleas after Christmas, held on the sixteenth of January, 1837, before the Baillif and Jurats, the following regulations were passed.

" La Cour, sensible du préjudice porté aux affieffeurs antérieurs dans les

Nor were these the only evils produced by the uncertainty which existed respecting transactions in real property. Several instances might be mentioned of estates having been seized for much less than their value. One remarkable instance occurred, where a debtor from a mere temporary inconvenience, sued by the late Mr. John Collings, renounced to his estates, consisting of two houses in town, one of which Mr. Collings sold, and from the proceeds, not only paid all previous incumbrances, but his own claim, with interests and costs, when he still remained with a considerable balance in hand, which, with the remaining house, nearly rent free, and of the same value as the former, he generously transferred to their legitimate owner. It is indeed well known that many rentholders formerly made a system of allowing their arrears to accumulate in order to dispossess their debtors or purchasers, whose real property thus reverted to them with every improve-

saisies par des affieffeurs postérieurs, souvent sans garantie ni moyens, qui se font tenant uniquement pour jouir quelque peu de temps des héritages, mais sans espoir de pouvoir payer les affieffeurs qui leur sont antérieurs et préférables, a ordonné et ordonne ouïe les conclusions des Officiers du Roi.

" 1°. Que lorsque l'affieffeur, créditeur ou engageur, qui se fera tenant ira compter avec le précédent saisi, les affieffeurs antérieurs pourront, s'ils le jugent à propos, se présenter devant commis et demander que la somme dont le précédent saisi sera redevable soit affectée au paiement des dettes antérieures en commençant par la plus ancienne des dettes des affieffeurs présens et ce dans telles proportions que le dit commis le jugera à propos, le jugement duquel sera final.

" 2°. Qu'afin de donner connaissance aux affieffeurs, créditeurs ou engageurs antérieurs du jour que l'on ira devant commis compter, le précédent saisi sera tenu de le leur faire signifier et d'en produire relation, et pour chaque signification et relation il chargera £1 1s. 0d. tournois ; savoir, 14s. pour l'avocat et 7s. pour le sergent. Et ne sera aucune partie de la balance entre les mains du précédent saisi affectée au paiement des demandes d'affieffeurs, créditeurs ou engageurs antérieurs qui ne se trouvent pas au vuidement de compte, à moins que la majorité, quand aux sommes des affieffeurs, créditeurs, ou engageurs présens ne le demandent.

" 3°. Que tout affieffeur, créditeur ou engageur qui se fera tenant sera tenu avant l'ouverture des Cours du prochain quartier (that is, within a delay averaging from two to four months) de payer dix pour cent sur le montant des affieffemens, dettes ou engages, clairs et liquides, antérieurs et préférables dûs sur la dite saisie, soit qu'ils aient été suivis en plaids d'héritage ou non, et à faute de ce faire le tenant sera censé avoir renoncé à sa dette, la saisie sera censée en état, et tout affieffeur antérieur pourra la vuider de même et semblable manière que s'il n'y avait pas eu de tenant et qu'elle fut demeurée en état.

" 4°. Et ne déroge le susdit article en rien à la loi et coutume qui déclare le tenant débiteur principal d'aventure et passible de toutes dettes antérieures et préférables à la sienne dans la saisie dont il sera tenant.

" 5°. Dans le cas qu'il soit de l'intérêt des affieffeurs, créditeurs, ou engageurs antérieurs et préférables de suivre le tenant comme débiteur principal d'aventure, et comme personnellement tenu de leurs créances, ils le suivront en envoyant à ses biens, comme cela se pratique actuellement."

ment made on them at the expence of their creditors; and not unfrequently because mortgagees were deterred from taking to them, through the fear of guarantee, which, though not at present so great as formerly, yet seriously requires remodelling. In fact, until the guarantee of the rentholders be restricted to the lands on which they were created there will be no security against its multiplied abuses. As to researches at the Greffe for the purpose of ascertaining the state of the liabilities of the owners of real property, they are worse than useless, from the complexity of the system, and from the number of persons and estates involved in guarantee; for not only must very strict enquiry be made into the present circumstances and former possessions of the present proprietor, but into the property formerly held by his ancestors; into the transactions and property of all who have ever, or for a considerable time, purchased of, or sold property to him, or his ancestors; into the property of their ancestors, and again into the transactions and property of all who have purchased of, or sold property to, such remote purchaser or vendor and his ancestors; and so on *ad infinitum*.* To expect perfect

* And even after all these multiplied researches, which would be enough to overcome the patience of Job himself, the efforts of the party directing these researches might have formerly ended without in the least fulfilling their object, from the circumstance that the Record of Hypothecations made no mention of the deeds on which rests the title of the creditor making himself owner of his debtor's estate, nor the Record office itself of those referring to the division of estates among co-heirs, known in ordinary phraseology as *Billes de Partage*. The registration of these important documents has however been ordered within the last few years, as will appear from the following extracts from the Record office; that referring to *Billes de Partage* bearing the date of the 30th of April, 1832, and that in reference to the tenant of a debtor's estate bearing the date of the 23rd of April, 1838.

In reference to the former the preamble and dispositions of the ordinance are as follows:—

" Aux Chefs Plaids d'après Pâques, tenus le trente Avril, 1832.

" La Cour prenant en considération les inconvénients qui résultent de ce que les rentes créées par des Billes de Partage, soit retours de bille ou retours de vingtième, prennent préférence dans les suites en plaids d'héritage d'après la date des dites Billes de Partage, quoiqu'elles ne soient point enregîtrées au Greffe, et souvent ne sont exécutées que sous seing privé, ce qui cause dans bien des cas un tort considérable aux individus qui ont acquis postérieurement à la date des dites Billes de Partage des hypothèques sur les héritages sur lesquels les dits retours de bille ou retours de vingtième sont dus, et qui peuvent n'avoir jamais connu l'existence de tels retours de bille ou retours de vingtième, faute d'enregîtrement au Greffe, a ordonné et ordonne, qu'à compter de ce jour et date, aucun retour de bille, retour de vingtième, ou autre rente ou hypothèque quelconque créée par une Bille de Partage ou autre pièce de cette nature ne prendra préférence dans aucune suite en plaids d'héritage que de la date de

security in real property transactions with such a system is mere delusion.

But is there then no remedy for such grievances? are the evils of guarantee really so insuperable that our system of tenure or *bail à rente* must be destroyed or they subsist; in other terms, is the present practice of guarantee so interwoven with the system of landed tenure here in force, that the latter must be destroyed, if the former be abolished? It may be safely answered in the negative, as the *bail à rente*, that is, the exchange of real property for a certain annual proportion of the fruits, or value in kind, has endured for centuries over fifty thousand times the surface of land contained in this Island, (and which still subsists in Jersey,) without guarantee being interwoven with it, as appears from the French law authorities, and more particularly Pothier, in whose treatise on the *bail à rente* our system of tenure may be found admirably explained, and yet unclogged by guarantee, that monster of our own creation.

But the abridgment of *saisies*, or judicial means of expropriating insolvent holders of their real property, and reducing the liability of the garant from nine to three years' arrears,—the rendering the party having assigned a rent liable for only forty years, instead of being perpetually so, to the holder of the rent so assigned—and the exempting from guarantee all subsequent purchases of real property to former ones; these principles, however strongly recognised by the legislature, have so far only mitigated the evils of guarantee, but not provided an adequate remedy, which, it is submitted, can only be found :—

First.—By rendering all rents created on real property, but more particularly on houses and dwellings, essentially redeemable; this would prevent the creation of the worst species of rents, whence the evils of guarantee proceed.

l'enregîtrement au Greffe de la Bille de Partage ou autre pièce par laquelle elle est créée."

In reference to the necessity of registering the act constituting the creditor tenant of his debtor's estate, the order is as follows :—

" Aux Chefs Plaids d'après Pâques, tenus le vingt-trois Avril, 1838.

" Il a été ordonné que celui qui se fera tenant d'une saisie sera tenu de faire enregîtrer l'acte de saisie sur le livre des contrats, et payera *deux chelins* au Greffier pour l'enregîtrement du dit acte."

Second.—By rendering that land only on which the rent is created liable for its annual payment, which would make landed proprietors cautious how they charged their lands with rents, knowing that if they overburthened them with rent charges it would be at their own risk, from the circumstance of real property subsequently purchased being no longer guarantee for the rents or sums due on such lands, as is the case to a certain extent at present.

Third.—That no other but monied rents, and consequently redeemable rents, be created on houses and lands to which there was not at least three vergées attached, such property being unable from its nature to grow or produce any corn for its annual discharge in the shape of interest.

These principles, with the reforms previously introduced by Council and before alluded to, would do away with all the evils to which our system of landed tenure is liable,—would enhance the value of real property generally, by rendering it a desirable investment and encouraging improvements thereon, and would be an effectual remedy against all those hardships which have hitherto brought ruin on so many families, whom the legislator and the judge, instead of effectually relieving, have hitherto been content with bestowing on them a sterile pity, which showed the enormity of the evil without adducing a remedy. Both have long since acknowledged the defects of the law, but neither has devoted his energies to avert the evils impending on so many innocent persons, whose hardships are the more deserving of early and effectual consideration, as the source whence their misery springs is a system the baneful effects of which it is beyond the most consummate foresight to prevent or to remedy.

Fortunately, however, experience demonstrates that very material reforms may be engrafted on the practice of guarantee without intrenching on the good effects of our system of landed tenure. Only let the state of the law previous to the Commissioners' arrival be contrasted with what it is now, and it will be seen the reforms introduced by them, have been attended with considerable benefit. Though we still too frequently hear of families ruined by guarantee, yet in consequence of the reforms made in the system of expropriation, and of the comparatively limited liability of the garants to

three years arrears, we do not so frequently see the expropriation of one debtor leading to the expropriation of several others of his creditors, who, by taking to his estate, fell victims to the expences and engagements it entailed, many of which, as before stated, it was beyond his power to ascertain, at the moment of his making himself proprietor of his debtor's estate. In fact when a process of expropriation, better known here as a *suite en plaids*, lasted for several years, and from the intricacy of the system brought on other expropriations equally dilatory,* when it was neither required of the heir to register the contract by which his property was divided among his co-heirs, nor of the creditor making himself tenant to register the act by which the debtor's estate had devolved to him—though by these respective acts they had as virtually bound themselves to guarantee as if they had contracted that liability by an express and more formal contract—our system of expropriation was a complete riddle which no modern Œdipus had been found to solve. Nor was this complication its most vicious feature, *saisies* often lasted two years before the debtor renounced, and four or five years afterwards from the difficulty of settling the different claims of priority among the creditors; so that the *garans* who have ever been called upon only at the close of the proceedings, had to pay nine, ten, eleven, and even twelve years' arrears to the rentholders, towards whom many of them had entered into no kind of engagement. These evils cannot be carried to such lengths under the present system, yet the

* The very name of some of the forms passing current in our former system of expropriation, is as curious as their existence itself was unnecessary, for the due administration of justice. They were nine in number and were as follows:

1. Le—Débiteur vers premier défaut.
2. Idem vers deuxième défaut.
3. Idem vers troisième défaut, et est le Prévôt partie.
4. Prévôt delai. { Where was the necessity of granting the Prévôt a delay; is he not always in Court when its sittings in Héritage are held ?
5. Terme en venant.
6. Terme compétent.
7. Prévôt garnit la cour d'argent; which was four pence.
8. Prévôt se fait tenant.
9. Prévôt renonce ou paie.

Of these nine delays, the two first, the fourth and the seventh have been abolished, as utterly useless, the Prévôt becoming party on the first instead of the third default no longer requires the delay mentioned in the fourth, it being his place to be always in Court: nor does the Court exact its fourpence!

principle, or rather the unprincipled source, whence they sprang continues in all its vitality, and if great benefits have been hitherto derived from its partial reform, what advantages may not be reasonably anticipated from its utter extinction.

We now proceed to examine the nature and efficacy of the remedies suggested :—

First.—That the land only on which the rent is created shall be liable for its discharge.

Second.—That all rents henceforward created on tenements and houses, which shall not have more than two vergées of land attached to them, as well as all assignable rents, be declared essentially redeemable.

Only let these just and fundamental rules be introduced into our system of tenure, and all the evils of guarantee, all those unjust liabilities which ruin the children and their posterity, through the untoward purchases of their ancestor, will disappear; and let it not be supposed that these purchases were incautiously made, for what precautions can be taken to prevent a purchaser from being expropriated under the present system, which renders him during the ordinary term of a man's life, the space of forty years, liable to all the previous transactions in real property contracted by his vendor. Such nevertheless is the consequence of our misnamed usage of guarantee which, instead of meaning a security from the vendor to the purchaser to secure him a good title, implies that the whole real property of the purchaser shall be liable towards the vendor's rentholders, or creditors in real property, for forty years; although no contract or warranty, whether express or implied, have been contracted by the purchaser towards such creditors, and although their debtor's circumstances, and the condition of his estate, so far from being rendered worse, have been considerably improved through his transaction in real property with such purchaser. Such is the natural consequence of our usage of guarantee, the effect of which is to destroy the very object of all warranties, to undermine all titles in real property, and to destroy all confidence respecting transactions of that nature. And for what purpose is a system fraught with so many latent evils to be any longer endured? what advantages can be derived to compensate for so many disastrous consequences, all too growing out of a

system founded upon a practice as much opposed to all sound principles as to the most sacred rights of property, an abuse peculiar to this Island, and which, to sum up all in one word, tends to unsettle all titles to real property.

But it may be asked, has the system of redeemable rents existed elsewhere; and what proofs can be adduced that the land on which the rent was originally created was alone liable for its discharge; consequently that guarantee, as here practised, is an innovation peculiar to the Guernsey laws? To all these questions it may be replied that the system of landed tenure, that is to say, the exchange of lands and houses for rents, existed on the same footing in France before the revolution as it does here, that these wheat rents when created on lands and houses were irredeemable, but that the evils arising from such irredeemable rents became so great that the system was there universally abolished during the sixteenth century as far as regards houses. That the same system of irredeemable rents with regard to lands having been found extremely objectionable, it was likewise abolished in 1790, and both these measures are now considered as wise and salutary improvements on the ancient system. It is curious enough to observe the reasons assigned by Henry the second, of France, for abolishing the system of wheat rents on houses; they will, however, apply with infinitely greater force here where our peculiar system of guarantee still subsists. But before we proceed to examine the reasons assigned for the abrogation of irredeemable rents, let us see what in the ancient laws of France was understood by guarantee, and what circumstance gave rise to it, and here again we shall find the position whence we started as to the nature and object of this obligation fully confirmed: " L'obligation du *vendeur* n'est pas entièrement consommée par la tradition qu'il a faite de la chose vendue; il demeure encore, après cette tradition, obligé à défendre et garantir l'acheteur de toutes *évictions** par rapport à cette

* What *évincer* or ejectment here means the same author sets forth as follows: " Évincer proprement, est ôter quelque chose à quelqu'un, en vertu de sentence, *evincere est aliquid vincendo auferre : éviction* est le délais qu'on oblige quelqu'un de faire d'une chose en vertu d'une sentence qui l'y condamne. Ce nom d'*éviction* se donne aussi dans l'usage et à la sentence qui ordonne ce délais, et même à la demande qui est donnée pour le faire ordonner."—*Traité du contrat de vente, partie* 2, *chap.* 1, *sec.* 2, *No.* 82.

chose; cette obligation s'appelle *obligation de garantie.* C'est ce qui résulte de cette maxime de Pomponius, en la *Loi 3. ff. de act. empt. Datio possessionis quæ à venditore fieri debet, talis est, ut si quis eam possessionem jure avocaverit, tradita possessio non intelligitur.*"* The authority of Pothier on this subject must be of great weight, when we consider that he wrote on a system governed by laws very similar to those which obtain on the *Bail à rente* here, that is to say, that lands were exchanged for irredeemable rents, and that the lands on which these were created were perpetually liable or guarantee for the discharge of the obligations created upon them, yet that author hails as a politic amendment the laws of Henry the second, which rendered all rents created on houses essentially redeemable, though when originally sold some still remained, which were only so on condition of the former proprietor receiving in exchange an irredeemable rent,— "public good," says he, "requiring it should be so from the tendency of proprietors of houses, allowing their property to run to waste when they had little or no interest in improving, or even maintaining them in tenantable repair, a house on which many of such rents were due, belonging in fact less to the possessor than to the former proprietor, who, in default of regular payment, was always at liberty to eject the purchaser from the estate thus sold him," a remedy by the way which shows that all the debtor's estates, particularly those subsequently purchased, were not guarantee or liable to be seized for the payment of such rents, as has been the practice in Guernsey.

Pothier thus sets forth the main difference between rents created for money, which were ever essentially redeemable, and *rentes foncières*, or irredeemable rents, which were created as the price, or valuable consideration of the land, the first were redeemable; the second, as representing the land for which they were the immediate consideration, were not.

With respect to the ground rents, or *rentes foncières*, created on houses situated in towns and boroughs, "these," says Pothier, "have ever been redeemable since an ordinance of Charles the seventh, in the year 1441, by which it was decreed that all rents created on lands and houses after the

* Du contrat de vente, partie 2, chap. 1, sec. 2.

ground rents, shall be essentially redeemable; and that no act of the parties could render such rents irredeemable, according to the rule *conventio privatorum juri publico nunquam derogat.*" The reason of this law was to give the proprietors of houses a greater interest in keeping their property in a fit state of repair. " Le motif de cette loi," says Pothier, " fut, suivant qu'il paraît par le préambule, qu'un grand nombre de propriétaires de maisons qui étaient chargées d'un grand nombre de rentes qui en absorbaient le revenu les laissaient tomber en ruine."* And again—

This ordinance of Charles was restricted to Paris, but Henry the second, by an edict issued in 1553, rendered this principle applicable to the houses situated throughout all the towns and boroughs in the kingdom. This right, says Pothier, can never be taken from the owners of houses so situated. " Ce droit qu'ont les propriétaires des maisons de ville de racheter les rentes foncières dont elles sont chargées, lorsqu'elles ne sont pas les premières après le cens, étant fondé sur une raison d'intérêt public, est imprescriptible.

" Par la même raison, il n'y peut être dérogé par la convention des particuliers, suivant cette règle de droit ; *Privatorum pactio, juri publico non derogatur.* C'est pourquoi, quand même il serait expressément porté par le bail qu'une telle rente ne pourra se racheter, elle ne laisserait pas d'être rachetable.

" Après avoir établi que les rentes foncières sur les maisons de la ville sont rachetables, si elles ne sont les premières après le cens, il reste à savoir sur quel pied elles sont rachetables. Henri second avait ordonné que ce serait sur le pied du denier vingt, comme nous l'avons vu ci-dessus. Les coutumes de Paris et d'Orléans ayant déclaré que le rachat de rentes créées par legs sur les maisons de Paris et d'Orléans seraient rachetables sur le pied du denier vingt, sont censées pareillement avoir réglé sur ce pied les rentes créées par le bail."

So that on the score of sound policy, and for the general improvement of property, so far back as the middle of the sixteenth century it was deemed expedient to allow proprietors of houses situated in towns and boroughs, the faculty of

* Traité du Contrat de *Bail à rente*, chap. 2, art. 2, sec. 5. Nos. 23, 24, 25.
† Traité du *Bail à rente*, Nos. 28 et 29.

repurchasing rents, though originally created as irredeemable, on paying up the amount of the capital for which they were created; and at the close of the eighteenth century we find the Constituent Assembly, taught by experience how much the system of landed tenure in rents had the effect of impeding the sales of lands, of diminishing the value of real property in general, and of rendering the general law of real property obscure and complicated, abolishing the system of irredeemable rents altogether, as well on lands as on houses, and none but good effects have resulted from the abolition. Yet in the French system of landed tenure, the practice of guarantee, with all its complicated ramifications and injustice was unknown. What greater reasons can be adduced to abrogate a vicious system than these examples of a powerful people, upheld by the authority of the most enlightened civilians that ever adorned a nation or an age.

But all that has been said and written on the nature and effects of guarantee cannot be better summed up than in the words of an eminent writer, whose fame chiefly rests on the excellence of the doctrines broached in his works on Judicial Procédure, by the aid of which alone the administration of all justice can be permanently secured.—In reference to guarantee, and the source whence it springs, Professor Carré states: "On appelle éviction la privation d'une chose ou d'un droit par quelque cause que ce soit, et principalement par autorité de justice, à la suite d'un procès. C'est de la victoire en ce genre de combat, que le mot éviction a été formé."*

" La garantie est la maintenue que doit une personne à une autre, en cas de trouble dans le droit qu'elle a transmis à cette dernière; c'est aussi l'indemnité dont elle est tenue en cas d'éviction."

" Qui doit garantie ne doit jamais évincer celui dont il est garant. *Quem de evictione tenet actio, eumdem agentem repellit exceptio.*" But this fundamental rule is reversed in Guernsey practice, as the purchaser falls a victim to the very party who undertakes to secure him in the absolute possession and enjoyment of the object sold.

" En tous contrats onéreux translatifs d'un droit," continues the same writer, " celui qui cède ou transporte la chose en doit la garantie, s'il n'y a convention contraire."

* *Introduction à l'Etude du Droit*, chap. 3. sec. 3. page 252. No. 142.

Only allow the principle of redeemable rents to come into operation, and restrain the liability of the purchaser or guarantee within its legitimate limits, and all the complications of our system of tenure will vanish. Then, indeed, but not till then, will parties be enabled to enjoy perfect security in all transactions connected with real property; then will the Registrar feel no hesitation in affixing his signature to the veracity of statements respecting the amount of hypothecations, or rents due by parties whose pecuniary liabilities may form the subject of enquiry, as he personally certifies to the veracity of all other equally important extracts from the public records. All he will then have to do will be to search the registry, which, with such a system, will ever convey a plain and faithful statement of the nature and amount of every person's liabilities, and to which in that case it would be his duty to affix his signature; no overacts, no latent guarantees, no untoward purchases, to which either party has been a stranger, would then be brought up to render that party a victim of transactions, the effects of which at the onset he could not foresee, nor ever afterwards by any possibility avert. But with the present practice of guarantee it would be as unjust to compel the registrar to certify against the chances of future expropriation, as it is to suffer the existence of such a system to the prejudice of *bonâ fide* purchasers; besides, his very signature, which, of all others, it should be the object of the legislature to render the faithful image of truth, would now, in many instances, only be an additional source of error; such are the ramifications of the present system, and the unforeseen liabilities which it entails. Notwithstanding daily and incontrovertible proofs of the ruinous tendency of guarantee, it is said that it still has its admirers; let not on that account, however, those who really desire to rid their country of this scourge allow their efforts to flag. Some of their opponents may take warning from the past, but, however great their number, or high their authority, both must fail if directed to support a practice, the very name and object of which, originally intended as an additional security for property, through the most unwarrantable perversion has had the effect of undermining the very titles on which real property rests. Such, however, is not the only instance,

where a good name has in modern times been deemed a sufficient cover for the most wretched institutions; the Inquisition was styled holy,—the Reign of Terror was denominated the government of public safety,—and, much on a similar principle, was that prerogative which our ancient landholders affixed to their property, and which in time has gone to unsettle its very foundations, denominated Guarantee.

CHAPTER V.

ON WILLS.

Preliminary Remarks.

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

Intestate inheritances may then be defined those where the law undertakes to provide an heir according to the presumed affections of the deceased. They who have broached the idea that individuals after their death having no controul over the affairs of this world, are not competent to

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Intestate inheritances may then be defined those where the law undertakes to provide an heir according to the presumed affections of the deceased. They who have broached the idea that individuals after their death having no controul over the affairs of this world, are not competent to

make wills or select their own heirs, and who on that eccentric idea would destroy the principle of testamentary bequests, do not appear to have bestowed on the sacred rights of property, that consideration the subject deserves, nor to have surrounded it with that protection to which it is so eminently entitled. Is not an owner on his death-bed quite as absolute master of his property as he was at any other period of his life! Why should he then be debarred from distributing it among those whom he considers have the strongest claim either on his honour, his affections, or his regard? Upon what principle debar him from exercising the noblest prerogative inherent in his nature, which the laws of all civilized society expressly uphold as one of the most strenuous promoters of industrious habits, as one of the strongest inducements to the accumulation of wealth, and a powerful means of maintaining the tranquillity and peace of families, as a distributor of rewards and punishments. In fact, the institution of wills as a measure of rewards, and that of representation as a preventive against the afflicted widow and unoffending orphans falling victims to the rigidity of legal principles, deservedly rank amongst the noblest of civilized institutions; and it has already been seen how the progress of civilization may in some measure be traced by the extent to which they have been acknowledged at various periods in different countries.

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

* L. 1. c. De SS ecclesi., Lib. 1. Tit. 2.

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

‡ This is strictly conformable to the rule laid down in the law, 1. *Dig. de ventre in possessionem mittendo.* Sicuti liberorum eorum qui jam in rebus

cence encore hors d'état de veiller sur lui-même, elle lui nomme des aides ou gardiens pour surveiller sa personne, et pour augmenter et améliorer sa propriété ; arrivé à l'âge mûr elle le maintient dans le libre exercice de ses droits civils, c'est-à-dire, de sa liberté et de sa propriété ; elle veille encore à sa sûreté tandis qu'il ne commet aucun acte qui lui fasse forfaire ses droits ; et même après son existence elle fait respecter sa volonté pourvu qu'il se tienne dans les bornes de son devoir."* Such indeed should be the object of the law in all states, and in those having any pretensions to the qualification of free, the power of willing has been sanctioned as one of the most undisputed rights of property ; so much so that the Roman legislator considered the power of willing, less as the attribute of the civil law, than as the common right of mankind : *testamenti factio non privati, sed publici juris est.*†

The feudal law which, with regard to real property, was till lately in so many respects the law of this Island, was very much opposed to the principle of wills, and with regard to real property inherited they were absolutely forbidden. This, however, was not to be wondered at, under a system by which landowners were treated less as proprietors than as life tenants, less as citizens than as the vassals or slaves of some powerful lord. Hence the prerogatives of the male over the female sex—the treatment of parents as convicts—and the exorbitant

humanis sunt, curam prætor habuit, ita etiam eos qui nondum nati sunt, propter spem nascendi non neglexit. Nam et hac parte edicti eos tuitus est dum ventrem mittit in possessionem. The law 7 of the *Dig. de statu hominum* is to the same effect—Qui in utero est, perinde ac si in rebus humanis esset, custoditur, quoties de *commodis ipsius* partus quæritur.

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

Montesquieu, in the preface to his spirit of laws, has said "qu'il n'appartient de proposer des changemens qu'à ceux qui sont assez heureusement nés pour pénétrer d'un coup de génie toute la constitution d'un état." How then must they be born who can thus, as this successor of Lanjuinais, not only penetrate to the uttermost recesses of the science, but explain its ramifications and animadvert upon its bearings in a manner to place the whole within the reach of the humblest capacity, and with such exquisite skill that they may literally be said to personify the law.

† L. 3. ff. qui testamenta facere possunt.

usurpations in the shape of redemption—permits or congés to sell—confiscations of property—right of wreck—and the like established in those days, the vestiges of which, in many respects, still remain; to wit, the Baronial Courts, where persons are obliged to assist once in three years, on pain of forfeiting one year's value of their estate, for the mere purpose of certifying their presence, ridiculously termed doing homage, which a man of sense would spurn to receive, and which, from being attended with no earthly benefit to any person, should be abolished as a nuisance, tending to make persons lose many a precious hour which would be so much more advantageously employed in agriculture and other honourable pursuits. As to the pecuniary advantages still enjoyed by lords of manors, these should not be abolished without a suitable indemnity, but it is surely high time that the remnants of personal servitude, the badges of the *servi glebæ* of the middle ages should disappear.

How was it possible for the law to allow a person to dispose freely of his property at a time when he was not in fact master of his own actions? How tolerate wills of any kind in presence of the axiom, *nulle terre sans seigneur*, which rendered every landowner the mere life tenant of his lord. In fact the system of wills seems to have been proscribed by all the Northern nations where the feudal system had taken deepest root, and in modern as in ancient times, seems to have gradually advanced with the progress of civilization.*

It has been often asked whether wills, as inheritances, were absolutely natural rights, or mere creations of the law. The chancellor D'Aguessau† finding wills established throughout the greatest number of nations, considered the institution as derived from the law of nations, but regulated by the positive laws of each in particular.‡ Both might, however, be said to

* They who desire to convince themselves of this may recur to BLACKSTONE, who refers to the introduction of wills among nations of the remotest antiquity, and more modern times. Book 2. Chap. 32. Nos. 11 and 12. DOMAT, in his introductory chapter on wills, and BASNAGE on the custom on Normandy, vol. 2. *Des Testamens*, art. 412, p. 181.

† This eminent lawyer made an ordinance on this subject which ranks amongst the most famous of the reign of Louis the XVth.

‡ Upon this question see Mr. Toullier, in his introduction on wills. Vol. 5, chap. 5. p. 352, wherein he states it to be derived from the *civil law*. Burlamaqui considers wills, or the power of disposing of one's property after death,—

be derived from the law of nature, it being natural to man that these institutions should be regulated according to his affections and his commands. At the same time they may be said to be derived from the positive laws of each state, as in all they can only be made in complying with forms more or less numerous or intricate. But perhaps the clearest idea that can be given of these subjects, as well as the cause of various nations having so differently regulated them by modifying the rights of ownership, may be had from the following passage taken from the works of the late Dean of the University of Rennes, Mr G. L. G. Carré: "La propriété," says he, "est la base fondamentale et l'un des plus puissans mobiles de la société civile. L'homme ne s'attachera à sa propriété, il ne s'appliquera à l'améliorer, à l'étendre, qu'autant qu'il aura raisonnablement la liberté de la transmettre suivant l'ordre de ses affections. Cette liberté, pourvu néanmoins qu'elle n'aille pas jusqu'à la licence, est en effet le plus noble aiguillon de l'industrie, la plus douce récompense du travail, d'où dépend la prospérité publique et particulière.

"De là deux conséquences:

"La première, c'est de laisser agir la volonté de l'homme, et de n'y mettre d'autre obstacle que celui qui aurait pour objet de ramener un père de famille égaré à l'observation des devoirs sacrés de la nature, et de l'empêcher, en modérant l'exercise rigoureux de son droit de propriété, d'être le destructeur d'une famille dont le droit naturel et le droit civil l'ont établi le protecteur et le conservateur.

"une suite naturelle du droit de propriété et de l'ordre de la société;" he also states that most nations have regarded the power of willing as a natural right by which mankind were more or less indemnified for the necessity to which all are subject in leaving their property behind them—"La pluspart des nations ont regardé la faculté de tester comme un droit naturel, par lequel on se dedommageait en quelque sorte de la nécessité où l'on est d'abandonner ses biens par la mort."—See Burlamaqui, *Elémens du droit naturel*, chap. 9. sec. 2. *Des Testamens*, page 457. D'Aguessau considers wills—"une invention du droit des gens autorisé par le droit civil." Tome 3. page 386. Heinecius, on the other hand, considers the power of man over his property limited to that of disposing of it during life. *De jure naturali.* Lib. 1. sec. 287 et *Seq.*... From these opinions of the most eminent writers on natural and civil law, it follows that wills may be said to be derived from the law of nations, as they are found tolerated among all who have most eminently respected the rights of property; and from the civil law, as most have prescribed certain forms conformable to which they must be made to be available, and which to be really beneficial should have for their sole object to enable the testator fully and clearly to make known his wishes.

"Ainsi le législateur doit donner à chacun la faculté de disposer de ses biens, même pour le tems où il ne sera plus, et de là la *succession testamentaire*.

"La seconde conséquence est qu'à défaut d'expression valable de la volonté du défunt, le législateur ne doit intervenir pour régler l'ordre des successions qu'en suivant la probabilité des dispositions que le défunt lui-même aurait faite, s'il s'était occupé de la transmission de ses biens. De là la *succession légitime*, que les jurisconsultes appellent aussi succession par *intestat ;* parce que c'est celle de l'individu décédé sans avoir fait de testament, comme si l'on disait *quæ ab intestato defertur*."*

From these remarks it may easily be conceived how the important right of willing has been differently exercised throughout all nations, some putting limitations as to certain kinds of property ; others modifying it as the testator leaves either parents or children behind him ; whilst others, as in England, have left the owner absolute disposer of his property, as well after death as during his life, without any regard as to the nature or number of his heirs, whether children, parents, or more distant relatives.

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

By the ancient law of Guernsey a person leaving neither wife nor descent could dispose of all his personal property by will, but he could never give more than one-third of his real property, by deed of gift or *inter vivos*, whether he had inherited or purchased it; under no circumstances could he by testamentary bequest give any portion of his real property, however distant his relatives. At present a person leaving neither wife nor descent is allowed not only to dispose of all his personal property by will, but he may do the same with his real property purchased, and even with his real property inherited, provided he leaves no relations within the second degree in a collateral line. Such is the text of the fourteenth article, "*Toute personne qui ne laissera pas de descendans pourra disposer par testament ..... de ses propres dans le cas seulement où il n'aura*

* Carré.—Introduction à l'Étude du Droit, pp. 197 et 196, No. 117.

point de parens dans le second degré, inclusivement, de la ligne dont ces propres sont provenus." That is to say, that any person leaving relatives further removed than a cousin germain, who is in the second degree according to the ecclesiastical mode of computation, may dispose of his real property inherited as of his real property purchased. By the present law a married man without descent may will one half of his personal property, the remainder belongs to his wife; if there are any children he can only dispose of one third, for of the two remaining thirds one goes to the wife and the other to the children, between whom it is divided, without distinction of sex.* So then an owner of real property who has no descendants may, by his will, now dispose of his real property purchased, as he can of his personal property, but he cannot do the same with his real property inherited, if he leaves a relative in the line whence the property descends within the second degree. The respective rights of husband and wife to the consort's real and personal property shall be examined under the twenty-eighth article, which refers to the wife's dower. From these remarks it will be seen that a distinction still exists between the right of an owner of real property, who leaves no descent, to dispose of his real property as it is either purchased or inherited, which it was long contended should not be the case. The Committee of the Petitioners very much desired that the law should be uniform with regard to the willing of both these kinds of property. They represented that, according to the present system, inherited property might still go to a distant relative and not to the nearest of the blood,

* In this respect our law very much resembles the old common law of England according to which Blackstone, quoting Bracton and Fleta, states "that Glanvil will inform us that as it stood in the reign of Henry the II., a man's goods were to be divided into three equal parts; of which one went to his heirs, or lineal descendants, another to his wife, and the third was at his own disposal: or, if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so *e converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but, if he died without either wife or issue, the whole was at his own disposal. The shares of the wife and children were called their *reasonable* parts; and the writ *de rationabili parte bonorum* was given to recover them." Vol. 2. book 2. chap. 32. p. 492.

In the French law the heirs who are entitled to these *reasonable* portions are called *héritiers à réserve*.

The law of England, in reference to the power of willing, has, however, long since been changed; a person being now absolute master of his property may bequeath the whole; nor do his wife or children form any obstacle to this power of absolute disposal.

as was the case with real property purchased and personal property of every other description—that those scandalous law-suits, which formerly so often took place to defeat the impolitic restrictions against the willing of real property, would only be checked and not eradicated,—and on these grounds they contended that the legislature should altogether abolish the distinction recommended by the Court's committee. The Petitioners in fact rested their arguments, for the purpose of removing the Committee's distinction, on the number of abuses which followed those disgraceful suits which came before the Court in consequence of the inability to which the owners of real property were reduced from making testamentary bequests—from the expence to which they were subjected in having recourse to fictitious sales to dispose of it according to their desire—and from the hardship to which every owner was exposed in being compelled, during life, to divest himself entirely of his property, and forego every personal comfort, on pain of seeing it revert to perhaps a distant relative, whose only claim to it was the inability of its owner to bestow it upon persons whom he considered to be either more deserving or better entitled to it.

Besides these undeniable facts which plead so powerfully for the removal of the restrictions which still fetter the disposal of real property inherited, there is the authority of the most eminent civilians of modern times, which bears so directly upon this matter, that one had almost supposed that they had before their eyes the evils springing out of the injudicious system actually in force in Guernsey. One of them, Mons. Jaubert, as commissioner appointed by Napoleon's government to draw up the laws which now govern France respecting gifts and bequests, expresses himself in a manner which, it is submitted, absolutely overthrows the arguments adduced by the Court's committee for introducing the restrictions which still continue to clog the disposal of real property.—"The legislator who knows the human heart," observes Mons. Jaubert, "desires that respect, affection, and kindness from the presumptive heir should cause his relative who possesses property to forget that he has the power of willing it. Even they who are of opinion that a person has no right to bequeath property after his death, have never contended that he had not a right at

least to give away during life even the property he may have *inherited.* Neither could they deny that a collateral relative had no power to annul any deed of sale which might have been made subject to the life enjoyment of the proprietor, or to his receiving a life rent. They only pretended that an owner of real property should not bequeath such property. But what would follow? Why you would constantly thwart a person's desires; he would always wish to dispose of his property, and you would compel him to have recourse to illegal transactions. You would oblige him to enter into contracts by which he would dispose of his property to another, reserving to himself a mere life enjoyment, or to make absolute gifts *inter vivos,* of which he might repent. In fact, lawsuits would occur in every succession. Allow then absolute liberty to every one: let him who labours know that he will always be allowed to dispose of his fortune; let him know that he who has the means will be assured of finding consolation; let him who wishes to acquire a succession know how to deserve it,—allow a free course to man's affections. Let every person be allowed during life to make what arrangements he pleases; let him not have constantly before his eyes an heir who will reproach him with his long life. Let him not in his lifetime be exposed to have recourse to acts which the law forbids; nor after his death, let there be any grounds for a scandalous lawsuit between the heir *at law,* and the heir of *the will,*—in one word, let every man by his will regulate all his transactions, and let the principle *dicat testator et erit lex,* borrowed from the greatest of nations, be our law."*

In fact, wherever unjustifiable restrictions are placed on man's liberty or property, he will find the means of evading them—and as the humanity of jurymen sets at defiance the cruel punishments of the criminal law—the adventurous daring of the smuggler the extravagant impositions of revenue laws—so do the owners of real property, by converting their estates into personal property; find the means of setting at defiance

* Jaubert was an eminent professor of law at the University of Bordeaux, his native town, before the revolution, and afterwards became a judge of the Supreme Court of Judicature in France. The French Codes may be said to have been drawn up by Commissioners, taken generally from all the Courts of Judicature in the Kingdom, most of whom distinguished themselves as members of the ancient *Parlements.*

the unjustifiable restrictions imposed by the modern feudal law. Thus it is that, in restrictive legislation, one evil draws another in its train, until their multiplication works the remedy by forcibly awakening the attention of the legislature to the necessity of their abrogation. Whilst the restrictions continue all parties are losers, for the disposer of an estate cannot even commence operations without paying for a congé, or licence to purchase, of two per cent on the purchase money, nor can the heir at law, or the legatee, take possession of the effects without a lawsuit which exposes the judge to annul wills, to the prejudice of those whom the testator had selected as his heirs, or to maintain them and thus violate his duty by attempting to repress the effects of unjust laws.

SECTION 1.

Of the right of willing according to the Order in Council of the thirteenth of July, 1840, registered here on the third of August following.

In the foregoing section the right and policy of making wills having been considered;—in the present shall be seen how far this right with regard to real property may be affected by the modern law, which has introduced no other change with regard to personal property except where a married daughter's property may be put in trust during her husband's lifetime; subject, however, to her recovering the absolute enjoyment, as her other brothers and sisters, in case of her surviving him.

The power of willing real property, and the forms prescribed on such occasions, are comprised within the fourteenth and twenty-sixth articles of the modern law, and shall now be examined.

The first of these, which refers to the power of willing, is thus expressed:—

Article XIV.

Every person leaving no descendants shall be at liberty to dispose by will, or by gift to take effect at his death, of the whole of his purchased real property; and also in the same manner of his inherited real pro-

perty, provided he have no relatives in the second degree, inclusively, belonging to the line whence that inherited real property has been derived.*

The first and indispensable condition attached to the power of willing any real property whatever under the modern law, is, that the testator leave no issue, that is, neither children nor descendants of children, which is clearly expressed in the original by the terms that, "*Toute personne qui ne laissera pas de descendans pourra disposer par testament.*" Thus, a person without issue, whether married or not, may bequeath the whole of his real property purchased, or acquired by will or deed of gift, provided the gift proceed not from a person whose immediate heir he was at the time the gift was accepted, or if a legacy at the time of the testator's decease; for in these cases property so given or bequeathed would in law be deemed inherited property, and in consequence subject to certain restrictions which no longer exist with regard to real property purchased.

A married person dying without issue can only bequeath one half of his personal property, the other belongs to his widow, who, in the absence of a marriage contract, will also enjoy one third of the whole of his real property as her dower. A married person leaving issue can only dispose of one third of his personal property, the remainder is divided in equal proportions between his children, after the widow has first taken her third. A parent cannot, however, bequeath a greater portion to one child than to another, however great or urgent may be the wants of such child; the Petitioners prayed the States to modify this part of the law, but their request was not acceded to; no sound reason can however be adduced to prevent a parent's disposing of a certain portion of his property in favour of any of his children, it being morally impossible

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

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

that some should not have been more advantageously treated than others during their youth or manhood, and it would be right that a parent should be empowered to bequeath, as he pleased, a certain portion among them, say one third. The reason alledged against the exercise of this legitimate prerogative, is, that a parent might abuse it, might favour the least deserving child; but is this probable? and is it because a right may in certain instances be turned to a bad purpose that a parent should be for ever debarred from exercising one of the most sacred of his prerogatives, and the safest means of regulating the affairs of his family? They who would refuse this power to a parent, alledge that it would have a tendency to create family disturbances by exposing him to the captious entreaties of his children, as if this tendency is not more than counterbalanced by the present state of things, by which he becomes responsible to them for the smallest trifles, and unable to procure the slightest degree of benefit for the needy without others in better circumstances calling him at once to an account for his actions. After all, which of the evils of either system is most to be deplored; that which would give a parent the power of recompensing virtue and reproving vice, of which he might indeed abuse; or that which creates a number of petty tyrants in a family, who force their will upon him whom it is their duty to obey, but whose precepts they disregard from his inability to enforce them, by the sole means which would check the very existence of those avaricious propensities, which the law having long fostered and rendered too common, the parental authority has become impotent to restrain? Thus it is that the law engenders those very evils, the consequences of which are afterwards assigned as reasons against its abrogation;—it in fact fosters the very curses its partizans afterwards attempt to vindicate on the ground that one attempt to remove them, would be attended by the outbreak of still more disgraceful passions! And this is the reformed legislation of the nineteenth century, which, to have been really deserving of the name, should have placed at the parent's absolute disposal one third of his property that he might bequeath it among his children, as he has the power of doing among strangers.

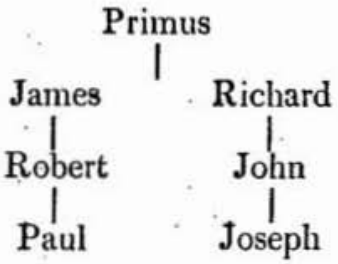
By the second clause of the fourteenth article certain restrictions are imposed upon the right of willing inherited real property which do not exist for bequests of real property purchased, or of personal property, it being stated that *any person shall be at liberty to dispose of the former when he leaves no relatives within the second degree inclusively in the line whence such property proceeds.*

The first question which naturally arises, is, what constitutes the second degree inclusively; or, what are the relatives within this degree? It may be safely answered that uncles, aunts, nephews, nieces and first cousins, are the relations within the second degree; therefore a proprietor may dispose of his real property inherited when he leaves only more distant relatives than these, who, according to the canonical mode of computation, each generation forming one degree, are within the second degree of relationship; brothers being in the first and their children or nephews being in the second degree from their father's brother.

By the civil, where one of the parties must raise himself until he finds a common ancestor, and descend until both meet, the nephew will be found in the third degree, as the brother is in the second degree of relationship: hence has arisen the axiom that in the collateral line there is no first degree. A person who possesses inherited property, and leaves more distant relatives than cousins germain in the line whence the property descends, and who, according to the canonical mode of computation are in the second degree, may will it, by virtue of the express declaration contained in the second clause of the fourteenth article; and were the civil instead of the canonical mode of computation adopted here, as in so many other places, a person leaving an uncle might make a will according to the above clause, but according to the canonical rule with the fourteenth article existing as it does, a person cannot dispose of his real property inherited when he leaves any nearer relative than a second cousin, that is to say, he will only be debarred from exercising the right of willing such property by a brother, a nephew, an uncle, a first cousin, and relatives within the same degree, who all exclude second cousins.

So then it may be said that there are two modes of reckoning the degrees of relationship, the Civil or Roman, and the

Canonical; by the former the degree of relationship is reckoned by computing the number of generations there is from the person seeking his relationship to the common ancestor, and then descending from him to the person sought after. Thus cousins germain are in the fourth degree of relationship, one of them being two degrees removed from the grandfather, the common ancestor, in one line, as the other is in the same proportion in the other line. Thus



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

This is by far the most simple and judicious mode of computation, the degree of all parties being regularly reckoned.

The same simplicity does not exist in the canonical mode of computation, where the reckoning is always from the common ancestor downward; and in whatever degree the two persons, or the most remote of them if they are not in parity of degree, is distant from the common ancestor, that is the degree in which they are related to each other. Thus James and his brother Richard, in the above example, are related in the first degree, for from the father to each of them is only counted one; and Robert and John, the cousins germain, are in the second degree. So, also, are in the second degree of relationship, James and his nephew John, and Richard and his nephew Robert,—for these nephews are each of them two degrees removed from the common ancestor, and therefore, according to this mode of computation, two degrees removed from their uncles. So, in the same manner, Paul and Joseph, whilst related to each in the third degree, or that of second

cousins, are each of them related, also in the third degree Joseph to his cousin Robert and also to his great-uncle James, —and Paul to his cousin John and also to his great-uncle Richard,—upon the principle that the degree in which the most distant of two persons is from the common ancestor, that is the degree in which they are related to each other,—which shows that the canonical mode of computation is both anomalous and absurd,—for a second cousin, according to this mode, is as nearly related as a great-uncle.

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

In Guernsey the canonical rule obtains, though it would appear that in point of fact it is neither followed in England nor in modern France, that is to say, since the commencement of the sixteenth century ; and it will be found that according to the above example the civil and not the canonical rule obtains, from the circumstance that though it be said that Richard and John are two degrees removed from Robert, yet it is evident that Richard the uncle, is nearer than John the cousin, who would be excluded by an uncle to any cousin's

succession, at least for certain kinds of property, wherein collateral successions representation does not extend beyond the second degree. As a proof of this assertion the following note from Mr. Christian's learned remarks on Blackstone's Commentary, may be quoted to show that in reality the CIVIL and not the *canonical* mode of computing degrees obtains in England.

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

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

After stating that there are two modes of reckoning the degrees of relationship, the civil and canonical; that the civil

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

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

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

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mode obtains on the subject of inheritance, and the canonical on that of marriages; the Editors of that work observe the technical distinction that exists, when the relatives sought after are in unequal degrees; and thus refer to the distinction existing between these modes:

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

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

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

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

Having thus seen when certain properties may be disposed of by will, and the difference there is between the willing of real property purchased and real property inherited, it may be proper to examine what persons may make wills and donations, before we arrive at the peculiar forms according to which wills of real property should be made.

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

* See page 40. *On the mode of computing degrees.*

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

A person aged twenty may then make a valid will, though he be under guardianship at the time, provided the guardian have been appointed merely for the purpose of securing his property; but if he have been appointed on account of the weakness of intellect of the testator, and rather with a view of protecting his person than his property, then the will he afterwards makes will be void. Had it been made before the appointment of the guardian, that is, at a period when

the law presumes that the testator was *capax mentis*, it is incumbent on them who deny the validity of the will to prove the testator's incapacity at the time it was made, and if its contents are reasonable, and particularly if written by the testator himself, the state of incapacity will be with difficulty presumed; if, on the other hand, the clauses of the will are irregular and incoherent, and not such in fact as might be expected from a person in the testator's station in life and education, in the ordinary enjoyment of his mental faculties, his incapacity will be easily presumed, and it is for them who argue in favour of the validity of the will to show that the testator was really *capax mentis* at the period of its confection.* Hence it is incumbent on a Court of justice to weigh well the reasons adduced by the parties requiring the appointment of a guardian before they grant the demand, and above all to consider maturely the nature and degree of the restrictions under which they are about to place a human being, whose future destinies may be so seriously affected by the step they are about to take; for instance, it would not be just to sanction a prodigal's being put under guardianship on the ground of weakness of intellect, unless his weakness had become permanent; the incapacity resulting from such a cause affecting him to a much greater extent than if the guardian were appointed on the score of mere prodigality, which does not entail the forfeiture of any civil or political rights, and among them that of making a will. Though a prodigal may bequeath his property he cannot give it *inter vivos*, there being, with regard to his fortune, the same reason to prevent an excess of liberality as an excess of expenditure. In fact the appointment of a guardian to a person who has

* To put this distinction in its clearest light it may be well to quote the sentiments of the great Chancellor D'Aguessau, than whom a more eminent authority never existed on all subjects connected with wills, donations, and others affecting man's civil condition in society, in reference to the rights derived from births, marriages, and deaths, and whose works upon these subjects have immortalized his name.—In reference to the question, on whom it is incumbent to prove the validity or invalidity of a will made by a testator previous to the appointment of a guardian, he sets forth the following distinction—"Où le testament contient des dispositions sages et judicieuses, et alors c'est à ceux qui l'attaquent à prouver que le testateur était en démence lorsqu'il a fait cette disposition; où, au contraire, le testament par lui-même fait naître des soupçons de faiblesse et d'égarement d'esprit, et en ce cas c'est à l'héritier institué ou au légataire à soutenir son titre par la preuve de la sagesse du testateur."—Tome 3, pp. 367 et 368 de ses œuvres.

attained his majority, when made for the purpose of securing his property against wild, thoughtless, or extravagant expenditure, takes place with a view rather of benefitting the unhappy individual than his heirs; when guardians are placed over furious and bewildered persons, it is as much the protection of society as their own benefit that is the object of such appointment.*

It was proposed by the eighth article of the Petition that persons under guardianship should not be allowed to bequeath their real property, a proposition which was very properly dissented from by the Court's Committee, and allowed to drop as incompatible with the principle which obtains with regard to personal property, and which does not prohibit a party from making bequests when the civil restraints to which he has been justly subjected, merely proceeds from some temporary incapacity, either to administer to his fortune or controul his actions.

SECTION 2.

Of the forms to be observed according to the modern law in drawing up wills of real property.

One third of the whole number of articles contained in the modern law of wills and inheritances is devoted to prescribe the forms in which wills of real property must be drawn up, and those to be observed by legatees before any advantage can accrue from the acts whence their rights are derived. These forms, with the exception of that which rules that the will must be duly registered at the greffe, or public record office, before it can be put into execution, originated with the

* Upon the circumspection which should be observed by Judges empowered to appoint guardians over those who may require them, Mr. Toullier has the following remarks :—" L'interdiction ne doit être provoquée qu'avec la plus grande réserve. Elle prive un citoyen du libre exercise de ses droits ; elle lui ôte la disposition de ses biens, et souvent la liberté de ses actions ; elle ne lui cause pas seulement une humiliation et un déplaisir extrême, elle porte atteinte à sa réputation. Elle ne doit donc être prononcée qu'en cas de nécessité, et seulement lorsque l'intérêt de celui contre qui on la provoque l'exige, car c'est son intérêt plutôt que celui de sa famille que l'on considère. Cependant le furieux est interdit, moins pour son intérêt que pour celui de la société, que ses excès menacent."—Tome 2. p. 524. No. 1318. *De la Majorité et de l'Interdiction.*

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Court's Committee, and on examining them it is easy to see how cautious its members have been not to sanction the principle of willing real property, without first surrounding it with every formality they conceived could possibly tend to prevent the testator's will being imposed upon him; here also it is that the spirit by which they were throughout animated, in entertaining the proposition to reform the law, is particularly descernible, and from the number of forms proposed we have an instance how powerfully in their estimation public interests require that its administrators should never lend themselves too easily to innovate on long established usages.*

It cannot be doubted that some of the forms now established might have been very well dispensed with. What necessity was there, for instance, that two jurats should in every case, and sometimes the baillif and two jurats, be called upon to attest wills of real property, more than any other kind of wills? Would not the ends of justice have been amply attained had the legislator only required of the testator that, on his expressing his wishes in his own hand writing, he should be dispensed from all further formality, either of a judicial or notarial character, and that it should only be on his abstaining from expressing them in this most solemn manner, that he should be subjected to the intervention of a judicial officer to attest the deed. If ascertaining the real wishes of the testator be the main object of all forms, how could such intentions be more satisfactorily ascertained than by their being entirely recorded in his own writing. But an olographic will was not deemed sufficiently formal by the Court's Committee to allow an owner to dispose of an inch of ground or a bushel of corn rent, and yet by his mere signature appended to a will drawn up in a third person's hand writing, he may dispose of a million in money and all his personal property. Nay more, by a nuncupative will or declaration made in the presence of two or more witnesses, a person may dispose of all such kind of property. When reflecting on this primitive simplicity, by which an unlimited fortune may be disposed of, and on the comparatively innumerable forms required for the disposal of the slightest portion of real property, one cannot but think that there is great inconsistency in the mode by which

* See their Report, Appendix, letter C, page 31.

property in general is allowed in Guernsey to be disposed of by will. And whilst nuncupative bequests might be abolished without difficulty, on the other hand it would be right to dispense wills of real property from being attested by judicial officers, provided they were entirely written by the testator.

An eminent civilian observes that, according to the law of nature, gifts and liberalities are subjected to no particular form, writing is only had recourse to for the purpose of more correctly ascertaining the existence of agreements, and with that view presents, by the Roman law, could be bestowed either verbally, in writing, or in the shape of a contract.* From the present state of education, and from the facility of procuring at any time a written will, all verbal bequests might now however be reasonably abolished.

But a multiplicity of forms can never answer any good purpose, nor will they ever prevent testamentary bequests from being made in those jurisdictions where the principle itself is once admitted, the power of willing being far too important to be checked by any temporary impediments which their observance may create. Though forms have been held, by one of the most eminent characters of modern times, to constitute "the handmaids of Justice," their excess and multiplicity rather than their paucity, or non observance, have so far, to a much greater extent, marred her administration. Their intricacy in wills should be more particularly guarded against, as it only tends to rivet the more closely the hands of the testator, who, having once succumbed to the insinuations and overpersuasion of artful fortune-hunters, finds it the more difficult to extricate himself from their trammels, and the meshes of the law, as these are the more complex, from a fear of invalidating the instrument which, besides their own legacies, generally contains others which are quite unexceptionable, nay, even meritorious on the part of their author. Honorable and confiding persons are much more apt

* "Suivant le droit naturel," says Monsieur Toullier, "les donations ne sont assujetties à aucune forme particulière : on n'a recours à l'écriture qu'afin de prouver plus facilement l'existence de la convention, et Justinien conserva cette raisonnable simplicité de principes dans la forme des donations entre vifs, aussi bien que dans celle des autres contrats. Les donations pouvaient être faites par écrit ou verbalement, à plus forte raison par des écrits privés."—Droit civil, Tome 5, chap. 4, § 1. *De la forme des donations*, No. 168.

to fall victims to the impolitic restrictions imposed on wills, than the artful and insinuating legatee, whose last fault is a neglect to comply with those forms, by the strict observance of which he can alone reap the benefit of not unfrequently an arduous undertaking.

If any thing more was required to show the necessity of simplifying the forms of wills, and to be convinced how much more easily and assuredly the intentions of the testator are ascertained by the observance of a plain and straight forward course, as would be the case were an olographic will to obtain in all cases, instead of compelling the testator to get a number of attesting witnesses, in the shape of either magistrates, notaries, or private individuals, it would be the number of wills which are every year annulled for mere defects of form, in the supreme Courts of Judicature in England and France. It is indeed one of the greatest blots on the administration of justice to witness the great uncertainty which prevails in this respect, and the very shallow grounds on which the fortunes of individuals are frequently made to change hands; how the reality is sacrificed to appearance, and substance to mere shadow; and how little the real intentions of the testator are thought of when the contending parties are once met in the arena to dispute the spoil. Nor is there any exaggeration in stating that by far the greater number of such discussions arise from too numerous, too minute, too intricate formalities being required for the formation of wills. Hence arises the outcry against an institution essentially just in itself, but rendered obnoxious through the number of useless fetters which pervert it. To prove this by giving an outline of some of the most prominent cases which have arisen in the Courts of law in England and France would carry out this Section far beyond the limits assigned to it; but in support of this assertion, we shall adduce the authority of civilians whose knowledge of such cases is unquestionable, and whose opinions are the more worthy of consideration, that many of them are fully illustrated in the course of their respective works. Of the law which required wills of freehold land to be attested and subscribed by three or four witnesses in the presence of the testator, Mr. Humphrey observes, "it has been frequently remarked that more good wills have been spoiled by it than

bad ones prevented. The fact is, that in the case (happily so rare in this country) of a will obtained by fraud or force, the formalities are carefully observed. Negligence is usually attendant on good faith, which, the less it is exposed to its consequences by embarassing formalities, the better. For publicity, two witnesses are as good as three; while the recommendations on the grounds of convenience, and their being the greatest number usually resorted to in other transactions, are great. The statutory check, too, of the witnesses subscribing in the testator's presence, has been much diluted by legal decision. In one case, it was held to be satisfied by an attestation in another room, seven yards distant, where there was a broken window, through which a testator might see the witnesses. In another instance, by the facts, that the testatrix executed in her carriage, which was opposite the window of the attorney's office, where the witnesses took the will and attested; but so (as was deposed) that she might see what passed. And in a third, by the witnesses subscribing in a room where the testator was ill, in bed, with the curtains closed. These strange refinements, forced by a desire to give effect to the clear intent, show the worse than uselessness of the rule. The greatest protection that can be afforded to wills by legal formalities, is to assimilate them as much as possible to those adopted on other occasions; which I have sought to do, by identifying them with those attendant on the execution of deeds; with the single additional guard of a second witness.* To show that even this is rather in deference to an existing law, I need only add, that a will of copyhold requires no witness; and that a will of personal estate, disposing of hundreds of thousands, requires no *subscribing*

* The act 1. of VICTORIA, cap. 26, has confirmed these views by requiring two attesting witnesses in all cases of wills. Thus are set aside the differences which formerly existed on testamentary bequests of property in England, where three witnesses were required for a will disposing of freehold property, two for funded property, and none whatever for personal property.

But it is now required that the will shall be signed at the foot by the testator, or some other person in his presence, and by his direction; the testator or person so subscribing to sign in the presence of two or more witnesses present at the same time, who shall attest the will in the testator's presence. § 9. Nuncupative wills are abolished, excepting if made by soldiers or sailors; all those too made prior to the first of January, 1838, are maintained. Not only what the testator actually possesses, but what he may hereafter possess, may be disposed of by will. No will can be made by a person under the age of 21. Formerly girls at twelve and boys at fourteen could bequeath their property.

witness; but may be established by an extrinsic testimony of belief of the handwriting. And yet, in neither of these instances do we find fraud attendant upon the want of a numerous train of attesting witnesses, whose subscription in the testator's presence has, from an urgent sense of justice, been often reduced from a fact to a bare possibility."*

From this eminent writer's remarks it is clear that an olographic will, that is to say, one entirely written, dated, and signed by the testator, constitutes by far the safest criterion by which his intentions may be ascertained, and ought to suffice for all wills of real property. Here, as formerly in England, no subscribing witnesses are required for a will of personal property for thousands of pounds, which need only be *signed* by the testator, and when unable to sign, a circumstance of rare occurrence in these days, two attesting witnesses to his mark are sufficient for its validity.

We shall now adduce the opinion of another writer, who, quoting from a number of authors, all of the same opinion, respecting the bad policy of rendering either the form or attestation of wills too intricate or difficult, and who, after stating that whenever the testator shall not have made an olographic will, which needs no attesting witnesses, nor is subjected to any particular form, provided it be ENTIRELY *written, dated,* and *signed* by the testator, thus expresses himself: "Le docte et judicieux Ricard doute," says Monsieur Toullier,† "avec plusieurs bons esprits, que les formes minutieuses toujours requises sous peine de nullité soient des moyens propres à remplir le but qu'on s'est proposé; c'est-à-dire, à garantir le testateur des surprises, à écarter le soupçon, et à donner à ses dispositions le caractère d'une volonté réfléchie. Ils prétendent que dans l'usage ces formalités, qui ne consistent que dans des mots, ne sont qu'un piège pour les personnes de bonne foi d'autant qu'elles dépendent uniquement, non de la volonté du testateur, mais du notaire, qui, manquant par oubli, par ignorance, ou même par connivence et par mauvaise foi, d'insérer dans le testament un mot exigé par la loi, ou se servant d'un autre qui a une

* On real property, chap. 2. *Regulations peculiar to wills.* No. 35, p. 231.

† Sur le droit civil, tome 5, chap. 5, art. 4. *De la signature du testament,* page 445.

signification un peu différente, est cause que les dispositions d'un testateur, les plus constantes, les plus réfléchies, souvent même les plus raisonnables et les plus justes, demeurent nulles et sans effet; tandis que l'adroit hérédipète, qui veut supposer un testament ou surprendre le testateur, ne manque jamais de faire observer scrupuleusement les formes qui ne dépendent que du notaire appelé pour recevoir le testament."*

Notwithstanding, the members of the Court's Committee appear to have anticipated more favourable results from a certain degree of complexity in the forms of wills of real property than from greater simplicity, and it is not difficult to perceive that they to a great extent conceived that aversion for the system of bequeathing real property so characteristic of the jurists of old, and which arose, less from any sense of impropriety they entertained respecting an individual's being allowed to extend the influence of his will beyond the grave, than from the disposition of rulers to impose such unjust fetters on their subjects, that, in the default of heirs, they might succeed to their property. Hence those unwarrantable restrictions, which, during the reign of feudalism, marred bequests of real property, and which might in some measure be considered as the natural consequence of those laws by which the possessors of land were regarded rather as life tenants than as owners. The idea that in ancient times men were not disposed to tolerate testamentary bequests, on the vague notion that the will should not survive its author, is chimerical, the origin of wills being almost as ancient as that of society itself. Besides, is not the whole system of inheritance based on the presumed will of the deceased; is not the law supposed invariably to select as heir the nearest relative for whom the deceased is presumed to have entertained the greatest affection? That the restrictions on gifts and bequests of real property arose from purely political motives, and those of the most sordid description, may be seen from the following remarks of the two perhaps most enlightened jurisconsults of modern times, whose extensive knowledge never shines more conspicuously than in their historical expositions of the law. After having stated that the greater number of forms required in drawing up deeds of gift com-

* Ricard, *Des Testaments*, partie 1. Nos. 499 et 500.

pared to other contracts, proceeded from the extreme aversion which feudal legislators entertained for such deeds, Monsieur Toullier thus accounts for it: "Le vœu des Coutumes," that is to say, the laws which obtained in those French provinces which were governed by their own peculiar usages, and which generally speaking were situated North of the Loire, those South being governed by the Roman law, "pour conserver les propres dans les familles, et les faire passer aux héritiers légitimes comme une sorte de substitution légale, au défaut de laquelle ils *retournaient aux seigneurs de fief*, avait fait imposer à la faculté de donner entre vifs, des formalités et des conditions qui en rendaient l'exercise plus difficile et moins fréquent. C'est pour cela que les coutumes voulurent que personne ne pût donner entre vifs, à moins qu'elle ne se dessaisit irrévocablement, en se privant de la faculté et du pouvoir de disposer de la chose donnée; afin que l'attachement naturel des hommes pour ce qu'ils possèdent, et l'aversion qu'ils ont pour se dépouiller de leur vivant, les détournassent de donner."*

Pothier's opinion is also to the same purport.—He states that there are two qualities essentially necessary to the validity of a donation *inter vivos*,—the delivery of the object given, and the irrevocable character of the donation. The reasons why both these qualities were required are purely political, as may be seen from his own remarks. After stating that the object of the ancient laws of France was to secure property in families for generations with as little deviation as possible, Pothier thus refers to the manner in which this object was attained: "Dans cette vue, comme on ne pouvait justement dépouiller les particuliers du droit que chacun a naturellement de disposer de ce qui est à lui, et par conséquent de donner entre vifs, nos lois ont jugé à propos, en conservant aux particuliers ce droit, de mettre néanmoins un frein qui leur en rendît l'exercise plus difficile. C'est pour cela qu'elles ont ordonné qu'aucun ne pût valablement donner, qu'il ne se dessaisît dès le temps de la donation de la chose donnée, et qu'il ne se privât pour toujours de la faculté d'en disposer, afin que l'attache naturelle qu'on a à ce qu'on possède, et

* Traité du Droit Civil, Tome 5, p. 254, No. 221, § 3. *De l'irrévocabilité des Donations.*

l'éloignement qu'on a pour le dépouillement, détournât les particuliers de donner.

" D'ailleurs, la parfaite libéralité qui fait que le donateur préfère le donataire à lui-même pour la chose donnée, est, (comme nous l'avons dit) le caractère des donations, entre vifs ; or, c'est une suite de cette préférence que le donateur se dépouille au profit de son donataire. Ce dépouillement est donc de la nature des donations entre vifs."*

In this manner every impediment was placed on the power of willing, and even on that of making gifts, which, to be valid, were required to be absolutely placed out of the donor's power to recall them ; hence their well known tendency to engender ingratitude. On the same impolitic foundation the donor who retained the life enjoyment of any property, could not always dispose of the principal by any deed of gift, however irrevocable the donation itself might have been.

Such was the abuse made of the axiom *Donner et retenir ne vaut*, that the noblest sentiment inherent in our nature, by which we are sometimes prompted to assist the indigent, to succour the afflicted, reward the meritorious, or retribute honorable services, was stifled at the onset for the purpose of upholding a system which has irrecoverably perished, from its adherents not knowing when to yield those timely concessions, which, granted in due season, might yet for some time have upheld their tottering power. It was not, however, probable, that whilst the few retained the persons and property of the many in vassalage, the law should allow bequests of real property : hence its tardy appearance in the law of nations formerly governed by feudal authority.†

Before we proceed to examine the articles which regulate the forms of wills, it may be proper to set forth the leading features to which they refer, and which are—the faculty which testators have of depositing their wills of real property at the Greffe, or Record office, for greater security in the event of their quitting the Island, or for any other cause,—the faculty all individuals have of searching the public records for wills of parties deceased as they may all other deeds of real property, to which wills of real property are now assimilated, their regis-

* Traité des donations entre vifs. § 2. art. 2. p. 463.

† It is only by the act I of VICTORIA, cap. 26, that in England real property can be absolutely devised.

tration being always required before they can be put into execution. Parties may also obtain extracts or copies of wills as of any other title deeds, only that the original will must always remain deposited at the greffe, which is not the case with the original of title deeds, which are invariably delivered to the parties after registration. The fees charged for extracts of wills are the same as those charged for extracts of title deeds transferring real property.

The power of legatees is also regulated with regard to the taking possession of the testator's property, after his will has been duly registered and authenticated; the universal or residuary legatee, in contradistinction to the legatee for an aliquot portion, or the special legatee, being alone entitled to the possession of the deceased's estate, in preference to the heir: their rights and obligations are, in other respects, also defined, and more particularly their liability to deliver to the holders of rents on the property bequeathed, those title deeds which rentholders may ever claim on the transmission of property to different owners, by sale or otherwise. On examining the different articles of the modern law in reference to the peculiar forms according to which wills of real property are to be drawn up, it will be seen that those of married women require, besides the signature of two jurats, that the baillif, or his lieutenant, should attest it, no disposal of property by married women, either by private contract or testamentary bequest, being valid unless first sanctioned by her husband. But though it is required for the validity of wills that they should be thus attested by the judicial authority, they may nevertheless be cancelled without going through similar formalities. In drawing up all the regulations it is evident that the object of the Court's Committee was as much as possible to assimilate the forms of wills to the forms observed in deeds of sale, it being required that they should be attested by the same authority and lodged at the same office, to be inscribed in the same manner as all other transfers of real property. The liabilities to which in this jurisdiction a legatee may be now subjected, and the prerogatives vested in him in consequence of the more extended powers left to testators with regard to the disposal of their property, are much the same as those inherent in the title of heir, and will form the subject of a

distinct chapter. Should the legatee neglect or refuse to convey proper title deeds to the rentholders who have claims on the property he may have come into possession of, the rentholders have a remedy by getting proper deeds of conveyance drawn out at the legatee's expence, who besides is held to remunerate them for the pains and trouble to which they are thus subjected through his fault or negligence.

We shall now review each of the articles in the order they are set forth in the law, commencing with the fifteenth, which decrees that the will of real property shall be transcribed on a distinct document from the will by which personal property is disposed of.

ARTICLE XV.

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

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

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

Article 15.—Le testament d'immeubles sera fait séparément de celui de meubles.

greater solemnities be required for the attestation of an instrument bequeathing a corn rent, a house, or an acre of land, worth perhaps one hundred pounds, than for one containing a bequest of ten thousand pounds in personal property? What necessity was there for requiring the attestation of the baillif and two jurats, in some instances, and of two jurats in every instance, for bequests of real property? Might not an olographic will, that is to say, one entirely drawn up in the testator's own hand writing, have been deemed a sufficient proof of his intentions, without subjecting him to the ceremony of a judicial ordeal, which, after all, is not so likely to answer the ends proposed. The fact is, the Court's Committee of the nineteenth century, as judicial committees in former centuries, appears to have been strongly bent in preserving the shadow of ancient institutions, when their substance could not be retained. Unable any longer to withhold from an individual the right of willing his real estate, and unwilling to retain him in the fetters imposed by ancient laws, from the operations of which he claimed relief, the Court's committee recommended a concession of the right, but subjected its exercise to unnecessary restraints.

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

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

Article XVI.

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

The first caution required is that the will be signed by the testator. If he is unable to sign, his mark, attested by the jurats to whom his inability will be made known, will suffice.

It is easy to see that this article refers to the two modes according to which wills of real property are to be drawn up:—First, by persons generally; and second, by married women in their husband's lifetime. The former must be signed by the testator and attested by two jurats; the latter, being attested by the same number of jurats, required to be signed by the baillif, or his lieutenant, who thus forming a quorum, the president administers the oath to the married woman, who declares whether the dispositions contained in the will are her own spontaneous act. In fact, the same formalities must be observed on a married woman's leaving a bequest of real property, as when she consents to a deed of sale of property in which she has a reversionary interest. This proves that the baillif and jurats attesting the will need not assemble at the same time to witness the instrument. We have already stated that these forms might have been very much abridged, if not altogether dispensed with: the

* *Le testament d'immeuble, autre néanmoins que celui fait par la femme mariée, doit être signé par le testateur, en présence de deux jurés.*

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

committee of the Petitioners represented this to the Court in their second address, when they prayed that in cases of wills by married women, the baillif, lieutenant-baillif, or a jurat, should be allowed to administer the oath required on such occasions. Without some disposition of this kind, they observe, it is not difficult to foresee that, in many instances, parties will be debarred of the advantages it is the object of the legislature to confer on them. They conceive that in all wills, excepting those entirely written, dated, and signed by the testator, the forms recommended by the Court's committee might be adopted; but with regard to wills entirely written by the testator, they consider that all further forms might easily be dispensed with. What stronger assurance can be obtained of the testator's real intentions than his thus recording his dictates with his own hand? No intervention from the judicial authority was at all necessary for the confection of wills, and if it be objected that the married woman under any circumstances required the intervention of the baillif, or his lieutenant, to administer the oath not only to ascertain whether her will was her own spontaneous act, but also whether it was moreover sanctioned by her husband, it might be rejoined, and with great reason, that the married woman should have been enabled at all times, to make her own will, without any consent from her husband, as she could in most provinces in France before the revolution, though not in Normandy, whose legislation in this respect has, however, given way for a better order of things, it being in the nature of a will that it should be the spontaneous act of the testator, which it can hardly be said to be, if the consent of a third party is required. The common law of ancient France, as the modern law, comformable in this respect to the Roman law, is then much more reasonable than our own, or the law of England, which requires the consent of the husband for the validity of the wife's will. According to the former of these laws, it may then be said that a will is always the expression of the testator's mind, the "*justa sententia* VOLUNTATIS NOSTRÆ *de eo quod quis post mortem suam fieri velit*," ordering certain things to be performed after his death,—but the same cannot always be said where the assent of a third party is required to a will, as in our law. Yet, in England, the wife has the power of bequeathing the personal

property given to her for her sole and separate use, without requiring the assent of her husband.*

The only means by which a married woman may retain the right of willing what absolutely belongs to her, without the consent of her husband, is to stipulate this right in a marriage contract. She will thus preserve a power of which she should never have been deprived, considering that her will only coming into operation at her death, can in no manner affect the marriage state or the rights of any party whilst it continues.

But though on this principle the married woman has, by different laws, been allowed to bequeath her property without the consent of her husband, yet none have allowed her to give or make a donation *inter vivos* without his consent,—the effect of such acts being to diminish the value of property common to herself and her husband, the permission of the latter is necessarily required for such a purpose.

A question might arise whether an owner of real property in Guernsey, residing abroad, could bequeath it by an instrument which no jurat had attested. From the terms in which the sixteenth article is couched, some doubt might at first sight arise, it being stated that "*every instrument giving real property to be enjoyed at the donor's death, and every legacy of real property, shall be signed by the donor or testator, in the presence of two jurats of the Royal Court.*" But this must always be construed to mean where it is in the power of the testator to comply with this provision; for, where it is not, on his having his will drawn up according to the forms in which wills are made at the place where he resides, it will be valid; and it is to such cases that the rule *locus regit actum* applies; which means that instruments derive their validity from being made in conformity to the laws of the place where they happen to be formed. As it was never the intention to deprive an owner of real property here who might be a resident abroad of the right of bequeathing it, a remedy should be given him to exercise this right, and none more natural can be devised than to allow him to dispose of it according to the best means in his power; thus an olographic will drawn up by a Guernseyman, or any other owner of real property

* Mr. Christian's note on Blackstone's Commentaries, vol. 2, p. 497.

situated here, whilst residing in France, would be valid, though not attested by two jurats. With regard to the *execution* of such a will, as the real property is situated in Guernsey it will take place in accordance with its laws, without any regard to the quality of the legatees, whether natives or foreigners. The French code, in this respect conformable to the common law of nations, formally provides by its 1000th article, that "Les testamens faits en pays étrangers ne pourront être exécutés sur les biens situés en France qu'après avoir été enregistrés au bureau du domicile du testateur s'il en a conservé un; sinon, au bureau de son dernier domicile connu en France; et, dans le cas où le testament contiendrait des dispositions d'immeubles qui y seraient situés, il devra être en outre enregistré au bureau de la situation de ces immeubles."

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

The last clause of the sixteenth article refers to the mode in which a will, though regularly made and attested by the competent authority, may be either changed, modified, or destroyed; it being stated that the instrument duly authenticated may nevertheless be changed or modified at any time by another instrument similarly drawn up, but that it may be

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

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

Nor is this difference respecting the forms to be observed in the changes or modifications of wills, and their revocation, peculiar to our jurisprudence. Wills, as contracts and laws in general, can only be changed or modified by observing the same rules as were required to create them ; *omnia quæ jure contrahuntur contrario jure pereunt.** This, together with the rule so often quoted, that nothing is more natural than to recall an act in the same manner as it was formed, *Nihil tam naturale est quam eo genere quidquid dissolvere quo colligatum est,*† have become a formal disposition in the last clause of the sixteenth article, in reference to the modifications of wills of real property. But this rule does not apply to the absolute revocation of a will, which may be destroyed without any formality. Though it may at first sight appear singular that

* L. 100 ff. *De regulis juris.* † L. 27 ff. *De regulis juris.*

a greater number and more complex formalities should be required for the mere modification of some clauses of an instrument, than for its total abrogation, and that the rules above mentioned, drawn from the Roman code, should not be applied to the revocation of a will as to its enactment; yet when we reflect on the consequences which follow from the mere modification and the revocation of wills, the difference in the rules may be satisfactorily accounted for. The will being the testator's law, *dicat testator et erit lex*, by which the distribution of his property is regulated at his death, this law is often directly opposed to the laws of inheritance which, as the general law, would otherwise have provided for such distribution. Constituting a derogation to, and indeed not unfrequently a total abrogation of, the general law of inheritance, the will must be clearly and formally established, but when so established its provisions supersede the distribution of property ordered by the general law. To revoke the instrument containing such an authority is therefore only returning to the general order of things as written in the law, and its revocation will be easily presumed on the appearance of any subsequent act or deed by which it may fairly be inferred to have been cancelled; hence is less formality required in returning to the natural order of things than in deviating from it; hence may a will be destroyed without any formality whatever, or by an act or writing whence it may reasonably appear that the deceased had altered his previous inclination to intervert the law of inheritance, by which he had preferred another to his heir. But the modifications or changes in a will still infer the existence of a will, or a derogation to the order according to which the legislator would have distributed the deceased's property among his different relatives; hence the necessity of consigning these modifications or derogations in as perfect and formal a manner as is required of the will itself, the effect of both as far as interverting the legal distribution of the testator's property, being the same, and the rule *ubi eadem ratio ibi idem jus* applying, accounts for the greater number of forms being required for the modification than for the destruction of a will. And these dispositions are quite conformable to the principles of the law of England, as laid down in the act I of Victoria, cap. 26, on wills, according

to which a will may be revoked by being destroyed by the testator or by an intention unequivocally expressed to revoke it, but any alteration or derogation to the will must be made in the same manner as the will itself; in other terms, it must be signed by the testator and attested by two witnesses.*

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

From the context of the different articles in the modern law on the forms of wills, it does not appear that witnesses would be allowed to prove the change in the testator's wishes in reference to his real property, without some *primâ facie* evidence in writing whence such change could be presumed. Nor should they be allowed to prove the revocation of a will disposing of personal property unless this change could be reasonably anticipated from some writing left, or act performed, by the testator. It would be too dangerous to judge of the intentions of a testator by the mere *vivâ voce* evidence which his heirs might bring forward to overthrow an instrument opposed to their interests, particularly in these days, when there are so few persons who cannot write, and when it is so easy for a testator to alter or cancel the dispositions of his will.

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

* Art. 5 and 6.—Marriage, according to the above act, also revokes a will previously made, and a person may now dispose of the whole of his real property, and thus totally disinherit his issue. Formerly such property could only be disposed of for a term of years. In fact, the great benefits conferred by this act, are, that it abolishes all differences in the form of drawing up wills, and places all property, without distinction, on the same footing as to the power of bequeathing it.

his heirs: *l'héritier de la volonté sera alors préféré à l'héritier de la loi.*

On the same principle, whilst nuncupative wills are tolerated in Guernsey, when duly made they would be sufficient to *revoke* a more formal will of real property, though such nuncupative will could not of itself be considered sufficient to bequeath such property.

The following article refers to the means which a testator who quits the Island possesses of securing his will against the chances of its being lost by accident or otherwise.

ARTICLE XVII.

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

This article contains three distinct propositions, which, in many instances, may prove exceedingly useful in forwarding the execution of wills,—first, an opportunity is given the testator of securing his will by having it deposited in a place of safety in the custody of a public officer on the payment of a moderate fee; second, the registrar is bound to ascertain that the instrument deposited with him is really the testator's will, the confidential nature of the trust and the importance of the sums or legacies which in a manner may be thus said to be confided to his care, render his ascertaining this fact a

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

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

proper precaution; third, the faculty allowed the testator to retake his will whenever he thinks proper without any fee.

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

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

ARTICLE XVIII.

Any person shall be at liberty to obtain permission from the Royal Court, on furnishing proof of the decease of an individual, to examine at the Greffe whether the deceased had deposited there a will. For the reading of the will, should any be found, the Greffier shall charge two shillings, after which any person may have the will read on paying one shilling to the Greffier.*

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

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

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

The necessity that the greffier or registrar should be satisfied that the person whose will is sought to be examined is really dead having been set forth in the above article, the following refers to the mode of registering wills before they can be put into execution, which is done on getting a permit from the Court to that effect.

Article XIX.

After the decease of a testator, the legatees, or one of them, shall obtain permission from the Royal Court to cause the will to be registered

* Article XII.—The registrar shall cause indexes of the register books in his office to be made, and kept with the other records; and he shall at all times, when the office is open, allow searches to be made of such indexes, and of any register books in his keeping, and give a copy, certified under his hand, of any entry or entries in the same. For each inspection or search of the index, and of the books connected therewith, together with a certified copy of the registry, if required at the same time, a payment of one shilling shall be made to the registrar,—and he shall be entitled to the like payment for every other certified copy of a registry.

on the book of contracts, which permission shall be granted after proof of the said decease, without prejudice to the rights of others.*

This article settles two points: first, by whom wills are allowed to be registered before they come into operation; second, when the registry of wills is allowed. Those parties who have an interest in the will are empowered to get it registered as a measure of precaution on their furnishing the Royal Court with proof of the testator's death. When the testator dies in the island nothing is more easy than to prove his death by an extract from the public registries, which are now all kept at the greffe or record office,† whence all title deeds respecting real property or judicial decisions affecting rights of every description may be easily obtained and at a moderate cost. On proof thus afforded to the Royal Court permission, as a matter of course, is at once given to register the will of real property among the public records of the island, by means of which the nature of the transfers of real property in general are ascertained.

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

By the recent ordinance in reference to the general registry of births, marriages, and deaths, the condition of persons and the titles to their property are now much more likely than they were formerly to be accurately ascertained and preserved,

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

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

† Article I. of the New Marriage Act.—The greffe, or present office of registry of deeds, and acts of Court, shall, for the present, be the general office also of registry of births, marriages, and deaths, in Guernsey, and the adjacent islands forming its bailiwick. And the Queen's greffier, or, in his absence, the sworn deputy-greffier, shall, for the present, be the registrar.

a separate registry being kept for each, besides a day-book, into which an entry is at once made of any birth, marriage, or death, that is reported.* Within the month the separate entries of each birth, marriage, and death made in the day-book must be transferred to the permanent book of registries, all the deputy-registrars in the country parishes being bound to make their reports within the month, and the rectors in their respective parishes being authorised to examine these registries and compare them with their own, a system of regularity and inspection has been established, which must be attended with good effects.† The better to preserve the authenticity and correctness of these important acts or documents, the parent or relative, and in their default the owner of the house in which a child is born, is bound, under a penalty not exceeding twenty shillings, to inform the registrar of the occurrence, specifying at the same time the day and month when it occurred, the names of the parents, their situation in life, and their residence, within one month of the child's birth.‡ In the same manner, and within a week of the occurrence of any death, the nearest relative, and in his absence the owner of the house where it happened, or the person superintending the funeral, is bound to inform the registrar of

* Article V.—The registrar shall keep a separate book for the permament registry of births, one for that of marriages, and one for that of deaths; as also a day-book for each of these registrations, in which an entry shall be made at the time when the report of each article is made at the office; from which day-book a regular entry shall be made in the permanent book, within thirty days subsequent to the entry in the day-book.

† Article VI.—Each deputy-registrar of the country parishes shall deposit every month, before noon, and at the latest within eight days after the expiration of the month, the book in which he has made the entries of births, marriages, and deaths, so that copy may be made thereof in the books of the greffe, and that the book of the deputy may be returned to him the same day. The rectors are authorized to visit and examine, at all times, the books of the deputies of their respective parishes, so as to assure themselves that the entries are conformable to the registries of the said rectors.

‡ Article VII.—Every father or mother of any child born, or in default of both the nearest of kin living in the island, or in his default the occupier or owner of the house in which the birth takes place, shall, before the expiration of thirty days, reckoned from and after the day of the birth, under a penalty not exceeding twenty shillings, make in person, or send in writing and signed, to the registrar, or to the deputy-registrar of the parish where the birth takes place, a report of the birth of the child, specifying the day of the week and month when it took place, the name and surname of the father and mother, the profession or situation in life of the father, and the parish and part of the parish in which he resides; and also the name prefixed, or intended to be prefixed, to the family name.

the event under a similar penalty,* and all rectors and officiating ministers are bound to furnish the registrar with a report of all the marriages that have been solemnized in their parishes, for each of which they receive six pence, and to secure uniformity throughout these acts and registries, the rectors are empowered, within the hours of nine and three, whilst the registrar's office continues open, to inspect the registries of births, marriages, and deaths, without payment of any fee.†

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

* Article VIII.—Before the expiration of eight days after the death of any person, the nearest of kin living in the same house, or, if none, the nearest of kin in the island, or in default of any the occupier or owner of the house in which the person died, or the person superintending the funeral, shall, under a penalty not exceeding twenty shillings, make in person, or send in writing and signed, to the registrar or deputy-registrar if in the country, a report of the death of said person, specifying the name, surname, and age of the deceased, the place of birth, and the parish or place of his usual residence; and, if a stranger, the country to which he belonged, with as many particulars as can accurately be known.

† Article IX.—(Last clause.)—At all times when the registrar's office is open, it shall be lawful for the rectors, or ministers officiating in the parishes, gratuitously to inspect the registries of births, marriages, and deaths, so as to assure themselves that they are as conformable as possible with the parochial registers.

‡ Article 45 of the Code Civil.

tificate of burial.* Now it is submitted that there was no necessity whatever for these witnesses, who, in the present instance, *happened* to know that the testator had made a will. In many cases the will is only known to the two jurats who may have signed it; besides, supposing the testator to have died out of the island, and his will to have been deposited at the greffe office before he left, how is the identity of the person deceased and the testator to be more satisfactorily ascertained than from extracts from the public registries of the place where his death occurred, and his signature to the will? Are witnesses to be brought from abroad to prove the identity? No fear need be apprehended from the absence of witnesses to prove the identity between the deceased and the testator, where the testator dies in the island; the heirs and other parties interested are generally not so far removed but that they can detect any imposition that might be attempted to be practised to their prejudice, and if the testator is dead abroad how is it possible, in most instances, to prove the identity, otherwise than by comparing with the will the extracts from the public registries of the place where the death occurred. It is always time to enquire after witnesses when the identity of the parties may be disputed, but not till then, an event in itself of rare occurrence, and when it does occur imposition is all but absolutely certain of being detected. Can that be a good system which requires witnesses to be heard in support of a fact which can easily be ascertained without their intervention when the testator dies in the island; and which, when he dies abroad, and that their testimony might be of service, there will, in most cases, be a moral

* *Le* 17 *Avril*, 1841, *devant Daniel De Lisle Brock, écr., baillif, et Jean Le Messurier, écr., Sir William Collings, Frederick Mansell, et Thomas William Gosselin, écrs., jurés.*

Il a été permis à Henriette Marie Robert, fille d'Hellier, légataire dénommée dans le testament d'immeubles de feüe Patty Priaulx Stanbury, fille de Guillaume, de la paroisse de Saint Pierre Port, signé de la dite Stanbury et de Jean Hubert et Harry Dobrée, écrs., jurés, en date du 5e. Janvier, 1841, à quoi recours, de faire enregîtrer le dit testament sur le livre des contrats pour la date, pour servir et valoir ainsi que de raison; sans préjudice aux droits d'autrui, après qu'extrait mortuaire de Patty Priaulx Stanbury a paru sous le sçeau de Charles Lefebvre, écr., registraire, en date du 16e Avril, 1841, et que Messrs. William Anderson Crousaz et Bredthafft Allez ont déclaré par serment que ladite Patty Priaulx Stanbury dénommée dans le dit extrait mortuaire est la testatrice dénommée au susdit testament.

impossibility of obtaining it. Besides, is it not highly inexpedient and unwise thus unnecessarily to augment the administration of oaths when experience so powerfully demonstrates that their efficacy materially depends on being administered as seldom as possible.

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

ARTICLE XX.

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

Thus are wills in regard to their registration assimilated to contracts embodying transfers of real property; by such registration they in fact become public property, and the registrar is bound to deliver extracts of wills as extracts of judicial decisions and contracts when required, and at the same cost. In one very material point, however, the registration of wills differs from that of judicial decisions and of contracts, the law requiring the original of the former to remain always deposited at the public record office, whereas the originals of contracts are delivered to the parties immediately after registration, and the original of forms of actions, or as they are here named *causes*, on which judicial decisions are given, are burnt by the public registrar after a period of seven years from the date of their registration. This distinction in reference to the mode of disposing of the original instrument, in the case of wills, and in that of contracts and

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

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

judicial decisions, is material and just, being founded on the difference that exists in the nature of these instruments and the manner in which property or other rights is affected by them. Contracts and judicial decisions are generally executed immediately after they are passed, and in presence of all the parties; hence no difficulty can arise respecting the consequences of delivering the original of contracts to them in the one case, and destroying the original of causes after so long a period as seven years in the other, from the date of their respective registration. The case of wills of real property is very different, as their execution only takes place after the death of the principal party; the instrument which regulates the fate of the property to which it refers, particularly the rentholders and mortgagees, may be materially affected; it therefore becomes in point of fact a public document, the original of which should always be at hand to decide any differences that may arise respecting it, and the only way in which this can be accomplished is by depositing the original at the record office. The parties interested cannot find fault, as they may easily obtain extracts which will as readily serve their purpose as the original, and the general rights of property will be the better secured, as a means will thus exist to afford every one an idea of the nature of the titles by which each has become proprietor of what he states himself to be possessed. But perhaps the most convenient method is for the testator to execute two or more copies of his will and have them signed as originals, or after drawing up the original, get copies of the same drawn up, which might often save the executors much trouble and might prove more satisfactory to persons abroad to whom these might be sent, than any copies however authentic, from the record office. These, however, when duly authenticated by the registrar, have quite as much force as the original, and may always be procured for a moderate fee.

SECTION 3.

On the Rights, Duties, and Obligations of different kinds of Legatees.

After regulating the forms to be observed in making and proving wills, as well as the manner in which parties may ascertain the existence of any will affecting them, and the fees to be paid to the greffier or registrar, into whose custody all wills of real property must be delivered before they can be executed, the law proceeds to define the rights, duties, and obligations of the different kinds of legatees. The principles referred to in this section constitute the most important features of the civil law, and as their introduction into our system of real property has only occurred within the last few months, it may be proper to set them forth as understood in other jurisdictions, whose inhabitants in this respect have enjoyed advantages of which we have been too long deprived. It is by comparing the legislation of other nations with our own, that we find the safest remedies for existing evils; it is in watching the operations of laws in different countries that their respective advantages and disadvantages may be duly appreciated, and that their consequences to a very great extent may be foreseen long before they are actually felt. Though we have seen what are the rights bestowed by the laws of inheritance on different individuals and may have perceived that generally speaking these rights, in reference to their property, were the more extensive as the ties of consanguinity were more powerfully interwoven between the deceased and his heir; the obligations derived from such rights have not, however, been so far alluded to;—yet as they, in most instances, affect the heir of the will much in the same manner as they do the heir at law, it was proper to reserve the subject of these obligations for a separate chapter. The rights and obligations of different kinds of legatees have been regulated by the modern law. Their rights it will be seen have considerably augmented from the power recognized in individuals who leave no descendants to dispose of their real property by testamentary bequests; a residuary legatee, when the testator

leaves no issue, being now entitled to take possession of all the deceased's property, without any distinction of real or personal. The children and their issue are now the only heirs who can exclude a residuary legatee from taking immediate possession of all the testator's property, they alone being recognized in law as *héritiers légitimaires*, or heirs of his body lawfully begotten, consequently preferred to the residuary legatee for such possession. On this principle the legatee for a given sum on the testator's leaving no descendants would be preferred to the heir for the amount of his legacy on the personal property as well as on the real property of the testator, the personal property being no longer solely liable in the first place to pay the testator's debts, as was always the case before the promulgation of the new law, which has done away with the absolute prohibition to dispose of real property by testamentary bequests.

This rule would only suffer an exception with regard to such real property as the testator could not dispose of by will, as would be the case with regard to the real property he might have inherited, and which, in the present state of the law, he cannot bequeath, unless he leaves relatives in the line whence that property descends, beyond the degree of cousins germain. This important feature in favour of the legatee, introduced by the modern law, not only favourably affects the power of disposing of personal property and real property purchased by the testator, but also the disposal of his real property inherited.

Respecting the immediate liabilities of heirs and legatees towards the deceased's creditors, we shall find them extended by our law far beyond what justice requires they should be, and that the benefit of an inventory with which the heir or the residuary legatee may provide himself on his accepting the deceased's succession as a precaution against himself being personally liable beyond the value of the deceased's estate to the creditors, was more than ever required in the Norman law which renders the heir and the legatee of a given proportion of the estate, debtors *in solidum*, not only for the amount the deceased's property may yield, but also personally responsible to make up towards the deceased's creditors any balance that may be due to them, after the whole of their debtor's estate

has been effectually disposed of for the liquidation of their own claims.* Nor is this the only feature wherein the severity of the Norman law is apparent; we will find another in the privilege it bestows upon any heir of the deceased who will absolutely take to his estate, that is to say, become at once responsible to its creditors, by giving the estate to such heir,† however distant or improvident he may be, to the prejudice of nearer relations, as if the commendable precaution which the latter take to secure themselves against the law's undue severity, and which on that very account it upholds them in taking, should become a reason to deprive them of their legitimate rights. Besides, what more can the creditor require than to have the whole of the deceased's property set apart for the liquidation of his debts, without the cost of any administration? Should he in justice be allowed more?

In fact the unjustifiable extent to which the liabilities of heirs, legatees, and creditors seized of their debtor's estate

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

Aux Jugemens et Records tenus le 3 Mars, 1840, devant Monsieur le Baillif et neuf Jurés présens.

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

† As may be seen from the forms by which estates pass *sous bénéfice d'inventaire*, wherein it is stated that the heir claiming the benefit of such inventory shall only obtain it, in the event of no relation of the deceased within the seventh degree, presenting himself and unconditionnally accepting such estate; or, as it stated, A. B. the heir, *fait savoir aux habitants de cette île, que s'il y a quelque parent dans le septième degré qui veuille se déclarer* HERITIER ABSOLU of the deceased's estate, *il ait à le déclarer après la troisième publication, faute de quoi ledit bénéfice d'inventaire sera octroyé au dit A. B.*

were carried by the ancient laws, the spirit of which is unfortunately but too apparent in our own, can only be referred to that extreme jealousy which manifested itself on the gradual emancipation of serfs, who, on exchanging their condition of life tenants for that of proprietors, were subjected to every inconvenience that could be imposed upon their new condition: hence the unlimited liabilities imposed on heirs, legatees, and creditors, when they administered to the property of which they were ultimately to become possessed. Hence was the heir or legatee for one twentieth part of the estate rendered a debtor *in solidum* for the whole claims due by it, as the *saisi* or administering creditor, judicially seized of his debtor's estate, was liable to be declared absolute proprietor, or in other terms personally liable to discharge all the claims due by the insolvent, for the mere performance of acts from which the estate, so far from having suffered any injury, had actually derived considerable benefit. And, on the same principle and to the same extent was equally responsible the executor who had incautiously, though by no means either negligently or fraudulently administered, and who invested with the unlimited confidence of the deceased had been specially charged with superintending the distribution of his property. "Nul saisi," says Mr. Du Comte, "ne doit disposer, soit par louage ou par baux-à-rente, d'aucune partie de l'héritage saisi; il ne doit démolir, *rédifier, ou réparer les maisons*, abattre ou *épiler* les arbres, faire couper ou recueillir le produit des terres dudit héritage, que préalablement il n'ait obtenu un acte de Cour, qui l'autorise à ce faire devant un commis; sous peine, au dit saisi, manque d'avoir obtenu cette permission de la Cour, d'être déclaré saisi propriétairement du dit héritage, ayant fait *acte de propriété*, et par-là *assujetti au payement de toutes les dettes et redevances*, soit *mobilières*, ou héréditales, comme le propriétaire l'était lui-même avant sa rénonciation, quoique ces dettes mobilières ou redevances héréditales, fussent *postérieures* à la dette du saisi,"* and in all probability many of them absolutely valueless. It was even at one time understood that the administering creditor who replaced a broken pane of glass without the Court's permission or the presence of one of its

* Mr. Du Comte, *Procédures en Plaids d'Héritage*, p.p. 23 et 24.

delegates, was likewise liable to be declared absolute proprietor. So that he who had replaced a pane of glass, repaired an outhouse, or lopped any of the trees, was deemed to have as completely rendered himself proprietor of the debtor's estate as if he had purposely demolished a building or sold any portion of the estate.

The recent judgments given in the cases springing out of the late Mr. Le Quesne's estate, the small treatise on our system of judicial expropriation or *Saisie*,* and Mr Christian's remarks on the nature of the acts which render the executor and administrator or heir personally responsible for the deceased's debts, all demonstrate the unprincipled source whence spring these undue liabilities of heirs, executors, and *saisis* or assigns, who should never be made personally responsible towards the parties, to whom an account of their respective administration is due, when these have, though in some instances perhaps carelessly, yet on the whole discharged their duties without fault or fraud.† Such are the consequences to which our laws on wills and inheritance still expose those whom it can only be their object to benefit. But of such results, as of the sources whence they sprang, it may be said that they have outlived their time, *tempore senescunt et evanescunt.*‡

But for these unnatural consequences springing from the worst of political purposes to which the laws of inheritance

* Il importe, sans doute, que l'administrateur d'un bien soit tenu d'une responsabilité, mais dire qu'une négligence ou une faute légère sera dans le cas de ruiner un particulier, qui souvent travaille pour autrui plutôt que pour lui-même, et donne son tems, ses peines et encore une partie de ses frais à la masse des créanciers, ce serait tomber gratuitement dans une sévérité excessive, toujours condamnable quand elle n'est pas condamnée par une loi bien formelle. —Il n'y en a point ici.

Et quel effet pourrait-on espérer d'une pareille sévérité ? Celui que la crainte seule a déjà produit sur l'esprit de ceux qui ont crû à la lettre tout ce qu'on leur a dit du danger des saisies. Des personnes de fortune et respectables ont été découragées de l'entreprendre, et la plupart ont été abandonnées à des individus qui se sont enrichis aux dépens des créanciers. Chap. 8. Des droits et devoirs du saisi, par feu Mr. Jeremie, p. 36.

† In his notes on Blackstone's Commentaries, chap. 32, p. 507. It is held that the least intermeddling with the effects of the estate, even milking cows, or taking a dog, will constitute an executor *de son tort*. *Dig.* 166. An executor of his own wrong will be liable to an action, unless he has delivered over the goods of the intestate to the rightful administrator before the action is brought against him. And he cannot retain the intestate's property in discharge of his own debt, although it is a debt of a superior degree. 3 T. R, 590. 2. T. R. 100.

‡ Cujas. On the law. 1. ff. *De justitiâ et jure.*

and wills have been so frequently rendered subservient, one might have imagined that were the dictates of the law of nature any where to be found, it would be in those regulations which have for object the transmission of property according to man's affections and commands. Yet in none have the rules of the latter been more frequently sacrificed to state policy, nor in any do we find governments so often deviating from strict justice as in these, respecting which it is so incessantly proclaimed that the private advantage of individuals must make way for the benefit of the state. Hence the variety of forms they assume in different communities; hence so rarely do we find the laws of inheritance conformable to that law properly so called, which, springing from eternal wisdom and immutable as that wisdom, existed before it was engraved on stone, or traced on canvass.* Why then be surprised that in the administration of such laws, justice should so rarely assume the ascendancy, when their very basis is opposed to all justice, or at least to that principle which has been so admirably described as "La véritable justice, la vraie philosophie, la sage application des LOIS aux cas particuliers; en un mot, la droiture de jugement que la raison naturelle, éclairée et dirigée par l'esprit des loix, inspire aux juges préposés pour rendre à chacun ce qui lui appartient."†

So then true justice must always be conformable to law, which means any thing but that law should be rendered subservient even to justice; it was of this latter species of justice that the suitors of old said, *que Dieu nous garde de l'équité du Parlement*, because such justice was made the too pliant instrument of its administrator's caprice and arbitrary rule: hence the remark of the great genius of antiquity, that there can be no justice where there is no law, or what is tantamount to it, where its administrators subvert it, by deviating at pleasure from its decrees,—*Omnia sunt incerta cum a juré discessum est. Nec præstari quidquam potest quale futurum sit quod positum est in alterius voluntate ne dicam libidine.*‡ But perhaps the effects of an unjust, because illegal, judicial decision were never more admirably demonstrated

* De legibus. Lib. 2. cap. 4.

† Emerigon. *Des Assurances.* Chap. 20, sec. 5, No. 2, *Equité.*

‡ Cicero ad familiares, lib. 9, epist. 16.

than in the following exposition by Bacon, wherein he shows that the judge who causes at his will the property of his neighbour to change hands, is far more guilty than even the culprit who displaces that neighbour's landmarks, and in the same proportion that, as the latter, only commits one unjustifiable act against the commands of justice, the other poisons the very fountains of all justice, which, from being the guardian, then degenerates into a curse to mankind: *Maledictus sit,* "inquit lex," *qui terminum terræ movet antiquum. Sané qui lapidem fines distinguentem transposuit, culpâ non caret: verùm judex injustus ille est qui præcipuè terminos immutat, cùm de terris et rerum proprietate iniquam fert sententiam. Una certè iniqua sententia plus nocet quàm exempla plurima. Hæc enim rivulos tantùm inficiunt, illa autem fontes.** And if the truth of these remarks apply to all nations and to all Courts of judicature, in none are the effects of such decisions more seriously felt than in inferior tribunals, where the judge from his personal acquaintance with most suitors, is apt to have his judgment the more powerfully warped as the limits of his jurisdiction are the more circumscribed, and that his prejudices increase with the narrowness of the circle within which they are confined. They, of all other administrators of the law, need call to mind that their conscientious motives are not always proof against remorse, and that their minds can never be more powerfully secured against its harrowing influence, than by strictly adhering to the principle that the conscience of the legislator is superior to that of the judge, or indeed of any man, and that *conscientia legis vincit conscientiam hominis.*

On attentively examining the principles which should obtain on the subject of the liabilities of heirs, executors, and assigns, it is easy to see how far justice would be secured in rendering them merely responsible for the quota they take in the deceased's estate, and not *in solidum* for the whole. As to their responsibility whilst in possession of the debtor's or deceased's estate, in the absence of all law, they need no longer fear being declared absolute proprietors, or, in the words of Monsieur Du Comte, personally liable, whilst they confine themselves to acts of mere administration by taking

* *De officio judicis.*

proper care of the property entrusted to them.—For instance, the administrator who would now build a house on an estate *en saisie*, repair delapidated buildings, and otherwise really improve it, might rest under no apprehension of being condemned to pay all the debts due upon it; the loss of his outlay would be all to which he could be subjected for not having in due season applied to the proper authority for its sanction to such outlay: and this should surely be deemed a sufficient penalty for such an oversight. As to milking the cows, or replacing a broken pane of glass, without a specific authority from the Court or the presence of one of its members, being deemed on the part of the heir, assignee or saisi, a sufficient presumption of a desire on his part to render himself absolute proprietor, they may be fairly set aside as the dreams of gone-by times, as the *summum jus* and *summa injuria*, as the evils of a system which appears to have been framed with any object but the speedy distribution of the debtor's assets among his lawful creditors, since we find that six years did not then suffice to terminate a *saisie* which is now easily done in two.* But the reign of all these dilatory, unsatisfactory and litigious processes is past for ever, *tempore evanescunt.*

Now all this severity, as that before mentioned, respecting the unlimited liability or the responsibility *in solidum* of heirs and executors, tended to prevent heirs who were in good circumstances taking to the deceased's estate, and to encourage needy ones who had nothing to lose in seizing upon what they anticipated might ultimately leave them a portion of the spoil for their pains. Hence it is easy to see that relaxing the severity of our laws with regard to the liability of heirs and legatees is only doing what has been so far constantly practised for the general advantage of debtors and creditors, and no stronger arguments can be adduced in favour of such relaxation than are to be constantly derived from the examples

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

of those ancient and modern nations, the excellence of whose laws only shone forth as the noblest of their achievements, after they had succeeded in banishing undue severity as well from their civil as from their penal codes.

The modern law commences by regulating the rights of the universal legatee.

Article XXI.

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

As no owner of real property can bequeath any portion of it if he leaves issue, the framers of the modern law gave the possession of the deceased's property to the universal legatee in preference to his heirs who, as we have seen by the fourteenth article, can be no nearer than collateral relations, and who by the common law of feudal countries are not always entitled to the possession of the deceased's estate as is the lineal heir. In this respect universal legatees, in regard to the possession of the goods bequeathed, are placed by the above article in the same state as they are by the French code, that is to say, when the testator leaves any issue or ascendants, the universal legatee must claim possession of the property bequeathed from such lineal or ascending heir, but when there exists no such heirs then he is entitled, as he is here, to the absolute possession of the property bequeathed. By our laws, however, the ascending heir is not entitled to this possession, so far indeed from being under any circumstances entitled *pleno jure* to a certain portion of his descendant's estate as he is by the French code, he is excluded by brothers,

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

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

sisters, and their descendants in the collateral line, which does not appear altogether reasonable. Nor will such a system tend to discourage wills, it being much more natural for a child to prefer his parents to his collateral relatives than to allow the latter to exclude his parents. To have effectually checked the progress of testamentary bequests, the reformed law of inheritance should have cherished the principle of affection much more powerfully than it does, by preferring parents to collateral relatives, and allowing in every case grand nephews, who had lost both their parents and grand parents, to succeed with nephews and uncles to their grand parent's succession, as they still do in some instances. Strange inconsistency, legislators wish to discourage wills, and yet they disinherit the very persons who, from their age and position, possess the strongest claims on man's affection and regard!

In comparing the text of the twenty-first and four following articles of the modern law on the nature of residuary and special legatees, and legatees to whom an aliquot portion of the deceased's property may have been given, with the 1003, 1009, 1010, 1014, and the 1024 articles of the French code, which define the nature and point out the various rights and liabilities of the different kinds of legatees, and comparing all these articles with the remarks of the Court's committee thereon, it will be easily seen that they had the French code before them in drawing up the regulations which refer to these various rights and obligations, as contained in the modern law. We confess that whilst thus engaged on that code they might have extracted a few more salutary principles which would have been a boon to their country; that contained in the 913th article, for instance, which allows a testator under any circumstances the free disposal of at least one-fourth of his property to whomsoever he pleases, a principle which ere long will be the law of the island. But this apparently would have been requiring too much, since a person leaving a cousin germain is even now debarred from disposing of any portion of his real property inherited, if that relation springs from the line whence such property is derived. In fact the Court's committee, as most other judicial committees, was too strongly biassed by antique reminiscences to allow them at once to mete out such a measure of reform as would have

put off its further consideration for an indefinite period. Those solemn discussions concerning the respective rights of the heir at law and those of the heir of the will, which nations in their progress towards civilization have always to undergo, were again opened, and as usual decided in favour of the former; not, however, without making considerable concessions to the latter. Here again we find the owners of real property regaining some portion of their unquestionable rights, however unnecessarily entrammelled by the impolitic restrictions of a gone-by system. It would have been wise to have thrown them aside altogether, but the "prestige..... qui tend à maintenir la vénération, qui se trouve naturellement chez presque tous les peuples pour leurs anciennes lois," was too strong to be so soon overcome. As the local authorities adopted the reasonable principles of the modern law of France with regard to the immediate possession of bequeathed property, *la saisine légale,* at the testator's death, as is laid down in the code, and which formed the common law before the revolution, why not have followed their regulations also in reference to his right of disposing of his property by testamentary bequests? The manner in which this question respecting the immediate possession was disposed of by the framers of the present code is thus referred to by an eminent civilian :—"A l'époque où le code parut," says Mr. Touiller, "la France était divisée entre deux usages absolument opposés. Dans les pays de droit écrit,* c'était en premier ordre la volonté de l'homme qui faisait les héritiers; les institutions d'héritier étaient le droit commun: les héritiers du sang n'étaient appelés qu'en second ordre, et seulement à défaut d'héritiers testamentaires; ces derniers étaient saisis de plein droit de la succession. La présence même ou le concours des légitimaires ne faisait point cesser cette saisie. Les légitimaires n'avaient à exercer qu'une action en partage.†

"Dans les pays de coutume, au contraire, la loi seule faisait les héritiers; elle n'en connaissait point d'autres que ceux du sang. L'institution d'héritier était proscrite, ou n'avait que la force d'un legs, quand même ce legs eût emporté tous les biens du défunt. Les héritiers du sang étaient seuls saisis,

* That is to say, in the French provinces South of the Loire.

† Domat, liv. 3, tit. 4, sect. 3, p. 2, page 458.

seuls représentans de la personne du défunt. Ainsi, point d'héritiers testamentaires.

" Entre ces deux législations opposées, le code a pris un parti mitoyen,* qui dérive des principes adoptés sur la disponibilité des biens.† Celui qui a des descendans ou (in France) des ascendans, ne peut disposer par testament que d'une partie de ses biens: en ce cas, les héritiers du sang sont les seuls héritiers, les seuls saisis par la loi avant la délivrance des legs. Il n'a paru ni juste ni convenable de diviser la saisine légale, pour y faire participer des étrangers appelés seulement par la volonté du défunt. La disposition de la loi l'emporte sur la volonté de l'homme."‡

" Mais à l'égard de toutes personnes autres que les légitimaires, c'est-à-dire les descendans et (in France) les ascendans, il conserve la qualité et les droits de légataire universel ou d'héritier testamentaire, même contre les autres héritiers du sang, qui, sans sa présence, concourraient avec les légitimaires. Par exemple, le défunt a laissé pour successibles sa mère et ses frères et sœurs, et institué un héritier testamentaire ou un légataire universel de tous ses biens ; la mère seule est saisie respectivement à l'héritier testamentaire ou légataire universel. Il est obligé de lui demander la délivrance, mais il est saisi vers les frères et sœurs qu'il exclut. Il est saisi vers les légataires particuliers qui doivent s'adresser à lui pour lui demander la délivrance de leurs legs, qu'il recueille par droit d'accroissement, en cas de rénonciation ou de caducité. Enfin, il est saisi à l'égard des créanciers de la succession, qui ont contre lui une action directe et personnelle comme représentant le défunt, outre l'action hypothécaire comme possesseur des biens.

" Si le testateur n'a ni descendans (ni en France des ascendans), il peut disposer de l'universalité de ses biens sans aucune réserve: en ce cas, les héritiers du sang ne sont appelés à la succession qu'en second ordre, et seulement à défaut de testament. Le testateur peut alors se nommer un successeur ou représentant universel ; en un mot, un héritier proprement

* Cette distinction raisonnable entre le cas où il y a des héritiers qui ont une réserve et celui où il n'en existe pas, est due à Mr. Cambacérès.

† The law of Guernsey is the same in principle.

‡ This is also conformable to the law of this Island, only that parents or grand parents form no obstacle to a testator's bequeathing the whole of his real and personal property.

dit ..... Sous quelque nom que ce successeur soit nommé, la loi le déclare saisi de *plein droit de toute la succession par la mort du testateur,** sans qu'il *soit tenu de demander la délivrance* aux héritiers du sang, qui sont exclus par sa présence, et qui ne sont appelés qu'à son défaut. En un mot, les héritiers et les légataires universels succèdent à l'universalité des droits actifs et passifs de l'hérédité; ils sont donc héritiers dans le sens légal de ce mot: *Hi qui in universum jus succedunt hæredis loco habentur.*† La loi leur défère de plein droit la saisine légale,‡ comme, à leur défaut, elle la défère aux héritiers du sang."§

In fact the principles set forth in the preceding paragraph constitute the law of this island, only that with us the immediate possession of the testator's real property is given to the lineal heir alone, exclusive of the parents, whose presence is no obstacle to a person's bequeathing the whole of his real property, whether purchased or inherited.

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

Having thus seen what constitutes a universal legacy or residuary legacy, on examining the twenty-fifth article, which should have been the twenty-third, we shall see how the respective rights and obligations of residuary legatees are defined, here premising, however, that these rights and obligations are precisely the same as those of the heir at law, the residuary legatee of real property in Guernsey being in fact constituted the heir of the will, a designation known in the Roman law as *institutio hæredis,* the institution of an heir, according to which, a will properly speaking was only designated as such which contained this institution, *Quinque verbis potest facere testamentum; ut dicat, Lucius Titius mihi hæres esto,*¶ and the will itself being defined an act

* Article 1006 du Code civil.

† L. 128, sec. 1. *De Regulis Juris.*

‡ Article 1006 du Code civil, as we have already seen.

§ Article 324 du même Code.

¶ L. 1. Sec. 3. ff. *De hæredibus instituendis.*

by which a certain thing is desired to be performed after its author's death: *Testamentum est voluntatis nostræ justa sententia de eo quod quis post mortem suam fieri velit.** The residuary or universal legatee is then to all intents and purposes the heir in law, and whatever name may be given to the instrument establishing such a personage, he is nevertheless the representative of the deceased, and as such the heir of his will, his rights and obligations being in every sense the same, as far as his property is concerned, as those of the heir of the body. And for the correctness of this assertion we have the distinct authority of the law itself, *verbis legis duodecim tabularum his, uti legassit sua rei, ita jus esto, latissima potestas tributa videtur et hæredes instituendi et legata et libertates dandi, tutelas quoque constituendi. Sed id interpretatione coangustatum est vel legum, vel auctoritate jura constituentium.*† But, however subject to judicial interpretation the dispositions of a will might be, its authority once satisfactorily ascertained was nevertheless tantamount to Law: *Disponat unusquisque super suis, ut dignum est, et sit* LEX *ejus voluntas.*‡

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

After thus defining the rights and obligations of the universal legatee, those of the legatee of an aliquot portion of the estate, and those of the special legatee or party entitled to any definite portion, we shall, following the order laid down in the law, first examine the rights and obligations of the legatee of an aliquot

* L. 1. ff. *Qui testamenta facere possunt.*

† L. 120. ff. *De verborum significatione.*

‡ Nov. 22, cap. 2.

portion of the estate, known here as the legatee *à titre universel.*

ARTICLE XXII.

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

By comparing the text of the twenty-first, twenty-second, and twenty-third articles it is easy to see that there are three kinds of legatees,—the universal or residuary legatee,—the legatee of a certain share of the testator's property, such as one-half, one-third, or any other aliquot portion,—and the legatee of a particular thing, such as a field, a house, or any other definite object as would be the legacy of all a person's funded property, all his furniture, or any other distinct object belonging to him. Residuary or universal legatees generally come in for the greater portion of the testator's property, and on that account are viewed by law as representing the deceased, whose obligations they in consequence are bound to discharge, and, as stated in the twenty-fifth article, they are as the heir liable for their proportion of real charges due on the whole estate, and also for their proportion of the excess of personal liabilities, should the personal property of the testator be found insufficient to discharge them. On the other hand, the legatee of any definite portion, or, as the French have it, *à titre universel*, can only be called upon for a similar portion of the debts, such as, if he receive a legacy of one half or more of the assets, so in proportion will he be liable for the debts, as the legatee of a certain object is only liable for the debts due upon, or in consequence of such object. Yet it may nevertheless happen that the special legatee may be by far the most, and the residuary legatee the least, benefited by the

* *Le légataire à* TITRE UNIVERSEL *n'est point saisi de plein droit de l'hérédité, mais est tenu de demander la délivrance aux héritiers ou légataires investis de la saisine.*

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

testator, as would be the case where a person possessing the bulk of his fortune in a certain stock, would leave the whole of such stock to one individual, and the remainder of his effects, which might be of comparatively trifling value, to two or more individuals; these would, in the first instance, have personally to bear the whole burthen of the deceased's debts on their proportion of his assets, before the special legatee could be called upon for any portion, so that their qualification of universal or residuary legatees, which, in most instances, might be deemed most advantageous, would in this peculiar instance have quite an opposite tendency. These consequences flowing naturally from the nature of testamentary bequests, are applicable not only to the modern law of Guernsey, but to the general law of Nations, which also ordains that the legatee of a certain proportion, as the special legatee shall require of the heir or of the residuary legatee when any has been appointed, to be put in possession of his proportion of the testator's effects, or of the object specially bequeathed. In one word, the residuary legatee, as representing the deceased, is alone entitled to the possession of all his effects, and it may be said of him as of the heir, that the legacy must come through his hands into those of the legatee which, on that account, was defined by the Roman law a gift to be paid by the heir, *donatio a defuncto relicta et ab hærede præstanda.**

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

Article XXIII.

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

* Sec. 1, *Inst. de legatis.*

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

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

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

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

Article XXIV.

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

This is conformable to the common law, but the testator may impose on the heir or residuary legatee the obligation to pay off the liabilities due on the property bequeathed, and if the rentholders or mortgagees would not allow it to be rendered free, the heir or residuary legatee would nevertheless be held to give the special legatee an equivalent in some other shape, in order that the testator's will should be accomplished. After stating that the will comes into operation at the moment of the testator's death and that the rights of the legatees are thereby irrevocably fixed, the same thing, Mons. Touiller observes, cannot be said of the possession of the objects bestowed as legacies, which, in the absence of a residuary legatee, must be claimed from the heirs. " Si la propriété est transférée de plein droit aux légataires, il n'en est pas ainsi du droit de possession qu'ils sont ordinairement tenus de demander

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

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

à l'héritier suivant la nature des legs que les lois définissent une donation qui doit être délivrée par l'héritier, *donatio a defuncto relicta et ab hærede præstanda.*"

"Le légataire ne peut donc se mettre en possession de son autorité privée; il n'a point la saisine de son legs, hors un seul cas, celui d'un légataire universel, ou héritier testamentaire institué dans un testament public par un testateur qui n'a pas d'héritiers auxquels une quotité de ses biens soit réservée par la loi. Dans ce cas unique, le légataire universel, ou héritier institué, est saisi de plein droit par la mort du testateur, en vertu de la régle le mort saisit le vif, sans être tenu de demander ni délivrance aux héritiers du sang, ni envoi en possession à la justice."*

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

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

ARTICLE XXV.

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

* Du Droit Civil, tome 5, sect. 6, *Sur l'effet des legs*, page 521, No. 520.
† Ibid. page 551, No. 560.

for their proportion of the excess of personal debts, after all the personal property has been applied to the discharge of the same.*

This is one of the most important articles of the modern law, as it regulates the respective rights and obligations of legatees and heirs, in reference to the property of which heirs and legatees may become possessed. As a general rule the legatee, as the heir, is responsible for the debts of the deceased, in proportion to the sums he receives from the testator's fortune, and when they have accepted a bequest or taken possession of the deceased's effects without taking the precaution of making a judicial inventory,† they are liable to make up to the creditors of the deceased from their own property, any deficiency that may arise from his own assets. In this respect, heirs, executors, and creditors becoming proprietors of their insolvent debtor's estates, are placed upon the same footing by the law of Guernsey; all, as a general rule, are liable for the debts of the deceased or of the bankrupt whom they in fact represent, even beyond the value of the assets they receive from his property, of which they become the owners; and that such is the fact may indeed be clearly inferred from the terms in which the last clause of the twenty-fifth article is drawn up, it being therein stated that universal legatees shall be liable for their proportion of the excess of personal debts after all the personal property arising from the estate has been applied to its discharge. By the common law of nations special legatees are not thus bound to make up from their own property to the deceased's creditors the deficiency that may arise from his not leaving a sufficient amount to liquidate their claims, because in point of fact such legatee can never be said,—as the universal legatee, the executor, and the legatee of a given portion,—to represent the deceased, nor

* *Le légataire universel et le légataire à titre universel, sera chacun pour sa portion respective tenu des charges imposées sur le fonds legué même pour le surplus des dettes mobilières quand elles excèdent l'actif de la succession.*

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

† Here known by the technical denomination of "Bénéfice d'Inventaire."

would such legatee be bound to do so here, in consequence of the special discharge set forth in his favour; all that he is subject to is the loss of the whole or part of his legacy, as may be seen from the following text of the twenty-fourth article, wherein it is stated that the special legatee shall only be liable to pay the real charges due on the object bequeathed, and that should there not be sufficient assets in the testator's estate to pay his creditors, he then loses his legacy, or in other terms, "the special legatee shall not be liable to anything beyond the real charges to which the property bequeathed to him was specially held, unless the other properties of the estate should be insufficient to pay the testator's debts."

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

From the foregoing observations it is easy to perceive that the universal or residuary legatee, the executor of a will as the heir and the legatee for a given portion of the estate, are one and all bound *in solidum*, towards the creditors of the deceased whose estates they accept, and that there is none but the special legatee, who, by abandoning his legacy after even his acceptation of it, is exempt from such liability, a very great privilege peculiar to himself. By the Roman law and by the common law of ancient France, as well as by the modern law of that country, the heir who accepts the deceased's estate though bound towards the creditors beyond the value of the property he receives, yet is not bound

beyond his proportion with other heirs. Thus a father dies leaving two children an estate worth £2,000, and £4,000 in debt; the sons are only personally liable for £2,000 each, or in this instance one half beyond what they receive; but, by our law, conformable in this respect to the Norman law, the case is different, the heir who accepts becomes *ipso jure* liable *in solidum* towards all the deceased's creditors. Though such a liability might appear favourable to the creditors, yet in point of fact its tendency is the very reverse, as honorable heirs often abandon successions which they would otherwise accept though at a trifling loss, and make the most of their deceased author's property, being deterred from the extent of the liability which an acceptation of the succession involves, and are thus constrained to abandon it. So that as Pothier very justly observes, by means of this joint liability the heir who only represents the deceased to obtain a portion of his property, is nevertheless bound to pay all his debts, a principle which implies as great a contradiction as an injustice in reference to those which should obtain in the law of inheritance. "La division des dettes entre les héritiers," says Pothier, "était de droit commun en France, il n'y avait exception que dans deux ou trois coutumes (of which Normandy was one) qui étaient assez déraisonnables pour obliger tous les héritiers au paiement des dettes d'un défunt comme si plusieurs pouvaient succéder *in solidum* aux droits d'une personne. Hors ces coutumes chaque héritier est tenu des dettes pour la part dont il est l'héritier."*

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

* Des Successions, chap. 5, art. 3, sect. 2, p. 231.

dettes au-delà de la valeur du quart des biens auquel il succède, de la même manière que l'héritier unique est tenu du total des dettes au-delà de la valeur du total des biens.

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

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

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

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

* Des Successions, chap. 5, art. 3, sect. 1, p. 230.

† All the heirs being now held *pro portionibus hæreditariis*, that is, for the portion which they respectively inherit, the framers of the code civil have construed this rule in the following terms of its 870th article, " Les co-héritiers contribueront entre eux au paiement des dettes et charges de la succession, chacun dans la proportion de ce qu'il y prend."

The 873rd article is, if possible, still more explicit, as it specifically determines that the creditor of the deceased shall only come upon each of the heirs for the portion he inherits ; thus, if one heir inherit half, that heir is only responsible for his half, though the deceased had contracted the debt and his estate was liable for the whole, the creditor must seek the balance of his claim from the other heirs who have inherited it.—873. " Les héritiers sont tenus des

of long usage, and the force of habits formed under vicious institutions, that the judges of the Royal Court of Rouen proposed to the framers of the code to adopt the principle consecrated by the ancient law of Normandy, and render all the heirs liable *in solidum* towards the creditors, but their motion was overuled. The principle of the Roman law in consequence continues to be that of France, the creditors can only come upon each of the heirs for his portion of the property to which he was entitled by law in the deceased's succession. The residuary legatees, as the legatees to whom a given portion of the deceased's estate has been bequeathed, such as one third, one half, or any other definite portion, are held in the same manner as they represent the deceased, and it may be said of them as of the heir that by meddling with the deseased's property they have tacitly obliged themselves towards all who have any claims upon it: *Is qui miscuit se (hæreditate) contrahere videtur.*† From this text it is easy to see that legatees, as well as creditors, may have claims on the testator's heirs and residuary legatees, and it is no less evident from the tenor of the French law, as laid down in the 873, 1009, and 1112 articles of the code civil, which oblige the heirs as the legatees who represent them, to pay all the debts and claims due by the succession, that the heir, as the legatee, is bound to pay indistinctly both all the creditors and legatees, even where the deceased has not left sufficient property to meet their claims, on the heir or residuary legatee's once accepting the administration of the deceased's estate. They then in fact represent him, and if his prōperty does not yield sufficient assets to liquidate the claims due by the estate, they then become personally liable to make good such claims. The liability of the residuary legatee, that of the legatee of a given portion, as that of the heir, would *a fortiori* follow according to the principles which obtain in the law of Guernsey, and there can be no question that all these parties, as an executor who would administer without taking

dettes et charges de la succession, personnellement pour leur part et portion virile, et hypothécairement pour le tout; sauf leur recours soit contre leurs co-héritiers, soit contre les légataires universels, à raison de la part pour laquelle ils doivent y contribuer."

* L. 4 ff. Quib. ex cau. in poss.

the precaution of accepting the administration under the benefit of an inventory, would render himself personally liable on his own property to make good the claims, debts, and legacies left by the deceased.

This implied obligation on the part of these heirs, whether of the law or of the will, is denominated their liability to pay *ultra vires hæreditatis* beyond the assets left by the deceased, which can only be accomplished by his making up the deficit at his expense. *Hæreditas quin obliget nos ære alieno, etiamsi non sit solvendo plus quam manifestum est,** which is stating in other terms that the heir representing the person and estate of the deceased, on taking to his assets becomes personally responsible to make good all his liabilities. Nor is there any distinction to be made in reference to this liability between the heir of the will and the heir of the body; both when they represent the deceased are equally responsible to pay his creditors; by the common law of Rome and France it extends to whatever portion they take in his estate, even beyond the value they receive, and by the ancient law of Normandy, which still obtains in Guernsey, they become liable not only for such portions, but *in solidum* towards the creditors for any deficit which may ensue, on the value of their own private property. As a matter of course the heirs are reciprocally bound towards each other to make up the deficit which one may have thus entirely paid, but the creditors are in no manner affected by the loss which may be sustained in consequence of the inability or unwillingness of any of these heirs to make good his proportion. It is immaterial whether the debts were known to these heirs at the time of their acceptance of the deceased's estate, it was their place to enquire into its condition before they took it, but having once accepted it they become personally responsible to the creditors by virtue of that fundamental principle which has ever obtained on this subject, and which rules that he who takes to an estate is bound towards its creditors: *Is qui se miscuit hæreditate, contrahere videtur,* and not only *pro modo emolumenti* to the value of the property inherited, but *ultra vires hæreditatis* beyond such value. We have seen according to the Roman law, the common law of ancient

* L. 8 ff. *De acquirendo vel ammittendo hæreditatem.*

France, and the law as constituted to this day that though the heir who accepted an estate was personally bound even *ultra vires* to pay the creditors, this liability was limited to the portion he was entitled to take on such estate, that is *pro portionibus hæreditariis*, which the jurisconsult Paulus interpreted to mean an equal portion for each heir according to their number, *id est pro numero vivorum viriles portiones æquales interpretatur Paulus;* but this interpretation is not always founded when some heirs take a smaller portion than others, as is the case when many represent a single person, which frequently occurs, more particularly in the case of nephews and nieces who come by representation with uncles and aunts to a deceased uncle or aunt's estate, in which case these nephews, coming by representation, would all be only liable for their author's proportion, and each nephew for that particular portion only which has ultimately devolved to his share, which might not exceed one twentieth portion of his deceased uncle's inheritance, and that twentieth constituting his portion of the estate would in consequence fix the quantum of his proportion of liabilities towards its creditors.

These principles, however reasonable and just, being entirely opposed to those which constitute the law of this island, whereby the heir of the smallest portion of the deceased's estate becomes personally liable for all its debts, it will be necessary here to transcribe the opinions of the most illustrious civilians of the eighteenth and nineteenth centuries, to show not only what was the law which governed, but what should be the law that ought to govern upon this point. Pothier, after stating that by the common law of France,—as adopted in those provinces which were ruled by their own particular customs and usages,—every heir was only liable to the creditors of the estate for that portion which he inherited, thus refers to this subdivision of liabilities among co-heirs; "Lorsque plusieurs enfans," says Pothier, "succèdent par représentation de leur père ou mère, ils ne sont héritiers chacun que pour la portion qu'ils ont dans la PORTION de la personne qu'ils représentent, c'est pourquoi ils ne sont chacun tenus des dettes que pour leur portion dans cette portion. *Finge:* une personne laisse pour héritiers deux frères et quatre neveux par représentation d'un troisième frère; chacun de ces neveux ne sera

tenu des dettes, que pour son quart dans le tiers, c'est-à-dire, pour un douzième."*

And again in his famous treatise on CONTRACTS and OBLIGATIONS, where he specially defines the rights and liabilities of heirs, he decides that the heir is not responsible beyond the proportion he receives from it, in the event of the insolvency of any of his co-heirs. "Un héritier est celui qui succède aux droits actifs et passifs, c'est-à-dire, aux dettes et obligations du défunt. Celui qui n'est héritier que pour une partie, n'y succède que pour cette partie. Il n'est donc tenu que pour cette partie. L'insolvabilité de ses co-héritiers, qui survient, ne le rend pas successeur, pour le total, aux droits du défunt. Il ne l'est toujours que pour sa part, et par conséquent il ne peut être tenu des dettes que pour sa part."†

But perhaps the principles which obtained on this subject under the Roman law, the ancient and modern law of France, and the justice of such laws, were never rendered more palpable than in Mr. Toullier's own words, where we will find another instance of that erudition, order, and perspicuity so much admired throughout the works which bear his name,—a quotation which doubtless will be the more readily excused as the rights which the creditors of the deceased may exercise not only in reference to his heirs, but in reference to his legatees, whose rights and obligations are in law so frequently assimilated to those of the heir, are therein clearly set forth: "La personne des héritiers," says he, "et de ceux qui en tiennent lieu, étant obligé aux dettes et aux charges de la succession, il s'ensuit qu'ils y sont tenus indéfiniment, quand même les biens de l'héritier ne suffiraient pas pour les payer; ils en sont tenus comme le défunt lui-même. S'ils peuvent exercer toutes ses actions, on peut intenter contre eux toutes les actions qui pourraient être intentées contre lui: c'est tout ce que signifie la maxime triviale, que *l'héritier représente la personne du défunt.*

"Tels sont l'origine et le fondement de l'action personnelle que les créanciers peuvent exercer contre l'héritier ou contre celui qui tient lieu d'héritier.

* Traité des Successions, chap. 5, art. 3, sect. 2.

† Tome I, part 2, art. 2, sect. 3.

" Mais s'il y a plusieurs héritiers, on a trouvé qu'il serait injuste que les créanciers pussent diriger solidairement leur action contre l'un d'entre eux. L'obligation de payer les dettes de la succession se divise de plein droit entre tous les héritiers, ou ceux qui en tiennent lieu ; en sorte que chacun d'eux n'est tenu personnellement que pour sa part et portion virile, c'est-à-dire, pour sa part héréditaire. Les créanciers doivent donc diviser leur action contre chacun des héritiers, sans pouvoir poursuivre les uns pour les portions des autres, ni demander le tout à un seul. Ainsi, s'il y a trois héritiers, chacun d'eux n'est tenu personnellement que pour un tiers, et chacun des créanciers ne peut diriger contre lui d'action personnelle que pour un tiers de sa créance.

" Si la succession se divise par souches, la subdivision des dettes se fait également de plein droit entre les représentans de chaque souche. Si le défunt laisse pour héritiers deux enfans et quatre petits-enfans, chacun des deux enfans n'est tenu personnellement aux dettes que pour un tiers, et chacun des petits-enfans que pour un douzième seulement.

" Cette division des dettes qui se fait de plein droit, par portions viriles, entre tous les héritiers, remonte à une antiquité fort reculée, puisqu'on la trouve dans la loi des douze tables, dont le texte restitué par Jacques Godefroy, porte: *Nomina inter hæredes pro portionibus hæreditariis ercta cita sunto.*

" Elle continua d'être suivie à Rome et en France dans les pays de droit écrit; elle fut même reçue dans plusieurs coutumes, et notamment dans celle de Paris. Art. 332. Enfin, elle a été adoptée et rendue générale par le Code Napoléon, qui porte, art. 873—Les héritiers sont tenus des dettes de la succession personnellement pour leur part et portion virile. La même disposition est répétée dans les articles 1009 et 1012, à l'égard des légataires universels et à titre universel, qui tiennent lieu d'héritiers."*

Having thus seen what in reference to the rights and liabilities of heirs constituted the common law of France, and how the particular custom of Normandy differed from the general law, by extending the liabilities of the heir to an unjustifiable length, we shall now see that legatees, as heirs, are placed

* Tome 4. *Des Successions*, Nos. 493, 494, and 495.

exactly on the same footing; that is, with the exception of the special legatee, the heirs and all other legatees by merely accepting the succession or will of the deceased, become one and all jointly and severally personally responsible to discharge all the testator's debts.

The danger in which the fortunes of heirs and legatees were thus placed naturally required some equitable temperament, by which the law generally provides against undue severity; hence the institution of the benefit of inventory, by means of which the heir is not bound to pay the creditors of the deceased a greater sum than he received from his succession, a principle borrowed from the Roman law, and which, being deemed advantageous in those jurisdictions where the heir and legatee were personally bound to the extent of their *quota* for the debts of the deceased, became quite indispensable in other jurisdictions, as in our own and in Normandy, where he is not only personally bound *ultra vires* for his portion of the debts, but *in solidum* for the whole of the debts, engagements, and liabilities contracted by his ancestor.

On examining the principles which obtain on the subject of the benefit of inventory by our laws, conformable in this respect to the Norman laws, whereby the succession of the deceased is bestowed on the nearest heir who will take to the estate absolutely, and at once pay the debts, in preference of the nearest of kin, we find another example of undue severity, repugnant to the principles of affection on which the laws of inheritance profess to be founded; for why should the boldest or the more distant heir be allowed to exclude the nearest?* In practice, however, the injustice of the principle is not attended with much evil, the liabilities contracted by the absolute acceptance of inheritance being too varied and extensive to warrant any one's taking to them without the precaution of an inventory, so that the rights of all are in this manner preserved, particularly those of the nearest of kin, as they almost invariably obtain possession of the estate, who, after taking an inventory, collect the assets and dispose of the whole among the creditors according to their respective

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

preferences or priority of claims. The creditors have no right of action personally against the heir, nor has the latter any claim on the estate until the whole of the debts are liquidated.

The residuary legatee, and the legatee for a given portion of the deceased's property, are now entitled as the heir to the benefit of an inventory; their liabilities being the same, it is but fair they should possess the same means of guarding against them, and after ascertaining the state of the succession they may abandon it, *n'est héritier ni légataire qui ne veut*, in which case they will only be held responsible for the amounts derived from it, or, as it is generally termed, *pro modo emolumenti.*

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

ARTICLE XXVI.

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

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

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

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

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

securing the rights and obligations which will arise between the heir, legatees, and rentholders in consequence of the power recognized by the modern law of bequeathing real property.

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

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

It may be right to state that these stains in the law respecting the undue liability of heirs and legatees do not proceed

* Vide Appendix, letter C, p. 39.

from the Court's committee, but from ancient usage; and though greater simplicity is desirable in the forms of drawing up wills of real property by dispensing testators who are willing to make *olographic* wills from appearing before a public officer to attest their wills, yet considerable credit is due to that committee for its judicious regulations on the manner in which it has secured the *execution* of such wills.

CHAPTER VI.

ON REDEMPTION OR PRE-EMPTION OF REAL PROPERTY, COMMONLY CALLED RETRAIT OR RETRAITE.

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

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

ARTICLE XXVII.

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

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

The relative who wishes to redeem must not be beyond the seventh degree to the vendor, and must belong to that branch or stock whence the property descends if inherited, and if acquired property then the nearest in degree excludes the more distant, without any reference to the line, whether paternal or maternal. In equality of degree each relative takes *pro rata* as he succeeds, without distinction of sex, that is, the male relatives may have a double portion where their number is equal or inferior to that of the females who demand the redemption. Formerly females were excluded by males

* *Le Retrait Lignager est aboli dans toutes ventes devant justice.*

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

in parity of degree, because as they could not then inherit, neither could they redeem.

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

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

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

In fact the whole working of *retraite*, commencing from its childish and insignificant formalities down to its wretched termination, constitutes one of the most scandalous systems imaginable, and should be absolutely abandoned: or if retained, retraites should be restricted to heirs in the first degree, and even then only for real property inherited.

* Mr. Toullier, tome 4, chap. 6, sect. 2, Nos. 417 and 418, p. 415.

CHAPTER VII.

ON HYPOTHECATION AND DOWER.

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

ARTICLE XXVIII.

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

By the custom of Normandy, on a parent's consenting to the marriage of his son, a daughter-in-law acquired a right of dower over one third of the whole real property which would have fallen to her husband as his heir, so that by having consented to his marriage, the parent was frequently debarred from selling his own real property, as no purchasers

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

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

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

The Court's committee approved of this proposition, and stated that they saw no reason why the daughter-in-law should retain a lien over the property belonging to her husband's parents, when her husband himself possessed no such lien, and that it was going too far to presume that parents had tacitly consented to such an extraordinary imposition on their real estates to their daughter-in-law, by merely acquiescing in the marriage of their son.†

The 359th article of the custom of Normandy thus disappeared from our system of inheritance. It indeed constituted such a singular anomaly, and its text was so complicated and

* Vide Appendix, letter A, p. 12.

† Ibid, letter C, p. 41, and B, pp. 15—25.

obscure, that many well informed persons to the very day of its abrogation doubted of its existence; it was as follows: "Si le père ou aïeul du mari ont consenti le mariage, ou s'ils y ont été présens, la femme aura douaire sur leur succession bien qu'elle échée depuis le décès de son mari, pour telle part et portion qui lui en eût pu appartenir si elle fût avenue de son vivant; et ne pourra avoir douaire sur les biens que le père, la mère, ou aïeul auraient acquis, ou qui leur seraient échus depuis le décès du mari."

It is therefore very certain that the daughter-in-law had a lien on the real estates not only of the parents, but of the grandparents of her husband, who had consented to her marriage, and some had even carried their pretensions so far as to claim this dower without being subjected to the debts of such parents and grandparents that had even been contracted before her marriage, notwithstanding that well recognized maxim that in law no one can be said to possess property until all his debts are paid, *bona non sunt nisi deducto ære alieno.** So that a parent, after a son had married with his approval, was placed in a complete state of guardianship, not only could he neither sell nor hypothecate his property, but his own *bonâ fide* creditors were likely to fall the victims of marriages which they could not foresee, and with the consequences of which they were as much acquainted as with the laws of the Medes and Persians. To so many difficulties did the law of Normandy on this subject give rise in ascertaining —first, what should be considered a parent's consent,—second, at what period the right of the daughter-in-law should be considered to have been acquired—on what property it should be exercised—was the date to reckon from the death of the husband? or that of the parent whose property was thus subjected to hypothecation—it being stated that property acquired by the parent after the dissolution of the marriage was not liable;—all these questions presented so many difficulties, that Basnage denounced this 359th article as the "*plus mal conçu et le plus obscur de toute la coutume; l'explication en est si difficile que toutes les Chambres du Parlement*

* The Parlement of Rouen, however, decreed that as the debts of the parent had in this case been contracted before the marriage of the grand daughter-in-law, the creditors should be preferred to herself on the property left by her husband's grandparents. Decree dated the 10th December, 1637.

assemblées n'ont pu convenir de son véritable sens relativement aux effets que le consentement du père peut produire à l'égard de la femme du fils et de savoir QUAND, COMMENT, *et sous* QUELLES CONDITIONS *elle peut demander douaire sur les* BIENS DU PÈRE DE SON MARI."* It was, however, recognized as a general rule that the daughter-in-law was entitled to her dower not only on her *husband's* succession, but also on the succession of his parents and grandparents for the enjoyment of one third of the whole real property which would have devolved to the lot of her husband had he survived them.

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

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

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

3.—That all daughters-in-law married at the above date and who held their right of dower by virtue of the old law, as contradistinguished from a marriage contract, are not entitled to dower on the estate of fathers-in-law who have survived that period: and that because holding their rights from the *law* it was in the power of the present legislature to abolish the decrees of its predecessors in reference to all rights that were not absolutely and irrevocably acquired at the date of its promulgation, as was the daughter-in-law's dower in the above instance, and that according to the famous axiom that nothing is more natural than that the authority which grants certain privileges, or imposes certain burthens, should have the power of abrogating them, *nihil tam naturale est quam eo genere quidquid dissolvere quo colligatum est.*† Other-

* Basnage's Commentary on the 359th article.

† L. 27, ff. *De regulis juris.*

wise the present generation could irrevocably bind posterity, and thus place absolutely beyond its controul the power of governing itself according to such regulations as might in future ages be deemed more conformable to its wants and desires than those which at present obtain.

Nor are laws the only regulations which are thus controled. Agreements, whether verbal or written, are changed, modified, or destroyed, by a similar process, that is, they vanish or are superseded by other laws, agreements, or contracts which governments or private individuals may think proper to enter into or promulgate. And, however much these changes may affect some individuals, none can complain that the law takes a retrospective effect whilst rights *absolutely and irrevocably acquired* are not affected by it, in contradistinction to those which are still pending; that is to say, which are *not yet*, but may *eventually* be acquired, and which therefore may be affected by a change in the law. And this is conformable to the rule *Nihil tam naturale est, quám eo genere quidve dissolvere quo colligatum est. Ideo verborum obligatio verbis tollitur. Nudi consensûs obligatio contrario consensu dissolvitur. Omnia, quæ jure contrahuntur contrario juré pereunt.** The law by which *perpetual* entails were limited within certain degrees by the Chancellor De L'Hopital, and that by which parents were allowed to sell *all* their property, notwithstanding that by the law of Normandy, repealed at the revolution, they could never dispose of more than two thirds, the remaining third being vested in the children at the date of the marriage of such parents,† are memorable instances in which the above rules have been judiciously applied by the supreme Courts of judicature without in the slightest degree infringing on the sacred adage, that laws can have no retrospective effect.

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

* L. 27, ff. *De diver. reg. jur. antiq.*

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

CHAPTER VIII.

PARENTS CAN NO LONGER MAKE ANY BEQUESTS AMONG THEIR CHILDREN TO ALTER THEIR PORTIONS OF INHERITANCE.

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

views as honorable as they were just, and, however illegal their decisions, because opposed to the positive decrees of the law, which they are ever bound to obey, notwithstanding previous erroneous decisions to the contrary, they still commanded respect and a ready compliance, because conformable to the spirit of the times, which revolts at the idea of the parents being, with regard to the distribution of property among their offspring, chained up like as many wild animals, to whom the slightest latitude cannot be granted, through a misconceived fear of some turning it to a bad purpose. But what singular instances of human frailty do not even courts of justice sometimes exhibit; its members, with the honorable intention of avoiding the consequences of an unjust law, established an unsound jurisprudence, and yet when an opportunity presents itself of giving full scope to these honorable intentions, by the introduction of a wise and just law, we find them formally consecrating a system wherein justice is more frequently honored in the breach than in the observance, and which their own decisions had turned into disrepute. The course followed by the legislature and recommended by the Court's committee on this occasion, presents as singular an anomaly as is any where recorded in the annals of legislation: for though we frequently see jurymen avoid the severity of penal enactments, by acquitting the guilty rather than subject them to unreasonable punishment, and sometimes find even judges modifying, not to say evading, the unnecessary restrictions imposed by the civil law, and still more frequently a great portion of the community not only openly transgressing but priding themselves on the transgression of such regulations as violently thwart their feelings and desires, yet all these indications of a wrong and unjustifiable system are commonly considered as the forerunners of a change in conformity with, and not in opposition to, their desires, as was the case when the first clause of the twenty-ninth article abrogated the wise and just, however unsound, jurisprudence which the Court had, by a series of uniform decisions, managed to consecrate.

We are aware that many persons entertain a less unfavourable opinion of the arbitrary restrictions established by the Norman law, than of the extreme latitude granted by the

law of England to parents over their property, but is there no just medium to be found between these extremes, and is it because a parent should not be allowed to give away the whole of his property to one child, that he should not be permitted to bestow on a single one of them the smallest trifle without being accountable to the others? But it may be said, difficulties present themselves on every side: under such circumstances how are we to proceed to find the safest rules for determining our judgment, if it be not to the laws of the most civilized people, which have all to a certain degree, and some even to an unlimited extent, recognized in parents the power of bequeathing their property among their children? But, without referring to Montesquieu and Pascal, who declare property to be a creature of the civil law, or to Basnage and Heinecius, who anticipate greater evils than benefits from the institution of wills, we shall support our views respecting the policy and justice of placing a certain portion of property at the absolute disposal of parents, without any reference as to the parties, whether their children or others, who may be the immediate objects of their bounty, by the authority of one of the greatest civilians of any age or nation, Emerigon, who sets forth the following criterion to go by in judging of the excellence or defects of human laws: "La tranquillité publique," says he, "la paix des familles, la nécessité de prévenir les procès,* portent souvent le législateur à faire des réglemens qui, malgré leur impuissance à prévenir toute injustice particulière, procurent le plus grand bien; ce qui suffit pour qu'on doive s'y soumettre sans répugnance. Le droit naturel n'est pas alors violé; il est simplement modifié, pour ce que l'intérêt de la société civile l'exige."† And quoting from D'Aguessau he observes: "Il en est des lois comme des autres ouvrages humains; on n'en voit point qui n'ait quelque imperfection, ou qui ne soit susceptible de quelque difficulté. Toute la sagesse du législateur, et toute la perfection de la loi, consistent souvent non pas à faire une

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

† Emerigon, des Assurances.

disposition qui soit exempte de toutes sortes d'inconvéniens, mais à préférer celle qui en a le moins."* *Nulla lex satis commoda omnibus est; id modo quæritur, si majori parti, et in summam prodest.*—So then the wisdom of the law will be best appreciated by its tendency to prevent litigation, as the wisdom of the judge will be by the soundness of his decisions, as the wisdom of statesmen is best evinced by their opening the widest field for the exertion of the human powers, and emanating laws which, in the highest degree, secure the happiness of the greatest number of individuals for the longest space of time.

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

The twenty-ninth article is as follows :—

Article XXIX.

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

* D'Aguessau, Tome 9, page 412. De ses Œuvres.

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

Article 29.—Mère, de même que père, ne pourra par son testament donner de ses meubles à l'un de ses enfans plus qu'à l'autre. Les pères et mères pourront ordonner que la proportion de leurs filles mariées soit placée en fidéi-commis, pour en être les dividendes payés aux dites filles pendant qu'elles seront

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

The children referred to in the twenty-ninth article are legitimate children, that is, all that are born in lawful marriage, or *before* marriage when a lawful marriage has eventually taken place between their parents, and at the time of whose birth there existed no *legal impediment* to such marriage, legitimation by subsequent marriage being admitted in Guernsey and throughout the Channel Islands. Incestuous or adulterous natural children cannot therefore at any time be rendered legitimate. The children are also reputed legitimate in law when born *after* marriage, though such marriage should have been void from any obstacle unknown to either of the contracting parties at the time of its celebration, as if one of the consorts was already married. These marriages are here known as *putative* marriages, that is, contracted *bonâ fide* by either of the parties, to one of whom at least the impeding obstacle must have been unknown; *sufficit enim bona fides alterutrius conjugum.* It is incumbent on him who alledges the bad faith of his opponent to prove it, and if he fail in doing so, the children born during the putative marriage, and during the period that the consort, who is of good faith, conceived there was no obstacle to its continuation, are treated in every respect as legitimate, that is, they inherit in the same manner as if there had never existed any obstacle to the marriage of the parents. The dower and other advantages which may have been stipulated by a marriage contract, or which arise from the law in the absence of such contract, continue in favour of the consort who is of good faith, notwithstanding that the marriage is void.* It does not, however,

couvertes de mari, bien entendu que si elles survivent leurs dits maris, le capital sera transféré aux dites filles, et que si elles prédécèdent leurs maris le capital sera transféré à leurs héritiers, à moins que les filles n'aient, dans les cas permis testamenté du dit capital.

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

appear that a putative marriage would have the effect of rendering legitimate a child born *previous* to its celebration, though one of its parents may have contracted such marriage in good faith, an exception which evidently shows that those born *after* such a marriage would be legitimate; because, as the Chancellor D'Aguessau observes: "*La loi récompense l'innocence telle qu'elle se trouve dans celui qui contracte de bonne foi et par erreur de fait, un mariage défendu; mais que la loi récompense une personne qui a voulu mal faire, parce qu'elle a cru faire un moindre mal, c'est ce qui ne peut pas être écouté.*"* All these questions may be seen treated at length in the written pleadings in the affair of Marie Jeune,† as also the authority due to public registrations in reference to the rights conferred by acts of birth, marriage, and death, as also in what cases and how the validity of such acts may be discussed.

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

* Tome 4 de ses Œuvres, p. 277. † Guernsey Records, anno 1830.

nature of such restrictions one would almost suppose that our forefathers, and some of their descendants, had been legislating for barbarians, and not for a civilized community. As to the idea that some fathers-in-law may be tempted to take advantage of this power to impose unnecessary restrictions on their sons-in-law, it may be fairly ranked among the overcautious preventives of those who would absolutely deprive man of the power of willing, because some of his fellows turn it to a bad purpose. In fact, the great correction of most evils of this description rests in investing the parental authority with an absolute power of distributing a certain portion of his property among children. Nor can any sound reason be alledged why parents should not possess this power of absolute disposal over one third of their property, so as to bequeath it to their children as they may to strangers. In persisting to deprive them of all power in this respect, we again find revived the spirit of those barbarous laws which treated parents as convicts, by debarring them from all participation in their offspring's inheritance.* It is on beholding such legislative enactments, and the source whence they sprang, that we are forcibly reminded of the great truth proclaimed by Fenelon, that authority seldom takes either religion or laws into its keeping but to disfigure them, an idea which has been thus elucidated by the eloquent Channing, and is perhaps the happiest lesson that can be administered to rulers of small communities: "Government," says he, "confers little positive benefit. Its office is, not to confer happiness, but to give men opportunity to work out happiness for themselves. Government resembles the wall which surrounds our lands; a needful protection, but rearing no harvests, ripening no fruits. It is the individual who must chose whether the enclosure shall be a paradise or a waste. How little positive good can government confer! It does not till our fields, build our houses, weave the ties which bind us to our families, give disinterestedness to the heart, or energy to the intellect and will. All our great interests are left to ourselves; and governments, when they have interfered with them, have obstructed, much more than advanced them. For example, they have

* Vide the thirteenth article, and Appendix, letter A, p. 6, and letter C, p. 40.

taken religion into their keeping only to disfigure it. So education, in their hands, has generally become a propagator of servile maxims, and an upholder of antiquated errors. In like manner they have paralysed trade by their nursing care, and multiplied poverty by expedients for its relief. Government has always been a barrier against which intellect has had to struggle; and society has made its chief progress by the minds of private individuals, who have outstripped their rulers, and gradually shamed them into truth and wisdom."*

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

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

What reasons can be assigned to subject parents, who enter into engagements with their children with regard to their property, to be brought to an account by the latter, whose unjustifiable power to annoy renders them, during life, a still greater scourge to their parents than even the thoughts of the unjust lawsuits which will ensue among them at their death? It would indeed be difficult to imagine a curse which in a greater degree disturbs the peace of families, foments litigation, and destroys parental authority, than these unnatural restrictions. Nor does this law in any way secure the

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

main object for which it was created, that is to say, an equal distribution of the parent's property among his children, for whilst some receive a better education, and others enjoy a more advantageous establishment, some there are who have only known their parents but to serve and obey them, and were the source of their prosperity as the companions of their manhood, and their solace at the decline of life. Will it be seriously pretended that justice is done, or that an equal distribution of property takes place among children thus unequally provided for, by the division of the patrimonial estate in equal proportions among them at the parent's death? Will it not, on the contrary, appear that they who have remained under the paternal roof have only been working for the remainder, with whom they only divide the fruits of their own industrious and economical habits, or in other terms, they divide their own earnings with others who, enjoying better prospects, have amassed wealth, which they keep exclusively for themselves?

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

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

† Basnage thus puts the question: Si le père, qui est le maître de son bien, et qui peut en changer la nature, désirant rendre égale la condition de tous ses enfans, et pour éviter une vente ou un changement qu'il pourrait faire de son bien, l'aîné renonce volontairement à son droit d'aînesse, cette renonciation serait-elle valable? Plusieurs Docteurs l'ont estimée valable,.....

Mais quelque liberté apparente que le fils pût avoir, on doit toujours présumer que cette renonciation *n'a point été entièrement volontaire*; car on ne présume jamais que l'on renonce sans quelque contrainte à l'espérance presque certaine d'un bien à venir; *ces renonciations sont un effet de la crainte et du respect paternel*; and the reason of this is because the right of succession is held from the *law*, rather than from *man's will*, therefore cannot be interfered with by the heirs during his parents' life time, even by mutual consent of the parties—*attamen jus succedendi non sit beneficium patris, sed legis, non potest à patre auferri, transferri, diminui, vel disponere in præjudicium primogeniti.* These principles Basnage moreover confirms by adducing two decisions of the *Parlement of Rouen*, by which it was decreed that the father's patrimony being divided among his heirs during his life time, could not debar the children from exercising their respective rights at his death; in one word,

civilized states, which have uniformly not only followed the axiom, *viventis nullus hæres*, that is to say, that in the life time of the author there can be no heir, but some have solemnly decreed "qu'on ne peut *même par contrat de mariage* renoncer à la succession *d'un homme vivant*, ni aliéner les *droits éventuels* que l'on peut avoir à cette succession,"* because in fact no inheritance is open but at the death of the author, and until then none of his heirs can be looked upon as free agents when contracting in the presence of a parent, to whose desires and commands their own will must be morally subservient, and consequently incapable of that degree of freedom which the law requires of all contracting parties to any agreement. As to the irregular jurisprudence, it might be easily reformed by a tribunal whose members would be determined to abide by the law instead of their own notions of equity, and who would act for themselves instead of being absolutely swayed by the erroneous decisions of their predecessors, who apparently did not always consider themselves bound to subscribe their opinions to the law's decrees; in one word, by a tribunal who would follow the conscience of the legislator, not that of their predecessors, *non exemplis sed legibus judicandum*. And as to the impolitic and immoral legislation, the source of all the evil, it can now only be set aside by that power which teaches rulers that there are limits to the endurance of wrong,—public opinion,—through whose instrumentality it has been so happily observed—"*Truth is asserting her sovereignty over nations without the help of rank, office, or sword, and her faithful ministers more and more becoming the lawgivers of the world.*"

The thirtieth and last article of the modern law on inheritance refers to cases where the ancient law on this subject still continues to

that such patrimonial divisions were illegal. Il est si mal aisé, says Basnage, de donner atteinte au droit d'aînesse durant la vie du père, que ni l'avancement de succession, ni le partage que les enfans en auraient fait, ne priveraient pas l'aîné de choisir un nouveau préciput, ou de ne le prendre point, si les choses ne se trouvaient pas au même état au temps de l'échéance de la succession, et que sa condition fût devenue meilleure qu'elle n'était lors de l'avancement de succession.—*Basnage* on the 337th article, and commentary thereon.

* Article 791. Code Civil.

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

ARTICLE XXX.

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

This article is wrongly construed, for the original law states eldest *son*, who may not be the eldest of the *children*, as stated in the above article, as will evidently appear from the thirtieth article, sanctioned by the States, and from the original draft in French, presented to the legislature, and which, as the translation received its formal sanction, as appears from its registration here on the third of August, 1840, wherein it clearly appears that the reserve is only made, or in other

* It should be of the *sons*.

† *Les cohérédités, où le fils aîné au 3 Août, 1840, aura atteint sa quatorzième année, ne sont point regis par la nouvelle loi, c'est-à-dire, que dans ces successions, le vingtième, le double préciput, ainsi que l'ancienne division par tiers en ligne directe des immeubles situés tant en dehors qu'en dedans des nouvelles barrières restent dans toute leur force.*

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

terms, the repealed law only continues to affect families where the eldest son at the above date had attained his fourteenth year. So that the modern law, which provides a more equitable distribution of lineal inheritances than the ancient law did, with regard to real property situated within as without the barriers, which are the subjects to which its first, second, and eighth articles refer, comes into operation in all families where the eldest son *living at the opening of the succession*, shall *not* at the above period, have attained his fourteenth year. Any other construction put upon this clause would verge upon the ridiculous, for by the substitution of the term *child* for *son* it would follow that a daughter aged *above* fourteen years at the date of the law's promulgation, and who, on that account, would be entitled to greater protection of this sort than if she were younger, would be subjected to additional hardship, for a cause for which the legislature has deemed her entitled to additional protection. This error in the construction of the english clause must no doubt be attributed to the translation having been made from the project inserted in the report of the Court's committee, which was in this respect modified by the States, who substituted the term sons for children, *l'aîné des fils* not *des enfans*. Besides, the whole context of the article demonstrates that the intention of the Court's committee itself was to limit the reserve to the sons only of a certain age, otherwise what necessity was there of reserving it exclusively to those who had attained that age and who should also be living at the opening of the succession, unless it was to protect the daughters, who would materially suffer from a different construction, as a younger brother under the age of fourteen would thus enjoy advantages which it was the evident intention of the legislature he should not. The terms "living at the opening of the succession" are also material in another point of view, as will appear from the following case.—Suppose in a family there was at the date of the promulgation of the law, a son aged fourteen, consequently entitled to the benefit of the repealed law if he succeeded, but that he died before the opening of the succession, that is to say, previously to the death of his parent, whose property was about to be divided, his younger brother who had not attained the age of