COMMENTARIES

ON

COLONIAL AND FOREIGN LAWS.
COMMENTARIES
ON
COLONIAL AND FOREIGN LAWS
GENERALLY,
AND
IN THEIR CONFLICT
WITH EACH OTHER,
AND
WITH THE LAW OF ENGLAND.

BY WILLIAM BURGE,
OF THE INNER TEMPLE, ESQ. ONE OF HER MAJESTY’S COUNSEL.

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PART III.

CHAPTER I.

SUCCESSION.

The remaining title by which property is acquired is succession.

In the civil law, and by foreign jurists, the expression _hæreditas_ is used to describe the estate of the deceased which the heir has acquired either from express institution by testament, or from his having been called to the succession by the law in consequence of there being no testament: "Nihil est aliud hæreditas, quam successio in universum jus, quod defunctus habuit." (a) "Hæreditas est successio in universum jus, quod defunctus tempore mortis habuit, quæ licet in se comprehendat, vel saltam comprehendere possit, res omnis generis mobiles, immobiles, incorporales; ipsa tamen in se considerata incorporalis est, atque etiam

(a) Dig. lib. 50, tit. 16, l. 24, and tit. 17, l. 62; lib. 28, tit. 5, l. 9, § 12.

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sine ullo corpore, juris intellectum habet, ac juris magis
quam corporis possessio est, universitatem quandam ac
jus successionis, non res singulares demonstrans." (a)

Sometimes it is used to express the right to the suc-
cession, as well as the subject of that right: "Sumitur
pro ipso jure hæreditario, quo hæreditas alicujus dicitur
propria." (b)

The property of the deceased is transmitted either by
the act of the law, or by his own act; his heirs are in-
stituted or named by the law, or by himself; the heirs
and the succession are ab intestato, or by testament.

When the deceased has made no will, or if his will be
not duly executed, or if it have been revoked, or if the
person instituted by him as his heir renounce the in-
heritance, he is said to have died intestate, and the suc-
cession to his property devolves on those whom the law
has called to it.

The succession in the case of intestacy is described as
the disposition of the law in contradistinction to that of
man, when the succession is derived from a testament.

The former prevails, unless there is a disposition by
testament: "Provisio hominis facit cessare provisionem
legis." (c)

He who would claim under any other disposition than
that made by the law, must prove that there has been a
disposition made by the deceased. The presumption is,
not that the deceased has made a will, but that he has
died intestate, and thus the claimant of his estate has
only to prove his relationship to the deceased: "Respon-
demus præemptionem esse, aliquem intestato decessisse,
et hinc sufficerit probasse, se proximum agnatum esse.
Huic enim lex ipsa defect successionem. Ille vero qui
cesserit, dispositionem hominis adesse, hoc probare de-
debit, quia successio intestata juris est, et sic ab onere

(a) Voet, lib. 28, tit. 1, n. 1.
(c) Cod. lib. 5, tit. 14, l. 11.
probandi liberat; testata vero facti est, et quidem non simplicis, sed admodum solemnis; solemnitas vero accessisse negotio non præsumitur, ut hinc probatione indigeat." (a)

It is intended to treat first of the succession ab intestato, and then of succession by testament.

In the civil law, and in the jurisprudence of Holland, Spain, and France, and in some of the states of America, there is no distinction between immoveable and moveable property, considered as a subject of succession, and with reference to those on whom it devolves. The systems of jurisprudence in which the law of succession to moveable and immoveable property is the same, will therefore be first considered.

In treating of succession by the law of England, and of those colonies which adopt that law, it will be necessary to bestow a separate consideration on the succession to immoveable property, because the law of succession to the one species of property is perfectly different from that by which the other is governed.

As the succession opens by the death of the testator or intestate, that event may not admit of direct proof. And when the right of an individual to the succession depends on his having survived another, it may be also matter of doubt from the circumstances under which both parties died, which of them survived the other. In these cases there are certain presumptions adopted by the law for the purpose of solving these doubts. These presumptions, as they are to be applied to succession ab intestato as well as by testament, will form the first subject of consideration.

The inquiry into succession by testament will be preceded by a view of that restriction on the testamentary

power which obliges a parent to reserve a certain portion of his fortune for his children called *légitime*.

The succession by testament will then be considered. It will be found that in the forms and solemnities of the testament no distinction was made by the civil law, or by the jurisprudence of Holland, Spain, and France, between the testamentary disposition of immovable and that of moveable property, whilst in the law of England, and other systems of jurisprudence, there is in this respect an important distinction. Hence a similar arrangement will be followed in treating of the succession by testament to property immovable as well as moveable, and then of immovable as distinguished from moveable property.

In pursuing this arrangement, the law which governs the succession to immovable and moveable property, the title to *légitime* and its amount, and the forms and solemnities required for the testamentary disposition of moveable and immovable property, will necessarily be considered.

The rights, obligations, and liabilities of those who are called by the law or by the testator to the succession, will form the remaining subjects of inquiry.
SECTION I.

OPENING OF SUCCESSION.

I. By death.—Effect of absence in affording the presumption of death.—Doctrine of the civil law and of the codes founded on it.—The former law of France.—The rules established by the Code Civil.—Doctrine of the law of England.

II. Presumptions respecting survivorship when two persons have perished at the same time, and under circumstances which afford no proof which of them first died.—To what extent the sex, age, bodily strength, &c., may afford these presumptions.—The rule adopted by the civil law, and by other systems of jurisprudence, in the succession ab intestato by descendents.—Ascendents.—Collaterals.—Survivorship of mother and infant of which she was delivered.—Husband and wife.—Survivorship of testator, devisees, or legatees.—In cases of substitutions, fideicommissae, donations.—Decisions of the Parliament of Paris.—Rules adopted by the Code Civil.—The cases decided in England.

I. The succession opens by the death of the ancestor. (a) The absence of the person whose succession is claimed may render it uncertain whether he be in existence or dead. But even if his death be known, another difficulty may arise in the title to succession, where the death of the person who was entitled to succeed takes place at the same time with that of the person to whom he was entitled to succeed, and under such circumstances as to exclude all proof which of the two survived the other. In both these cases, if there be no actual proof of the death, or of the person who died first, the law adopts certain presumptions, by means of which it adjudicates as if the absent person were proved to be dead,

(a) Dig. lib. 10, tit. 2, l. 2; lib. 18, tit. 4, l. 1; lib. 29, tit. 2, l. 13, § 1. Cod. lib. 8, tit. 51, l. 4.
and the one or the other of the two persons is deemed the survivor, and the rights of succession take effect, as if there had been proof that he had survived the other.

There are two subjects of inquiry: 1st, What is the duration of the absence which affords the presumption of death; and, 2ndly, The presumptions made by the law that one of two persons survived the other, where there is no actual proof by which the fact can be determined.

The absence of the person did not in the civil law, or in the codes founded on it, alone afford the presumption of his death. He who claimed an estate on account of a man's death was always held to prove it. An absentee was always reputed living until his death had been proved, or until one hundred years had elapsed since his birth. (a) "Non aliter actionem finiri concedimus, nisi centum annorum curricula excesserint." (b) "An usufructus nomine actio municipibus dari debeat, quae situm est; periculum enim esse videbatur, ne perpetuus fieret: quia neque morte, nec facile capitis diminutione periturus est: quae ratione proprietas inutilis esset futura, semper abscedente usufructu. Sed tamen placuit damnum esse actionem. Unde sequens dubitatio est, quousque tuendi essent in eo usufructu municipes? Et placuit, centum annis tuendos esse municipes; quia is finis vitae longaevi hominis est." (c)

But even under these systems of jurisprudence the absence of the person for a much shorter period afforded such presumption of his death as to enable the heir to obtain the possession of the estate, and to make a division of it, on giving adequate security to restore it, if the party should be still alive. (d)

(a) 2 Ferriere, 359. 2 Pigeau, 2. Denisart, verb. Absence.
(b) Cod. lib. 1, tit. 2, l. 23.
PRESUMPTION FROM ABSENCE.

There does not seem to have been any disposition in either of these systems of jurisprudence prescribing the period which must elapse before this presumption could be made. The length of time, and the other circumstances attending the absence, were left to the discretion of the judge, aided and controlled by previous judicial precedents. In the opinion of Grotius, sixteen years at least should elapse before the presumption could arise. Voet considered that, when the law has prescribed no stated time, the presumption must be founded on the various considerations which may be suggested by the age, station in life, occupation, and particularly the perils to which the person was exposed. Pothier holds that in those countries where no period is fixed, the presumption arises if ten years of absence have elapsed without any intelligence having been received of the absentee. (a)

The time is computed from the period when intelligence of him was last received.

The persons who would succeed on his death are let into possession of his estate provisionally. For this purpose, application is made by them to the judge of the place in which the absent party had his last domicile, who, after establishing by a due inquiry the length of the absence, granted them an order, permitting them to enter into possession of the succession, on giving security to make restitution and account to the absent party if he should return. (b)


(b) Ib.
There are certain circumstances which afford a presumption for fixing the time when the succession opens. Thus, if a soldier goes with his regiment into battle, and after it is terminated does not appear with his regiment, the day of the battle may be presumed to be that of his death, and of the opening of the succession. So if a man embarks in a vessel of which nothing is heard long after the time when she might have completed her voyage, he is presumed to have perished with the vessel, and the time which was fully sufficient for her voyage may be assigned as that of the opening of the succession. (a)

The Code Civil has laid down certain rules to be applied when the death of the ancestor is to be inferred from his absence. (b) It divides that absence into three periods. The first period is that of four years. If a person has ceased to appear at the place of his domicile or residence, and no tidings have been heard of him during four years, the parties interested may make application to the Court of First Instance, in order that his absence may be declared. The absence having been verified by the production of papers and documents, the court directs an inquiry to be made peremptorily in the circle of the domicile, or actual residence, if they are distinct from each other. In adjudicating on this application, regard is had to the motives of absence, and to the causes which may have prevented tidings from being received respecting the individual presumed absent.

The second period is that of ten years. If the absentee have left behind him a power of attorney, his heirs presumptive are not at liberty to prosecute a declaration of

(a) Pothier, Tr. de Success. Sect. 1, § 1, and Introd. au tit. 18, de Droits de Success.
(b) Code Civil, art. 115, et seq. Toullier, liv. 1, tit. 4, c. 1, et seq. Des Absens.
absence, or to obtain provisional possession, until after the lapse of ten years from the disappearance or the last tidings respecting him.

The judgment by which the absence is declared cannot be given until the expiration of a year after the order directing the inquiry.

If the absent person had not left a power of attorney for the administration of his property, or if the power of attorney is extinct, his heirs presumptive at the date of his disappearance, or at the date of the last tidings respecting him, are empowered, by virtue of a definitive judgment declaring his absence, to take upon themselves provisional possession of the property which belonged to the absentee at the time of his departure or of the last tidings respecting him, on condition of giving security for the fidelity of their administration.

When the heirs presumptive have obtained provisional possession, the testament, if any exists, is to be opened on the requisition of the parties interested, or of the commissioner of Government in the court, and the legatees, donees, as well as all those who have any claims upon the property of the absentee contingent upon his death, are empowered to exercise such claims provisionally on giving security. (a)

This provisional possession is regarded as a trust. It confers the administration of the property of the absentee, but renders those who obtain it accountable to him in case of his re-appearance, or the receipt of tidings respecting him.

They who by means of provisional possession, or of legal administration, have thus obtained the property of the absentee, are liable to him only for the fifth part of his revenues, in case he re-appears within fifteen complete years from the day of his disappearance; and for

(a) Art. 123.
the tenth part only, in case he shall not re-appear until after fifteen years.

After thirty years' absence, the whole of his revenues belong to them. No alienation nor pledge of the immoveable property of the absentee can be made.

During the two periods already mentioned, whatever may be the doubt respecting the ancestor being alive, yet there is not sufficient ground for believing him to be dead. The measures which the Code Civil allows to be taken, are such as are essential for the protection both of his interests if he should return, and that of his heirs if he be dead.

The third period is that which affords such a presumption of death that the court authorizes a definitive possession to be taken, and the division of the succession to be made.

When the absence has continued during thirty years from the provisional possession, or where an hundred years have elapsed since the birth of the absentee, the securities are discharged, and all those who have claims may demand a distribution of the property of the absentee, and have the provisional possession pronounced final by the Court of First Instance.

The doctrine of the law of England and Scotland is, that the proof of the death of any person known to be once living, is incumbent on the party who asserts the death, for it is presumed that he still lives until the contrary be proved. (a) By an analogy to the statute of bigamy, and the statute concerning leases for life, where a person has not been heard of for many years,

the presumption of the duration of life is considered in England to cease at the end of seven years. Thus, upon a plea of coverture, where the husband had gone abroad twelve years before, the defendant was called upon to prove that he was alive within the last seven years. (a)

Proof that a person sailed in a ship bound to the West Indies some years ago, which had not since been heard of, is evidence upon which it may be presumed, according to the law of England and Scotland, that the individual is dead, but the time of the death, if it become material, must depend upon the particular circumstances of the case. (b)

II. The case which presents the greatest difficulty is that of the death of two persons, who are either entitled to succeed each other, or one of them derives some right in the property of the other if he survives him, and when from the circumstances attending their death it cannot be proved which of them first died. (c) This difficulty will occur, either when they both perish by the same calamity, as if they should be shipwrecked, being on board the same ship, or if the house in which they both were fell in, or was burnt, and they were destroyed in its ruins; or if they should both perish at the same time being in different places, as if they were shipwrecked at the same time on board different vessels, but it was not proved which of the vessels was first wrecked; or if they were in different parts of the world, and no intelligence could be procured of the time of their respective deaths.

The following rules have been proposed by jurists for the decision of such cases: 1st, To admit a presumption derived from the difference either of sex, or age, or


(b) Ib. Watson v. King, 1 Starkie’s Cas. 121. Pattison v. Black, Park’s Insur. 433. Forrester, Feb. 12th, 1760, Dict. 11,674.

(c) Voet, lib. 34, tit. 5, n. 3. Lauter. ad h. lib. tit. Loen. Decis. 1, cas. 56, p. 381.
bodily strength, or from propinquity to the place in which the cause of the death arose. 2ndly, To admit in all cases the presumption which is founded on the order of nature, namely, that parents die before children, the elder before the younger. 3rdly, To admit the latter presumption only in those cases in which the two deceased were of the same sex, or of the same age, or the children were of the age of puberty. 4thly, It may be proposed not to admit any presumption when the claimant's right to the succession depends on the pre-decease of him in whom the property was vested, and on the survivorship of him on whom it devolved, and through whom it is claimed. In this case, as one party is known to have been at a given time the owner of the property, but as it is not known that any other person had become the owner by its devolution on him, the law can act on a known and certain fact, and refuse to act on that which is unknown, or to recognize a claim which is only supported by conjecture. 5thly, It may be presumed that both the deceased parties died at one and the same time, and therefore if the claim has no foundation, unless the previous owner of the property had first died, and consequently the person through whom the claim is made had, by having survived, become the owner of such property at the time of his death, the law may either reject it, or admit the heirs of both persons to share equally in the property of either. (a)

The civil law had recourse to the presumption that the one rather than the other survived only in cases of

succession between parents and children, and it then adopted that which was most favourable to those who would succeed according to the course of nature. On this ground it presumed the son to have survived the father. "Si Lucius Titius cum filio pubere, quem solum testamento scriptum hæredem hablebat, perierit; intelligitur supervivisse filius patri, et ex testamento hæres fuisse, et filii hæreditas successoribus ejus defertur, nisi contrarium approbetur." (a) "Inter socerum et generum convenit, ut si filia mortua superstitem anniculum filium habuisset, dos ad virum pertineret; quod si vivente matre filius obisset, vir dotis portionem, uxore in matrimonio defunctâ, retineret; si mulier naufragio cum anniculo filio periti, quia verisimile videbatur, ante matrem infante perisse, virum partem dotis retinere placuit." (b)

But if the parent, being either father or mother, or other ascendant of either sex, and the son or daughter of either should perish together by the same cause and in the same place, or within reach of each other, and the son or daughter has only just attained puberty, the father, on account of his greater strength of body and presence of mind, is presumed to have survived the son. (c)

"Quod si impubes cum patrie filius perierit, creditur pater supervivisse." "Si mulier cum filio impubere naufragio periiit, priorem filium necatum esse intelligitur." (d)

In 1629, a mother and her daughter aged four years,

(a) Dig. lib. 34, tit. 5, l. 9, § 4; l. 22, 23; lib. 5, tit. 2, l. 15.
(b) Dig. lib. 23, tit. 4, l. 26; lib. 34, tit. 5, l. 16, 23. Menoch. de Presumpt. lib. 6, pres. 50, n. 21. A. Faber, ad Cod. lib. 4, tit. 14, def. 39.
(d) Dig. lib. 34, tit. 5, l. 9, § 4, l. 23; lib. 23, tit. 4, l. 26; lib. 36, tit. 1, l. 17, 7. Alciatus, 1, presum. 49.
was drowned in the Loire. The Parliament of Paris, on appeal decided that the youngest had died first. (a)

The Parliament of Paris, however, in deciding on cases of this description which arose out of the atrocious massacre on St. Bartholomew’s day, adopted the presumption that the murder of the parents or older persons preceded that of the children or younger persons. The murderers would destroy in the first instance those who could resist them, and they had no cause to apprehend resistance from the latter when they were left alone. (b)

The same presumption was adopted in the case of the wife of Bobé, the daughter of the celebrated Dumoulin, who together with her children, one of twenty-two months and the other eight years old, were murdered in her house by robbers on the 19th of February, 1572. It was presumed that the robbers would for their own interest destroy the mother first, in order that there might be no one remaining to obstruct or resist them in murdering the children. (c)

But generally and in the absence of other circumstances, the parent is presumed to have survived the son who had not attained the age of puberty. (d)

If however they die in different places, and when they are not within reach of each other, resort is had to the presumption founded on the order of nature, and the son is presumed to have survived his father. (e)

Again, the son having exceeded the age of puberty, he is either on account of the vigour of his mind and body, or because it is consonant to the course of nature, presumed to have survived the parent. (f)

(b) Stryk. Diss. 10, c. 6, n. 11.  
(c) Potier, Tr. de Success. c. 3, § 1.  
(d) Potier, Introd. au tit. 17, du Droit de Success. § 38. Dig. lib. 34, tit. 5, l. 9, § 1, 22, 23.  
(e) Stryk. Diss. 10, c. 2 and 7.  
In 1658, a father and son perished in the famous battle of Dunes; and at noon the same day, the daughter became a nun, whereby she was dead in law. The battle commenced at that very hour. It was inquired which of these three survived, and it was decided that the nun died first. Her vows being voluntary, were consummated in a moment, whereas the death of the father and son being violent, there was a possibility of their living after receiving their wounds. It was then necessary to decide between them, and after some dispute, it was agreed to follow the Roman law, and to declare, that the son being arrived at the age of puberty survived the father. (a)

In 1751, a merchant aged fifty-eight, and his wife aged fifty, and his daughter aged twenty-seven years, were drowned with many others, in endeavouring to cross the Seine in a small vessel. The question of survivorship was raised by the relatives, and an opinion was given on the case by the celebrated Lorry that the daughter died first. But the Parliament of Paris, by a decree of the 7th of September, 1752, admitted the presumption of survivorship in her, and ordered a disposition of the property accordingly. (b)

The situation of one of the parties at the time of their death may of itself afford grounds of a presumption that the one survived the other. Thus, where the death is in the field of battle, and one be in the front and the other in the rear rank, the latter is presumed to be the survivor. If it be a death by fire in a room, and one was in the room where it broke out, and the other was in a more distant apartment, the presumption arises that the latter survived. (c)

If there be proof even by one witness of having last seen one of them in a shipwreck or fire, the person thus

(c) Pothier, Tr. de Success. c. 3, § 2.
seen is presumed to be the survivor. The fact of his existence at the latest period which would precede his death is known, and ought to prevail over the mere possibility that the other was then alive. If he were so, it is a fact of which there is no certain knowledge. (a)

It may happen that the father and two sons, one who had not attained, and the other who had exceeded puberty, were blown up together in the same building. In such a case the son who had not attained puberty, is presumed to have died first, then the father, and lastly the other son. Thus, where one of the sons was ten years old by a second wife, and the other sixteen years of age, the son of a first wife, and both had thus perished together with the father, who left a widow surviving, it was held that as the widow could not succeed to the son by the first marriage, the whole inheritance would devolve on his heirs. (b)

If a parent, son, and grandson should all perish together, the grandson having exceeded the age of puberty, and the father and son leave widows, the father is presumed to have died first, then the son, and then the grandson. (c)

It has been maintained that the presumption that the younger of the persons having exceeded the age of puberty has survived the elder ought not to be admitted in the case of a daughter, notwithstanding the latter has attained the age of puberty. But on the other hand it is insisted that it would be inconsistent with one of the rules of succession adopted by the civil law, to admit in this case a distinction founded on the difference of sex to the prejudice of the female, when her age is equal to that which raises the presumption in favour of the male. (d)

(a) Voet, lib. 34, tit. 5, n. 3. Carps. p. 3, const. 17, def. 15.
(b) Stryk. ib. n. 11.
(c) Stryk. Diss. 10, c. 2, n. 20.
SURVIVORSHIP—PRETZPTION OF.

If the son or daughter have exceeded the age of puberty, and perish with the mother, the latter is presumed to have died first. Thus in a case which is stated of a mother and son being hung on the same gallows for theft, the son is presumed to have survived the mother. (a)

Some codes do not admit these presumptions when the question arises which of two collaterals first died, but consider that both died at one and the same time, and that neither survived the other.

If a brother and sister both perish together, the weaker must be deemed to have died first. (b)

It is considered by some jurists that the female is on account of her sex the weaker, and therefore the presumption must always be in favour of the survivorship of the brother. (c) But it has been answered that this presumption could never be universally admitted. It could only be adopted when the death was occasioned by those means which would induce resistance by bodily strength, for if it were caused by suffocation, the female is supposed, from the structure of her chest, to be enabled to retain life longer than the male. The greater weakness of the sister is not to be inferred on account of her sex, but must be established from other causes; and unless they exist and are proved, there is no ground for presuming her death to have preceded that of the brother. (d)

If two brothers or sisters, or a brother and the son of a deceased brother perish together, the presumption arising from the puberty or seniority of the one is not

(a) Stranch. Diss. 11, Th. 24. Stryk. ib. n. 19.
(c) Pothier, Introd. su tit. 17, c. 9, § 20, 22, 23.

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admitted, but both are presumed to have died at one and the same time, and that neither survived the other. The heirs of each would therefore be admitted to the succession. (a)

In the succession of collaterals there is the less necessity for making the presumption, and they are less favoured than ascendants. The law therefore adopts the maxim non jus deficit, sed probatio, and holds that the person whose claim has no foundation except on the fact of a particular person having survived another is bound to prove that fact. (b)

The distinction in these respects between a succession in which parties entitled are descendants or ascendants, and that of the succession of collaterals, is that when descendants or ascendants are the parties, the law makes the presumption of the survivorship of one, whilst in the succession of collaterals the law makes no presumption in favour of the survivorship of either. It proceeds upon the fact that both are dead. It has no means of knowing whether either survived the other. It acts therefore as if both died at one and the same time. The latter is also a presumption. But these presumptions in both cases may be repelled by evidence.

If the death be of that kind which allows of greater personal resistance according to the bodily strength of the party, the greater debility of one, and consequently less power to struggle so long as the other, would afford the presumption of that one having first died. If the death were occasioned by drowning, and one of the persons was an expert swimmer, and the other could not swim at all, the presumption would be that the latter was first drowned. (c)

The survivorship of mother or child when both die

(a) Dig. lib. 34, tit. 5, l. 18. Stryk. Diss. 10, c. 3, n. 3 and 5.
(b) Fab. in Cod. lib. 4, tit. 14, def. 2, n. 7. Someren, de Repres. c. 3, n. 11. Alciat, Reg. præs. 49. Stryk. ib. c. 3, n. 7.
(c) Stryk. Diss. 10, c. 3, n. 9.
during the delivery, or when the delivery has taken place without any person being present, affords another occasion in which much must be left to presumption. The presumption seems to be that the mother survived. (a)

The Imperial Chamber of Wetzlar were consulted, at the conclusion of the seventeenth century, concerning the case of a mother and child, who some years previous had both died during delivery. There were no facts upon which an opinion could be founded, and the naked question was presented. They decided, for physical reasons, that the mother had died first. (b)

It is questioned by medical jurists whether this decision is correct, and there are certainly many reasons to be assigned why the presumption should be against the child, and in favour of the survivorship of the mother. (c)

Another case is mentioned in which the presumption was in favour of the mother. A female at the eighth month of pregnancy died of a disease which the physicians styled anasarca, complicated with scurvy, (anasarque compliquee de scorbut.) A surgeon immediately performed the Cæsarean operation, and extracted the child. In his procès verbal, he states, that after tying the umbilical cord, and removing the mucus from its mouth, he observed pulsation at the region of the heart, and also found that it preserved a sufficient degree of warmth. It expired, however, (he adds) three quarters of an hour after the decease of its mother. Six witnesses were also present at the operation, four of whom stated that they applied their hands to the breast and felt the pulsation. The other two had not observed it.

Pelletan was desired to examine this testimony, and

(a) Stryk. ib. c. 2, n. 21. Cod. lib. 6, tit. 29, l. 3.
(c) Beck’s Elem. of Medic. Jurisp. vol. 1, p. 488.
to give an opinion whether the child had actually survived the mother. He remarks there are certain causes of death which may destroy the mother, while the life of the infant may be preserved; of this nature are sudden accidents, as drowning, a blow on the head, or violent hemorrhage. Fetal life is even compatible with some inflammatory complaints, but the probability is certainly against the surviving of the child, when the mother dies from a lingering and wasting disease. For this reason, and also because it does not appear to have arrived at the full time, he was of opinion that the child died in the womb. As to the signs of life, even if they were fully substantiated to have been present, he conceives them to be equivocal. The pulsation and heat were probably the remains of fetal existence. And if the surgeon was correct in believing that the heart beat for three quarters of an hour, he was certainly blameable for not using means to promote respiration. But the probability is that he was deceived.

For these reasons Pelletan gave it as his opinion that the mother survived the child. (a)

Dr. Beck mentions a case furnished by the Hon. De Witt Clinton. The mother and child died during delivery. If the latter was found to have survived, the father by the law in the state was the heir; if the former, her relatives became entitled to the property. On the trial it was proved that the child was born alive; and the question of the priority of death was then decided against the parties claiming as heirs of the mother. (b)

It has been a subject of controversy amongst jurists whether the husband must not on account of his supposed superior bodily vigour be presumed to have survived. Strykius maintains that the civil law did not

(a) Pelletan, vol. 1, p. 322 to 341.
(b) 1 Beck's Medical Jurisp. c. 10, p. 487.
admit such a presumption. He combats the arguments by which other jurists hold a contrary opinion. (a)

It is admitted by the law of Spain, and Voet treats it as established, and it would seem to be adopted in the Coutumes of Paris and Normandy, and by the present law of France. (b)

This inquiry has hitherto been confined to those cases in which the succession in question was that ab intestato. It is proposed to extend it to those which involve the right of a stranger by virtue of a testament to the inheritance, or of a legatee, or under a gift.

It has been observed by Mr. Duplessis, that the civil law makes the presumption that the one survived the other only from necessity, and when there exist no means of ascertaining which of the two did in fact survive the other. "Un père et un fils sont morts dans un même naufrage; comme ils sont héritiers nécessaires l'un de l'autre par la loi et par le sang, il faut nécessairement feindre que l'un a servé l'autre, pour régler à qui appartiendra leur hérédité, afin qu'elle ne demeure pas vacante; et dans cette espèce comme le fait manque, il faut suivre le droit tout pur: hé que dit le droit? filius ergo hares, voilà la raison de la fiction, et toutes les loix qui ont présumé la survie in commorientibus, sont en cette espèce de père, de mère et d'ensans morts ensemble, et il ne s'en trouvera aucune qui soit entre étrangers, comme a fort bien remarqué M. Cujas au passage que l'on verra tout maintenant.


(b) Covarruv. ib. n. 10. Voet, lib. 34, tit. 5, n. 5. Poth. Introd. au tit. 17, n. 38.
"Mais il n’en est pas de même des legs; il est bien nécessaire qu’un homme ait des héritiers, mais il n’est pas nécessaire qu’il ait des legataires, c’est pourquoi si le testateur et le legataire meurent en même temps et dans un même accident, comme il n’y a point alors de legataire qui puisse venir dire, j’ai servé, j’ai gagné le legs, et comme ses héritiers ne peuvent point alleguer ni justifier de survie, pour prétendre qu’il leur ait été transmis, le legs demeure caduc: car enfin l’héritier du sang est saisi de la succession dès le moment du décès du défunt, par la règle, le mort saisit le vif. Les legataires au contraire, n’ont qu’une simple action pour venir demander la délivrance du legs, et dans cette action il faut qu’ils prouvent la survie pour fonder leur demande; ils y sont obligez par la règle générale, qui veut que tous demandeurs fassent les preuves nécessaires pour établir leur prétention, et faute de preuve on les exclut." (a)

This necessity does not exist when the claim is derived from those whom the testator has himself instituted his heirs, or those whom the law would not call to the succession, or from a person to whom he has bequeathed any part of his property. Hence it leaves them to establish their title by proving the validity of the devise or bequest, that is, by proving that the devisee or legatee survived the testator. (b)

If the legatee survived the testator, but the question arises whether the testator survives a third person, that event being a condition defeating the bequest of the legacy, the law abstains from presuming such survivorship. Mævius bequeathed one thousand florins to Sempronius, if Gaius, the testator’s brother, should die in his the testator’s lifetime. The testator and his brother died at the same time of poison. It was considered that the one was not to be presumed to have died before the

(a) 1 Duplessis, p. 774.
(b) Mascard. de Prob. Conclus. 1074, et seq. Stryk. ib. c. 3, n. 10, 11. Dig. lib. 34, tit. 5, l. 16.
other. There was no ground for presuming that the testator had survived Gaius, and therefore the legacy was held payable. (a)

A testatrix bequeathed two hundred florins to the children of her sister in the event of her, the testatrix, surviving her sister. Both the sisters were carried off by the plague, and it could not be ascertained which of them had died first, it was decided that the testatrix should be presumed to have survived her sister. (b)

In these cases the presumption is admitted in order that the legacy might not fail, and the intention of the testatrix be defeated. (c)

In pupillary substitutions, if the father and son to whom another had been substituted should perish together, it is presumed that the father first died, in order that the substitution might take effect: but this presumption is not admitted, if there be a mother or brothers, or other lawful heirs surviving. In the latter case, the substitute must prove that the will took effect by the death of the testator, before that of the son. (d)

In fidei-commissary successions the law is still more disposed to favour the presumption which will give effect to the trust, because the family of the deceased suffer less from the fidei-commissary institution, than from the pupillary substitution. (e)

If the heir by substitution and the heir by institution should die at the same time, the substitution must wholly fail, as it cannot be proved that the event on which the substitution was to take effect happened whilst he was alive. (f)

(a) Brunnenman, ad lib. 34, tit. 5, l. 6, n. 3. Stryk. Diss. 10, c. 3, n. 13.
(b) Carps. p. 1, decia. 19. Stryk. ib. n. 5. (c) Ib.
(d) Stryk. Diss. 10, c. 5, n. 1, 2, 3. Mascard. de Prob. Concl. 1346, n. 5.
(e) Fusar. de Pub. Subs. Quest. 127.
(f) Stryk. ib. n. 4. Covarruv. tom. 1, c. 10, n. 22.
(F) Stryk. Diss. 10, c. 3, n. 4; c. 5, n. 15. Brunnenm. ad lib. 34, tit. 5, l. 18.
Alciat. de Præs. Reg. 1, pæs. 49.
CONFLICT OF LAWS.

In *fidei-commissa*, if the *fiduciary* and *fidei-commissary* heirs have both died, there is no presumption that the one has survived the other. The *fidei-commissum* must fail, because the survivorship of the *fidei-commissary* was essential to its validity. But if the father had been instituted heir, or subject to the condition that if he died without children he should deliver the property to another, and he and his children should die together, in this case in order to give effect to the *fidei-commissum* it will be presumed that the children died before the father, so that at his death he had no children. (a)

In all these cases there existed a will or bequest which contained a perfect and valid declaration of the testator's intention, and the presumptions were admitted in order to prevent the disposition from being defeated. (b)

A father in disposing of his property to his two sons, directed that the one who last died should deliver a particular part of it to a certain relation. Both the sons having died at the same time, no presumption was admitted as to survivorship, and the direction failed. In this case it was not possible for the claimant to entitle himself, because he could not prove that the event which alone entitled him had ever happened, namely, that either had survived the other. (c)

When the validity of a gift *inter vivos* depends on the death of the donor before the death of the donee, the law in the absence of proof of survivorship makes the presumption in favour of the donee. A gift by the husband to the wife will take effect if he dies in her lifetime without having revoked it. If the husband had given a farm to his wife, and had not revoked the gift, and they died together at the same time, or if they

(b) Ib.
died in separate places, and it could not be proved which of them had first died, the gift will remain valid, because it cannot be said he had survived his wife. (a)

In donations mortis causd between the husband and wife, and which have been delivered, the presumption is that the donor first died, ut actus magis valeat, quam pereat. (b)

But this presumption could be admitted only in the entire absence of any proof that the donor had survived the donee for the shortest space of time, or had revoked the gift. (c)

If it be stipulated by a marriage contract, or if it be the law of the country that the dos of the wife shall be returned si in matrimonio decesserit, or that she shall acquire any other interest upon the condition of her dying under coverture, and the husband and wife perish together under circumstances which preclude any proof that she did not die after the dissolution of the marriage, the law does not make the presumption. On the contrary, the circumstances of the case afford at all events an equal ground for inferring that they both died at the same time. (d) But if the title to the dos or any other interest of the wife was dependent on the condition of her surviving the husband, if both should die under such circumstances that it cannot be ascertained that the one died first, and the other survived, the claim cannot be sustained, because the condition has not been performed, and the event has not happened, on which alone the claim is founded. The same rule

(a) Brunneeman, ad Dig. lib. 34, tit. 5, l. 8. Menoch. lib. 6, prms. 50, n. 6 and 8. Covarruv. d. l. n. 5. Alciat. Reg. 1, prms. 49. Stryk. Diss. 10, c. 4, n. 13, 14, 15.

(b) Dig. lib. 34, tit. 5, l. 12. Stryk. ib. n. 18. Covarruv. d. l. n. 7 and 5.
(c) Stryk. ib. n. 20, 21.
(d) Covarr. ib. n. 38. Stryk. ib. n. 22, 23, 24. Brunneeman, ib. ad l. 9, 3, n. 8.
would be applied if the title or interest of the husband depended on the condition of his surviving his wife. (a)

It may also be stated that when the stipulation or contract gives a right or interest to a person if he survives another, and both the parties die together, the presumption of survivorship is not admitted; and as those who claim in consequence of the survivorship cannot prove that the event has happened, or the condition been performed, which was to give them their title, their claim is therefore rejected, because in fact they have not substantiated it. (b)

The code civil has given to those rules which the jurisprudence of France adopts the sanction of law. Their application was not, as many of the rules which have been just stated were, subject to the discretion of the judge.

If several persons respectively called to the succession of each other perish by one and the same accident, so that it is not possible to ascertain which of them died first, the presumption of survivorship is determined by the circumstances of the event, and in defect of such, by force of age and sex. (c)

If those who perished together were under fifteen years, the eldest is presumed to have survived.

If they were all above sixty, the youngest is presumed to have survived.

If some were under fifteen years, and others more than sixty, the former are presumed to have survived.

If those who perished together were of the age of fifteen years complete, but less than sixty, the male is always presumed to have survived, where there is equality of age, or if the difference which exists does not exceed one year.

(c) Art. 720.
If they were of the same sex, the presumption of survivorship which gives rise to succession according to the order of nature must be admitted, thus the younger is presumed to have survived the elder.

It is considered by Toullier that these rules are applicable not only to successions ab intestato, but to the institution of heirs by testament, to legacies, and donations. (a)

In the few cases which are reported to have been decided in England, it would seem to be the inclination of the courts not to adopt these presumptions.

Upon the death of General Stanwix and his daughter, the property was claimed by the brother of the daughter's mother, upon the presumption that she had survived her father. The question in this case was never judicially determined. (b) In Mr. Fearne's posthumous works there is a very elaborate discussion of the subject, in which his conclusion seems to be that the presumption of the daughter's survivorship could not be supported. This subject came before Sir William Wynne, as Judge of the Prerogative Court, in the case of Wright and Netherwood, 6th May, 1793, (c) upon a question respecting the implied revocation of a will by marriage, and a birth of a child. The father and child having perished together by shipwreck, the learned judge said, that with respect to the priority of death, it had always appeared to him more fair and reasonable in these unhappy cases to consider all the parties dying at the same instant of time, than to resort to any fanciful supposition of survivorship on account of the degrees of robustness. (d)

In another case it appeared, that in the month of January 1809, the testator, who was at that time a middle aged man, embarked with his son Francis on

(a) Toull. des Success. n. 3, tit. 1, c. 1, n. 75, et seq. Chabot. Tr. des Success. art. 722.
(b) The King v. Dr. Hay, 1 Bl. Rep. 640.
(c) Lagg v. Lagg, 2 Salk. 593.
(d) Ib.
board the Calcutta, on a voyage to England. The ship sailed the same month, was lost on her homeward voyage, and all on board perished.

The master by his report stated that all persons on board perished, and he was therefore unable to state whether the said Francis survived his father or not.

The Master of the Rolls (Sir W. Grant) said, "There are many instances in which principles of law have been adopted from the civilians by our English courts of justice, but none that I know of in which they have adopted presumptions of fact from the rules of the civil law. In General Stanwix's case, I thought the stress of the argument to be in favour of the representatives of the father. There were three contingencies; either the daughter survived the father, or the father the daughter, or both perished at the same instant. In the first of these cases alone would the representatives of the daughter have been entitled, those of the father in either of the two last. There were, therefore, two chances to one in favour of the latter. In the present case I do not see what presumption is to be raised; and, since it is impossible you should demonstrate, I think that, if it were sent to an issue, you must fail for want of proof." (a)

A husband appoints his wife executrix and residuary legatee; he and his wife were drowned, but there was no direct evidence which of them had survived. A question arose, whether the next of kin of the wife as residuary legatee, or of the husband, were entitled to administration. The learned judge thus states the ground on which he decided in favour of the next of kin of the husband. (b) "The next of kin of the husband has the *prima facie* right, but if there is a residuary legatee he would be entitled: there is no such person here, for the party claims derivatively from the resi-

(a) Mason v. Mason, 1 Mer. 313.
(b) Taylor v. Diplock, 2 Phillimore's Rep. 261.
duary legatee. The burthen of proof lies on him to show that the deceased left a residuary legatee; the next of kin of the residuary legatee is to show that the wife survived her husband. The same was the rule in the civil law, as has been satisfactorily stated in argument; the proof of the wife surviving must be shown, otherwise the deceased left no residuary legatee. Upon the whole, I am not satisfied that proof is adduced that the wife survived. Taking it to be that both died together, the administration is due to the representatives of the husband. I assume that they both perished at the same moment, and therefore I shall grant the administration to the representatives of the husband. I am not deciding that the husband survived the wife."

The same principle was adopted in a subsequent case. (a)

CHAPTER II.

SUCCESSION AB INTESTATO TO IMMOBILE AND MOVEABLE PROPERTY.

In the following chapter those systems of jurisprudence are selected in which the order of succession is the same, whether the property is immovable or moveable.

SECTION I.

SUCCESSION UNDER THE CIVIL LAW AND THE LAW OF SPAIN.

I. The Civil Law, Novell 118.—Order in which the heirs are called.—Descendants.—Representation.—Children born in wedlock.—In consubstantes.—Spurii.—Ascendants.—Collaterals.—Agnati.—Coagnati.—Husband and wife.—Succession to each other.

II. The law of Spain.

According to the civil law, the same order of succession was adopted with respect to real and personal property. It conferred no preference on account of primogeniture. It admitted females to an equal parti-
cipation with males in the succession to real as well as personal property. (a)

The succession was not acquired until the heir had accepted it, whilst according to the law of France, \textit{le mort saisit le vif}.

The order of succession established by the civil law holds a very prominent station in the several systems of jurisprudence which are here considered.

It is not necessary to advert to the order of succession established by the Twelve Tables. That which was introduced by the Emperor Justinian formed the law of succession now known and referred to as the succession according to the civil law. It admitted three classes of successors, descendants, ascendants, and collaterals. The descendants were first entitled, then ascendants, and lastly collaterals. It is expressed in the following terms: If a man die intestate, leaving a descendant of either sex or degree, such descendant, whether he derives his descent from the male or female line, or whether he is under power or not, is to be preferred to all ascendants and collaterals. And although the deceased was himself under paternal power, yet we ordain that his children of either sex, or any degree, shall be preferred in succession to the parents, under whose power the intestate died, in regard to those things which children do not acquire for their parents, according to our other laws; for we would maintain the laws in respect to the usufruct which is allowed to parents, so that if any of the descendants of the deceased should die, leaving sons or daughters, or other descendants, they shall succeed in the place of their own father, whether they are under his power or \textit{sui juris}, and shall be entitled to the same

share of the intestate’s estate which their father would have had if he had lived, and this kind of succession has been termed by the ancient lawyers a succession in stirpes, for in the succession of descendants we allow no priority of degree, but admit the grandchildren of any person by a deceased son or daughter to be called to inherit that person, together with his sons or daughters, without making any distinction between males and females, or the descendants of males and females, or between those who are under power, and those who are not. These are the rules which we have established concerning the succession of descendants. (a)

The children of the deceased were preferred to either ascendants or collaterals. Without any distinction in respect either of their sex or their priority of birth, they equally participated in the property of either parent. It was immaterial whether it was the succession of the father or mother. But if they were the issue of several marriages, although they all equally succeeded to the property of the father, yet the children of each mother succeeded exclusively to her property; and some jurists carried this principle so far as to maintain that the property which the father had acquired by succeeding to the son of a former marriage, provided the son had derived it from his mother, would descend on her children. (b)

But by other writers it was considered that the property of the former wife, where the husband has acquired only an usufruct, ought on his death only to devolve exclusively on her children; but when he acquires absolutely by survivorship her property, it must be deemed part of his succession, and devolve equally on all his children. Thus upon the death of Sempronius, leaving two children by his first wife, Mævia, whose property he derived

(a) Novell, 118, c. 5.
by force of the law which gave him her estate as the survivor, its amount being £10,000, and having one child by his second wife, from whose property he derived £1000; and his own property being £7000. The whole bulk of his estate amounted to £18,000. The question was, whether the children of the first marriage were not entitled to the £10,000; but it was held that the three children were entitled to equal shares of the £18,000, which was to be deemed the inheritance of the father. (a)

Step-children were considered perfect strangers in the succession of their step-parents. (b)

If the descendants were not all of the first degree, that is, children, but some of those children had died, leaving descendants, the latter became, as the representatives of their deceased parents or ancestors, entitled to take the parent or ancestor’s share in the succession. They succeeded per stirpes. (c)

There is no representation of persons living, but only of those who are civilly dead. The grandchild, therefore, cannot during his father’s life-time inherit the property of his grandfather.

If the father has renounced the succession, his children cannot succeed with the other grandchildren of the deceased; but if the father had been the only child of the deceased, it has been considered that as there was no preceding degree to be admitted to the succession, his children might take, not however by representation, but per capita. (d)

But if any child or children of the deceased have died

(a) Stryk. de Success. Diss. 1, c. 2, n. 8. Forster, de Success. lib. 3, c. 11, n. 4.

(b) Stryk. ib. n. 11. Barry, de Success. lib. 18, tit. 4, n. 10. Someren, de Jure Noverc. c. 10.

(c) Novell, 118, c. 1. Forster, ib. lib. 4, c. 12, n. 7, 9. Stryk. ib. n. 31.

in his life-time, and thus the intestate's descendants are not all of the first degree, i. e. his children, then the grandchild or grandchildren succeed to their parent's share. In this case, they take *per stirpes*, as representing their deceased parent, and are entitled to that which would have been his share had he been living. *(a)*

In the succession *per stirpes*, this right of representation is admitted, whether the descendants be all of the same degree, or whether some be of a nearer degree than the others, and those of a more remote degree succeed equally with those more near, although they take only such share as the ancestor whom they represent would take. This rule prevailed, although all the intestate's children had died in his life-time. If the intestate left grandchildren by three different children, and there were four of the one child, three of another, and two of the other child, the inheritance would be divided into three parts, and each of the classes of grandchildren would take only one-third. In this respect the law of England, it will be hereafter seen, differs from the civil law. In the case which is put of all the intestate's children having died in his life-time, the nine grandchildren would take *per capita*; that is, each would take one-ninth. The right of representation takes place amongst great-grandchildren, and all the other descendants in a direct line of the children of the deceased, *in infinitum*. *(b)*

The civil law distinguished children born in concubinage from those who were the fruits of a casual or promiscuous connection. The former were called *liberi naturales*, and the latter *spurii*. *(c)* *Liberi naturales*,


*(c)* Novell, 89, c. 12, § 6. Dig. lib. 1, tit. 5, l. 23.
although born *extra matrinomium*, were the issue of that species of intercourse to which was given the appellation of concubinage, and which was treated as a species of marriage—"semi-matrinomium—licita consuetudo." (a)

If the father left surviving him children born in wedlock, or a wife, his natural children (*liberi naturales*) were wholly excluded; but if he left no legitimate children, nor wife, his natural children would succeed with the mother, *concubina*, to a sixth part of the property. But no representation was admitted amongst them. The legitimate child of the intestate's natural child could not succeed to his grandfather, nor the natural grandchild, although the father of the latter was the legitimate child of the intestate. (b)

The civil law made a distinction when the succession in question was that of their mother. There was no uncertainty respecting the person from whom they were born, and they succeeded without distinction to her property equally with her legitimate children, and they succeeded not only to the mother, but to the maternal ascendants. (c)

If the illegitimate children answered to the description of *spurii*, that is, were the fruit of promiscuous intercourse, they were excluded from the succession to any part of the supposed father's property. But as this exclusion was founded on the difficulty of fixing on the person who was their father; when that difficulty did not exist, the distinction ceased, and they were admitted equally with other natural children. (d)

Children the issue of an incestuous connection were excluded from the succession to the property of the mother as well as that of the reputed father. The issue

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(c) Vaq. de Success. Creat. c. 1, § 10, n. 494. Forster, c. 6, n. 11, n. 1. Stryk. lib. c. 2, § 53.
(d) Ib.
of an adulterous intercourse were subject to the like exclusion, but it has by some jurists been contended that they ought not to be excluded, if their mother was not married at the time of her intercourse with a married man. (a)

But it is maintained by other jurists with great force, that such a distinction ought not to be admitted. The fact of either party being married at the time of the adultery, necessarily prevented a marriage between the adulterer and adulteress. (b)

Children born out of wedlock, but legitimated by the subsequent marriage of their father and mother, share in the succession equally with those who were born after the marriage had taken place. (c)

Children born of a marriage which was unlawful, before either of the parents had acquired a knowledge of that which rendered it unlawful, were not considered illegitimate, even although they were the issue of a marriage which was incestuous, if the relationship which rendered it so was unknown to either of the parents. (d) But the ignorance which affords this excuse must be of the fact which constitutes the illegality, and not of the legal consequences or effect of the act.

The succession of ascendants forms the subject of the second chapter of the Novell, 118.

"When the deceased leaves no descendants, if a father or mother or any other parents, grandfathers, great grandfathers, &c. survive him, we decree that they shall be preferred to all collateral relations, except brothers of the whole blood to the deceased, as shall hereafter be more particularly declared. But if many ascendants are living, we prefer those who are in the nearest degree,

(b) Stryk. ib. Diss. 1, n. 57, and the authors cited by him.
(c) Stryk. ib. (d) Stryk. ib.
whether they are male or female, paternal or maternal; and when several ascendants concur in the same degree, the inheritance of the deceased must be so divided that the ascendants on the part of the father may receive one half, and the ascendants on the part of the mother the other half, without regard to the number of persons on either side. But if the deceased leaves brothers and sisters of the whole blood together with ascendants, these collaterals of the deceased shall be called with the nearest ascendants, although such ascendants are a father or mother; and the inheritance must be so divided according to the number of persons, that each of the ascendants and each of the brothers may have an equal portion: nor shall the father in this case take to himself any usufruct of the portions belonging to his sons and daughters, because by this law we have given him the absolute property of one portion, and we allow no distinction to be made between those persons who are called to an inheritance, whether they are males or females, or related by males or females, or whether he to whom they succeed was or was not under power at the time of his decease."

Although the father and son are distant from the deceased in an equal degree, yet it has been seen that the son is preferred. The respective degrees in which a person is of kin to the intestate are important only when they are of the same line. But if there are claimants of different lines, the line to which they belong is the first consideration, that of the degree is of secondary consideration. The descendant entirely excludes the ascendant, and thus the great grandson, who is of the third degree excludes the father, who is of the first. The inheritance descends rather than ascends. (a)

But on failure of descendants of the deceased, the father and mother are next called to the succession, and

(a) Stryk. Diss. 2, c. 1, § 4.
they exclude all collaterals, except his brothers german and their children. In the succession of ascendants as well as in that of descendants, the difference of sex is not recognized, and as the ascendant of the nearest degree is to be preferred, the mother of the deceased will exclude his grandfather. No representation is admitted amongst ascendants. (a)

If the father and mother are dead, the other ascendants are called to the succession, but the nearest is always to succeed. The maternal grandmother excludes the paternal great grandfather. But where there is more than one parent surviving, and they are alone, the inheritance is divided in lines, so that the ascendants ex parte paternâ take one half, and those ex parte maternâ take the other half. Thus, if on the part of the mother there was a grandmother only, and on the part of the father a grandfather and great grandfather, the grandmother would take one half, and the grandfather and great grandfather would take the other half. (b)

It has been questioned whether the same rule prevailed if the ascendants were of a more remote degree. The case occurred of an intestate having left on the part of his paternal grandfather, a great grandfather A., and great grandmother B., and on the part of his paternal grandmother a great grandfather C., on the part of his mother a great grandfather D. It was decided that the inheritance should be divided into two parts, one of which should be taken by A. B. and C., and the other by D. (c)

This decision, however, does not determine in what manner the moiety allotted to A. B. and C. should be taken, whether per capita or by lines. Strykius considers its division should be made by lines, and the great

(a) Forster, de Success. lib. 7, c. 4, n. 23. Stryk. Diss. 2, c. 1, n. 18. Bach. ad Treutl. vol. 2, disp. 16, Th. 4, lit. D.
(b) Novell. 118, c. 2. Stryk. Diss. 2, c. 1, n. 20.
(c) Stryk. ib. n. 20.
grandfather and great grandmother *ex parte avi paterni* should constitute one line. (a)

Amongst ascendants of a more remote degree, no regard is had to the source from whence the property is derived.

In the succession of ascendants of the second or a more remote degree, but being all of an equal degree, those who constitute the ascendants *ex parte paterni* take one half, and those who constitute the maternal ancestors take the other half. (b) In this rule no regard is had to the source from whence the property was derived, and the rule *paterna paternis, materna maternis*, is not admitted. (c)

If there are brothers and sisters of the whole blood, they succeed equally with the father and mother taking *per capita*. If there is neither father nor mother, but brothers and sisters, it was a controverted question whether the grandfather should succeed with them. Strykius, and with him several jurists, (d) maintain the affirmative. But the contrary opinion was held by Voet. (e) It may be observed that the opinion of the latter jurist was adopted in England. (f)

Those who maintained that the grandfather and grandmother succeeded with the brother of the whole blood, held that the division in this case must be *per capita*, and therefore, if there were a grandfather and

(a) Stryk. Diss. 2, c. 1, n. 20.
(d) Gudelin, Forster, Ferriere, Domat.
(e) Voet, lib. 38, tit. 18, n. 13.
grandmother on the father's side, and a grandmother on the part of the mother, they would take in lines, the latter taking one half, and the paternal grandfather and grandmother taking the other half; yet if there was a brother of the whole blood to take with them, the succession would be divisible into four parts, and each would take a fourth. (a)

The 118th Novell did not admit the children of brothers of the whole blood with the ascendants, but by the 127th Novell they are called to it. The children however take per stirpes, that is, the share which their parent, if living, would have taken. But the grandchildren of the intestate are clearly excluded. (b)

It has been doubted whether, to enable the children of a deceased brother to succeed with the ascendants, there must not be a surviving brother of the deceased, and therefore, whether they could succeed alone; but a great weight of authority maintains that if all the brothers should be dead their respective children would succeed. (c)

To entitle them to succeed, the children must be of the whole blood. (d)

The succession of reputed parents to the property of their natural children takes place in the same manner as that of natural children to the property of their reputed parents.

If the natural son dies leaving no wife nor child, his reputed father succeeds to one sixth, and the mother to the remainder of his property. (e)

(a) Winchelsea v. Norcliffe, Freeman's Ch. Cas. 95. S. C. 1 Vern. 403.

(b) Forster, de Success. lib. 7, c. 6, n. 3, 4. Stryk. Diss. 2, c. 1, n. 30
Fris. lib. 4, tit. 8, def. 5. Carpz. p. 3, c. 17, def. 4. (d) Ib.

(e) Stryk. Diss. 2, c. 1, n. 42.
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The mother succeeds to the property of her illegitimate children in the same manner as if they were legitimate. (a)

Whenever the grandson, being illegitimate, would have succeeded his grandfather, the latter is admitted to the succession of his grandson. (b)

As the reputed father cannot take more than a sixth, collaterals are admitted to the rest of the intestate's property in the same manner as they would otherwise succeed. (c)

The brothers of the intestate, whether natural or legitimate children, are excluded by the mother. (d)

Legitimation per subsequens matrimoniwm, or by the revocation of the sovereign, has the same effect on the rights of the ancestor, as it has on those of the descendants. (e)

"If a man leaves neither descendants nor ascendants at the time of his death, we first call his brothers and sisters of the whole blood, whom we have also called to inherit with the fathers of deceased persons. But when there are no brothers of the whole blood of the deceased, we call those who are either by the same father only, or by the same mother. And if the deceased leaves brothers, and also nephews by a deceased brother or sister, these nephews shall be called to succeed with their uncles and aunts of the whole blood to the deceased; but however numerous these nephews are, they shall be entitled only to that share which their parent would have taken if alive. From whence it follows that if a man dies, and is survived by the children of a deceased brother of the whole blood, and also by brothers of the half blood, then his nephews (that is the children of his brother by the whole blood) are to be preferred to their uncles and aunts; for although such nephews are themselves in the third degree, yet they are preferred, as

(a) Stryk. Diss. 2, c. 1, n. 42.  (b) Ib. n. 45.
(e) Ib.          (d) Ib. n. 46.  (e) Ib.
their parent would have been if living. And on the contrary, if a man dies and is survived by a brother of the whole blood, and by children of a brother of the half blood deceased, these nephews are excluded, as their father would have been if he had lived. But among collaterals we allow the privilege of representation to the sons and daughters of brothers and sisters, and no farther; and we grant it only to brothers' and sisters' children, when they concur with their uncle or aunts paternal or maternal; for when ascendants are called to inherit, we by no means permit the children of a deceased brother or sister to share in the succession, although the father or mother was of the whole blood with the deceased brother. But we have so far allowed the right of representation to brothers' and sisters' children, that being only in the third degree they are called to inherit with those who are in the second, and this is evident, because brothers' and sisters' children are preferred to the uncles and aunts of the deceased, paternal as well as maternal, although they are all in the third degree of cognition.

"But if a deceased person leaves neither brothers nor brothers' children, we then call all the other collaterals according to the prerogative of their respective degrees, preferring the nearer to the more remote, and if many are found in the same degree, the inheritance must be divided according to the number of persons, and our laws distinguish this manner of dividing an inheritance, by calling it a division in capita." (a)

Collaterals are either related on the father's side, and called agnati, or on the mother's, and the latter are called cognati. (b)

The Novell abolished all distinction between these two descriptions of kindred, as well as that of sexes. (c)

(a) Novell, 118.
(b) Inst. lib. 3, tit. 1, § 1. Stryk. Diss. 3, c. 1, n. 4.
(c) Novell, 118, c. 4.
Brothers and sisters of the whole blood are called before all other collaterals, and they take the inheritance per capita. They exclude brothers of the half blood ob vinculi duplicatatem. If there are parents, it has been seen that the latter are admitted with the brothers and sisters per capita. (a)

The children of a deceased brother or sister take with his uncles per stirpes, that is, the share which belonged to their deceased parent. (b)

If, however, the children of deceased brothers and sisters are to take alone, there being no uncles and aunts to take with them, they take per capita. (c)

If one of the brothers should repudiate the inheritance, it is doubted whether his children should succeed with the children of the other brothers per capita.

The intestate left a brother A., who had nine children, there were three children of a deceased brother B., and four children of another deceased brother C. A., upon the death of the intestate, renounced the inheritance. Is the inheritance to be divided into sixteen or three parts? Strykious differing from other jurists, concludes that all the children ought to take per capita, and that the children of A. ought to be confined to the third, which he would have taken if he had not repudiated the inheritance. (d)

If there were no brothers of the whole blood, but children of those brothers, and also brothers of the intestate of the half blood, the children succeed with these brothers per stirpes by representation, and it has been observed that the children of brothers succeed by representation, whenever they would be excluded by others on account of their greater proximity, but when that reason ceases they succeed per capita. (e)

The children of brothers and sisters are to be preferred

(a) Novell, 118, c. 3. Stryk. Diss. 2, c. 1, n. 24, and Diss. 3, c. 1, n. 7.
(b) Stryk. Diss. 3, c. 1, n. 7.
(c) Ib. n. 9.
(d) Ib. n. 11.
(e) Ib. n. 12.
to the uncles and aunts, and amongst themselves they take per capita. If there be a cousin on the father's side, a grandson of a brother is not preferred to him, but being both of the same degree, they are equally called to the succession. (a)

The same preference is given to the children of brothers of the whole blood as was given to their parents.

If there are only brothers of the half blood, whether they are on the side of the father or mother, they are admitted to the succession in the same manner as brothers of the whole blood, and the children of such half brothers occupy their places. (b)

The children of half brothers are to be preferred to the uncle of the whole blood on the father's side.

If the intestate has left several half brothers of different sides, it has been considered that regard should be had to the source from whence the property, which is the subject of succession, was derived, that thus the property which devolved on the deceased from his father should be taken by the half brother on the father's side, whilst that derived from the mother should be taken by the half brother on the mother's side, but that to the rest of the property of the intestate they should equally succeed. (c)

But this distinction as to the source from whence the property was derived prevails only with respect to that which proceeded immediately from the paternal or maternal line, not to that which has proceeded from the kindred of the father or mother. (d)

Neither does it prevail beyond the children of the brothers of the half blood. (e)

(a) Stryk. Diss. 3, c. 1, n. 14.  (b) Ib. n. 20.
(e) Stryk. ib.
On failure of brothers and sisters of the whole blood, and their children, and brothers and sisters of the half blood, those who are next of kin on the side either of father or mother, are called to the succession, and exclude all those of a more remote degree, and they take per capita. (a)

The more general opinion is, that the succession among collaterals does not extend beyond the tenth degree. (b)

Illegitimate brothers who are brothers from the same father, have no title to succeed either to legitimate brothers or to each other. (c)

But if such brothers are from the same mother they succeed each other, as also all collaterals on the mother's side.

If the intestate, being himself legitimate, left brothers of the whole blood, the latter will alone succeed; but if the brothers are only of the half blood, ex parte materna, natural brothers by the same mother will succeed them. (d)

Illegitimate brothers rendered legitimate by the subsequent marriage of their parents, succeed in every respect as if they had been born in wedlock. (e)

Whatever may have been the right of the husband and wife in the early history of the Roman Republic to succeed to the property of each other, yet before the time of Justinian, the survivor succeeded by virtue only of the prætor's authority, whenever there was a failure of collateral relations of the deceased. The advantage of a concession depending on an event of rare occurrence must have been very inconsiderable. The Emperor Justinian admitted the wife, under certain restrictions,

(a) Stryk. Diss. 3, c. 1, n. 26. (b) Ib.
(c) Ib. n. 35. Barry, lib. 18, tit. 3, n. 9. Forster, lib. 8, c. 10, n. 4.
(d) Ib. (e) Ib.
to a fourth part of the husband’s estate, even although there were children of the marriage. (a)

“Quia vero legem dudum posuimus præcipientem, ut si quis uxorem aliquando sine dotalibus acceperit, cum affectu solum nuptiali, et hanc sine causâ legibus agnîta projecerit: accipere eam quartam partem substantiæ ejus. Et aliam post hanc fecimus legem decernentem, si quis indotatam uxorem per affectum solum acceperit, et usque ad mortem cum eâ vivens, præmoriatur, accipere similiiter et eam quartam illius substantiæ, portionem: ita tamen, ut non transcendent hoc centum librarum auri quantitatem. In præsentī melius utramque legem disponentes, sancimus in utroque casu ex talibus matrimonii natos filios, legitimos esse, et ad paternam vocari hereditatem; uxorem autem ex utroque horum casuum, siquidem usque ad tres habuerit filios ejus vir sive ex eâ, sive ex alio matrimonio, quartam partem ex substantiâ viri accipere. Si autem amplius fuerint filii: tantum in utroque similiiter casu accipere jubemus mulierem quantum uni competit filiorum: ita quippe, ut usum solum in talibus rebus mulier habeat: dominium autem illis filiis servetur, quos ex ipsis nuptiis habuerit. Si vero talis mulier filios ex eo non habuerit, jubemus etiam domini jure habere eam res, quas ex viri facultâbus ad eam venire per præsentem jussimus legem. Quæ tamen irrationaliter exclusa est: in ipso tempore expulsionis partem jubemus accipere, quæ contaminetur hâce lege. Virum enim in talibus casibus quartam secundum priorem nostram legem ex substantiâ mulieris accipere, modis omnibus prohibémus.” (b)

It will be perceived, from the terms of the Novell 53, that it was requisite that the husband should have died

(a) Novell, 53, c. 6; ib. 117, c. 5. Dig. lib. 38, tit. 11. Cod. lib. 6, tit. 18. Voet, Brunemann, Zossius, Perez., Lauterbach, on these titles.
(b) Novell, 117, c. 5.
locuples, that the wife should be inops, and that there should have been no dowry settled on her marriage. The law not having expressed the amount of property in respect of which the one was to be deemed wealthy and the other indigent, it was left to the discretion of the judge to decide what was the condition of the deceased and of the survivor (a)

In order to entitle the party to this succession, it was further necessary ut matrimonium sit indotatum. The dos which deprived the party of this claim must however have been of an amount sufficient for the support of the survivor. If it be insufficient for that purpose, it must be brought into the fourth claimed by the wife, so that the children can only be compelled to supply what is deficient. (b)

A widow who has a wealthy father was not considered to be in that indigence which was contemplated by the law. (c)

The question whether there be a state of indigence must be considered with reference to the time of the death of the deceased husband or wife. The survivor on whom a valuable succession should afterwards devolve is not deprived of the portion to which, by his condition at the time of the decease, he had become entitled. Neither can his subsequent poverty, to whatever misfortune it may be attributed, entitle him to it, if at the time of the death he was wealthy. (d)

The estate, to one fourth of which the survivor is entitled, is that which exists at the time of the death of the deceased after deducting his debts. (e)

The survivor succeeds not by the title of heir but by

(a) Menoch. de Arbitr. jud. quest. lib. 2, Cas. 65. Stryk. Diss 4, c. 1, n. 18, 19, 20, 21. Forster, de Success. lib. 9, c. 4, n. 4. Gudelin, de Jure Noviss. lib. 2, c. 16.
(b) Stryk. n. 22. Berlich. p. 3, concl. 26, n. 18.
(c) Ib.
(d) Stryk. ib. n. 24.
virtue of this special provision of the law. His fourth is not subject to be diminished by any legacies which the deceased may have bequeathed, neither does the survivor take any increased interest in the estate which may have accrued by the death of any heir or legatee. (a)

The paraphernalia of the wife, her dowry, any legacy which may have been bequeathed to her by her husband, and the amount of that dos, must be brought into account in computing the one fourth. (b)

The bequest by the husband to the wife, unless it be equal in amount to her one fourth, will not bar her title to that which is required to complete the one fourth, unless it has been expressly left to her, and she has accepted it in satisfaction of that claim. (c)

If a stranger, during the lifetime of the husband, should make a bequest to the wife which was not equal to her one fourth, but was sufficient for her support, she could neither succeed to her husband nor claim the difference between the amount of the bequest and her fourth of her husband's estate. It has been considered, that it was not competent for her to renounce this bequest, and thus entitle herself to claim the fourth; but Strykious expresses his doubt of the correctness of that opinion. (d)

The deduction of the bequest from the one fourth takes place only when the wife succeeds to the fourth of the property absolutely. If she has to take with children she is entitled only to a fourth of the usufruct, (e) and in that case she is not bound to deduct the bequest from it, but this Novell is wholly silent on this subject, and the 53rd Novell, which requires that the bequest should be brought into account, speaks only of the fourth of the absolute property. (f)

(a) Stryk. Diss. 4, c. 1, n. 26, et seq.
(b) Stryk. ib. n. 32, et seq. Barry, de Success. lib. 18, tit. 4. Forster, de Success. lib. 9, c. 8, n. 2, et seq.
(c) Stryk. ib. n. 33.
(d) Barry, de Success. lib. 18, tit. 4, n. 15. Stryk. ib. n. 34.
(e) Novell, 117, c. 5. (f) Stryk. ib. n. 35.
According to the 117th Novell, the fourth of the widow, whatever may have been the wealth of the husband, could not exceed *centum libras aurei.* (a)

By the 53rd Novell, c. 6, the absolute property in this fourth was given to the wife, notwithstanding there were children of the marriage. The 117th Novell also, if there were only three children, allowed the wife to take the fourth. But if there were more than three children, she only took a share with the children. In the latter case however she took only the usufruct, and not the absolute property in that share, and on her death the principal reverted to the children. If there were no children, she succeeded to the absolute property in the one fourth. It is to be observed, that although there should be children, yet if they were not her own children, but those of the husband by a former wife, she would take the absolute property in the fourth. (b)

The limitation of the widow's interest to the usufruct in one fourth in the event of there being more than three children, also took effect if there were grandchildren. They succeed to the rights of children when the latter are dead. But as grandchildren the issue of different deceased children succeed by representation, if there were ten grandchildren, the issue of three children, the widow would take her fourth, because the grandchildren taking by representation, would be accounted only as three; but if the ten grandchildren were the issue of only one child, then as they would take *per capita,* the widow would only take a share with them, that is one eleventh. (c)

If there be no children, the widow succeeds to the one fourth. When the succession devolves on ascendants or collaterals, she takes this fourth absolutely, and not merely the usufruct, but it seems if there are more than

(a) Stryk. Diss. 4, c. 1, n. 35. (b) Ib. n. 37.
(c) Carps. p. 3, const. 12, def. 11, n. 9. Stryk. ib. n. 38.
three ascendants or collaterals to take, she will be restricted only to an equal share with them. (a)

It has been doubted by some jurists whether the husband being *inops* and the wife *locuples*, enjoys the same right of succession to the wife's property and can claim a fourth. (b) But by other jurists it is considered, and with great reason, that the husband is equally entitled. (c)

II. The law of Spain adopts the order of succession *ab intestato* established by the civil law as to descendants, ascendants, and collaterals, and in respect of the husband and wife. (d)

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SECTION II.

SUCCESSION *AB INTESTATO* BY THE LAW OF HOLLAND.

The law of succession of North Holland and South Holland.—In Demerara, Berbice, Cape of Good Hope, and Ceylon.—Peculiar principles of the two laws.—As distinguished from the civil law.—Descendants, ascendants, collaterals.—The issue born in *concubinatu* on the same footing as other children born out of wedlock.—The succession of husband and wife to each other not recognized.

The law of Holland, following the civil law, made no distinction between inmoveable and moveable property as to the order in which persons succeeded to the estate of the intestate, and except as to the descent of feuds it conferred no preference on account of primogeniture, and it admitted females equally with males to the succession. (e)

(b) Barry, de Success. lib. 18. Gudelin, de Jure Noviss. lib. 2, c. 16.
Two rules of succession prevailed from time immemorial in different parts of Holland, the one called the Jus Scabinium or Schependomsch Recht, or South Holland law, the other called the Jus Aesdominum or Aasdomsch Recht, or North Holland law. The latter was adopted in the northern and the former in the southern part of Holland.

These laws, whilst they recognized the three classes of descendants, ascendants, and collaterals, and followed the order in which the civil law called them to the succession, adopted two different principles. It was the fundamental principle of the law of North Holland that the nearest in blood was the nearest in succession. According to this principle it did not admit representation; the sons excluded the grandsons, and the latter excluded the great grandsons.

The principle of the South Holland and Zealand law of succession was, that the property should return to the source from which it was derived, according to the order of descendants, ascendants, or collaterals from whence it had come. If therefore there were no children of the deceased, both the parents succeeded, but if either of the parents had died in the lifetime of the intestate, neither the surviving parent nor any others related by him or her to the deceased were admitted to the inheritance or to a share of it, and the relations on the side of the deceased parent, although more remote, were preferred to them.

In 1580 it was deemed advisable to adopt one uniform order of succession for the whole of Holland by combining parts of both laws, and in that year the political ordinance was passed by the States General, and in 1594 an edict was passed, containing an interpretation of it on certain points. (a)

It was however considered that the political ordinance of 1580 had given too decided a preference to the Jus

(a) Pol. Ord. 1st April, 1580. Van Leeuwen, Cens. For. part 1, lib. 3, c. 16.
Scabinium, and those who were attached to the Jus Aesdominum were dissatisfied with it.

On the 18th December, 1599, a placaat was passed, in which it was endeavoured to reconcile both laws. It names the particular places to which it extended or by which it was adopted. The other parts of Holland continued to adhere to the political ordinance of 1580.

By a resolution of the States General of the 4th of October 1774, the placaat of the 18th December 1599, or as it is called the North Holland or West Friesland law of succession ab intestato, is declared to be that which was to prevail in Demerara.

The same order of succession had been previously established in the colony of Surinam, by a decree of the States General, of the 30th August, 1742, and in Curaçoa by the decree of the 17th November, 1752.

The succession established by the political ordinance of the 1st April, 1580, is adopted in the other colonies in the West Indies under the decrees of 13th October, 1629, art. 59, and 14th April, 1763. It is also adopted in the colonies in the East Indies, under the decree of the 13th May, 1594, but with this modification—that if there are brothers and their children, the surviving parent takes half, but failing those, he succeeds to the whole. The same law was granted to the colony of Berbice, by a law of the 6th December, 1732, art. 30. (a)

The political ordinance of 1580, and the placaat of 1599, both concur with the civil law in giving the preference to the children of the deceased and their representatives, the latter taking per stirpes the share of their deceased parent. (b)

In default of children, if both the father and mother are living, they succeed to the whole inheritance, and exclude all the brothers and sisters of the deceased. (c)

(a) Law, 10th January, 1661. Vander Keessell, Th. 352.
So amongst the cognati either on the fathers’ or mothers’ side, or on both sides, the grandfather and grandmother, if both are alive, are preferred to the fathers’ brothers on the same side, and to their children. (a)

But if one only of the parents be alive, whether father or mother, which event is called the separation of the bed, then according to the law of South Holland the surviving parent never succeeds, but is excluded by the more remote of the relations. (b) But according to the placat of 1599, or the law of North Holland, the surviving parent is admitted with the brothers and sisters of the deceased being of the whole or of the half blood, and their children and grandchildren who take by representation; and if the deceased had no brothers by a predeceased parent, the whole succession devolves on the surviving parent to the exclusion of the more remote relations. (c) But the half brothers and sisters here contemplated are those who are related to the intestate by the side of the deceased parent.

If the grandfather and grandmother, or those who are above them, be not living, but one of them is dead, such survivor does not succeed to his grandchild. (d)

In the like manner all the collateral relations who are of kin to the deceased through the surviving father or mother are excluded. (e)

But by the placat they are admitted in their respective places. Thus then it is a general principle, that when one of the parents is dead the whole inheritance devolves on those who are united by the side of the deceased parent to him whose succession is in question to the exclusion of all others. (f)

In the succession of collaterals, according to the Poli-

(a) Pol. Ord. art. 15. Plac. art. 7. Voet, lib. 38, tit. 18, n. 11. Someren, de Repres. c. 2, n. 3.
(b) Pol. Ord. art. 22. (c) Placat, art. 3.
(d) Pol. Ord. art. 27. (c) Ib. art. 27. Interp. 13th May, 1594.
(f) Placat, art. 3.
tical Ordinance, when both parents are dead, brothers and sisters of the whole blood, together with their children and grandchildren, the latter taking by representation, are equally admitted to the succession; but those who are related on the side of the father or of the mother, or other collaterals who are related on one side only are admitted, with the half hand, *dimidiatâ manu*, so that those who are related on both sides take first one half of the whole succession, and the other half is equally divided between them and those who are related only on one side. When however there is only one of the parents dead, these would take *plênd manu*, if they were related to the intestate by the side of the deceased parent. (a)

Amongst other collaterals, the nearest in degree excludes him who is of a more remote degree, and when they are of equal degree, they succeed equally to the inheritance. (b)

According to the *placaat* of 1599, if there are neither children, nor father nor mother of the intestate, brothers and sisters and the children of deceased brothers and sisters by representation succeed. (c)

If there are only brothers and sisters of the whole blood, they are admitted to an equal share, but if besides brothers and sisters of the whole blood, there are other brothers and sisters, some of whom are related on the side of the father and mother, and others on that of the mother or on different sides, the inheritance is divided into two equal parts, and one half is divided between themselves and the relations on the father’s side, and the other half is divided with the relations on the mother’s side. But if with brothers and sisters of the whole blood there should be relations only on one side, either that of


(b) Pol. Ord. art. 28.

(c) Placaat, Success. art. 4.
the father or mother, the succession is also divided into 
two half parts, one of which is divided by the brothers 
and sisters of the whole blood, and they share the other 
with the relations on the one side or the other. (a)

In default of brothers and sisters of the whole blood, 
and their children and grandchildren, the property is 
divided into two equal parts, one of which belongs to the 
next of kin on the side of the father, and the other to 
those on that of the mother. If there should be next of 
kin only on one side, whether on that of the father or of 
the mother, they succeed to the whole inheritance, un-
less a grandfather or grandmother, or other ascendant, 
who is of a degree above them, and who is related to the 
deceased on the other side, should survive, in which latter 
case they take the other half with the surviving grand-
father, grandmother, or other ascendant. (b)

After the parents, brothers and sisters, and their chil-
dren and grandchildren, the grandfather, grandmother, 
and other nearest ascendants are called to the succession 
per capita, although there were on one side both grand-
father and grandmother, and on the other side only one 
of them a grandfather or grandmother surviving. (c)

After these succeed the nearest descendants, the 
brothers' or sisters' grandchildren, who are related to 
the intestate in the fifth or in any more remote degree, 
and they take per capita and not per stirpes, and without 
any distinction whether they are of one or both beds. (d)

Next to these are the uncles and aunts per capita, and 
their children of the first degree by representation, without 
distinction whether they are of one or other bed. (e)

In default of uncles and aunts, their children of the 
first degree take, and also great uncles and aunts with 
them per capita, and after all these, the next of kin also 
per capita, to the exclusion of all who are in a more 
remote degree. (f)

(a) Plac. Success. art. 4.  
(b) Plac. Success. art. 3.  
(c) Plac. art. 7.  
(d) Plac. art. 8.  
(e) Plac. art. 9.  
(f) Plac. art. 10.
In case all the half brothers and sisters, their children, and grandchildren, are related to the intestate only on one side, then according to the law of South Holland, they take only half of the goods, and the other half goes to the next of kin of the other side. (a)

According to the South Holland law of intestacy, although those who succeed to the inheritance are all equally near in degree to the intestate, yet they take per stirpes and not per capita. (b) But according to the law of North Holland, they take in this case per capita, and not per stirpes. (c)

All the persons above enumerated failing, then, according to the law of South Holland, all the goods of the intestate go to the next descendants of brothers' and sisters' grandchildren per capita; (d) after these, to the grandfathers and grandmothers of both sides, if both be alive; but if one of these be dead, either grandfather or grandmother, then his or her share goes to the nearest relations on such deceased grandfather's or grandmother's side, (e) viz. to the uncles and aunts of the intestate, and their children of the first degree by representation, in such way that the goods being divided into two parts, one half goes to the father's, and the other to the mother's side, the next of kin of the half bed dividing only with the half hand. (f)

When there are no uncles or aunts, then their children of the first degree take per stirpes, and on failure of these, then the nearest collaterals per capita. (g)

These two laws of succession present these peculiarities, 1st, According to the Pol. Ord. if either of the parents be dead, the property always devolves on those who are related on the side of the parent who had died, and

(a) Pol. Ord. art. 27.  
(b) Ib. art. 28.  
(c) Plac. art. 11, 12.  
(e) Ib. art. 25, 26. Interpr. 1594.  
(f) Ib. art. 23, 24, 27. Interpr. 1594.  
(g) Ib. art. 28.
never reascends. (a) 2ndly, The nearest descendants of the grandchildren on the side of the brother or sister are preferred to the grandfather and grandmother, if both are alive. (b)

According to the succession by the placaat, the nearest descendants of grandchildren on the side of the brother or sister are preferred to the uncles and aunts. And according to the succession established by both laws, the representation by which children succeed *per stirpes*, to the place of their parents in unequal degree, is confined to the children of brothers and sisters, and of uncles and aunts. (c)

It is a general rule that whatever is not expressed in the placaat, is not to be regulated or explained according to the Aesdominum or Schependomsch law, or the Ordinance of 1580, but according to the Roman written law.

Illegitimate children succeed to their mother, together with her legitimate children. (d) There is no distinction between children born in *concubinatu*, and those who are the fruit of any other illicit intercourse. (e) The right of representation is allowed to prevail amongst such children, whether they be legitimate grandsons descended from an illegitimate daughter, or whether they themselves be illegitimate. (f) And they may succeed to their maternal grandfather, and to their maternal relations. (g)

But illegitimate children can in no case succeed to their father, nor to any paternal ancestor. (h)

(a) Art. 27.  (b) Pol. Ord. art. 24, 25.
(c) Ib. art. 28.  Plac. Success. art. 11.
(g) Van der Keessell, Thes. 342, 3.  (h) Voet, ib.
Those who are the offspring of an adulterous or incestuous intercourse are incapable of succeeding. (a)

Those who are illegitimate at their birth, may become legitimate by the subsequent marriage of their parents, and such subsequent marriage will entitle them to succeed with any other children subsequently born of such marriage. (b)

Those who are legitimated by the Prince will be entitled to succeed, if such legitimation had taken place in the lifetime of the parent, when he has no other legitimate children. If he had legitimate children, it would be an act of injustice if their rights could be prejudiced, by admitting such illegitimate children to participate with them in the succession. (c)

The parents of illegitimate children are subject to the same rules with respect to their succession to the estate of those children, as the latter themselves are. (d)

As between brothers and sisters who are illegitimate, if they are the offspring of different mothers, there can be no succession amongst them. But if they have all the same mother, so that they might, according to a preceding rule, be called to the succession to her estate even together with legitimate children, the right of succession to each other would be admitted, although they might have different fathers. (e)

Collaterals being illegitimate, if they are related to each other on the mother’s side, will succeed each other. (f)

It has been a subject of controversy whether the law recognized any proximity beyond the tenth degree of cognati, and the seventh degree of cognati. Wissen-

(b) Voet, lib. n. 10.
(c) Ib.
(d) Ib. n. 15. Gaill, lib. 2, obs. 115.
(e) Voet, ib. n. 19.
bouchus, Mynsingerus, Faber, Hotoman, and others, were of opinion that none could be recognized beyond these degrees. But the better opinion seems to have been, that these degrees were referred to as examples, and not for the purpose of restriction. Such certainly is the law of Holland. (a)

If one line, or even one degree, should renounce the inheritance, it seems another line, and the next following degree may be admitted to the succession, notwithstanding it derives its descent from that which renounced. The heir or grandson may succeed his grandfather, although the intermediate parent may have renounced the inheritance of his father, or the son of a brother, when his father, the brother of the deceased, renounced the inheritance. (b)

It is not necessary that he who represents one nearer in degree should also be the heir of him who is nearer, for a grandson may succeed his grandfather after he has rejected the inheritance of his father, who had previously died, or after he has been for just cause disinherited by his father. (c)

So if the father and grandfather be both dead leaving a grandson surviving, and the father had not adiate the inheritance of his father (the grandfather), the grandson may reject the inheritance of his father and adiate that of his grandfather, or reject that of the grandfather and adiate that of the father. (d)

The proximity to the deceased is that which exists at the time of the death of the latter, but if a party died


(c) Someron, ib. n. 1, 4, 5, 6; c. 3, § 1, n. 4. Voet, lib. 38, tit. 18, n. 4.

(d) Matth. de Success. disp. 14, n. 5. Voet, ib.
testate, but the heir repudiated the inheritance, then as until this takes place the deceased cannot be said to be intestate, the proximity is that which exists at the time the instituted heir had thus repudiated. (a)

Neostad expresses an opinion that by the law of Holland the wife can in no case succeed to the husband, but that the property would devolve on the fisc. (b)

There can be no doubt that this species of succession does not take place in those parts of Holland in which the law of South Holland prevailed, and it prevails in all those parts of Holland using the placaat of 1580, because, although no mention is made of this right of succession in the placaat, yet by its terms recourse is to be had to that law in all the cases not therein expressly mentioned, and the decision reported in Neostad related to a question to be governed by the law of South Holland. (c)

In those parts of Holland which are governed by the placaat of 1599, it will be recollected that recourse is to be had to the civil law in all other cases than those which are expressly provided for, and therefore as the placaat does not provide for this case, it seems that reference must be made to the civil law under which this right of succession exists. (d)

On failure of all these persons the fisc succeeded to the inheritance as bona vacantia, subject to the debts which were owing by the deceased. When the estate is insolvent, or nearly so, the fisc will not interfere, but leaves the creditors themselves to proceed against the estate, and render it available for the payment of their demands. (e)

(a) Inst. lib. 3, tit. 2.
(c) Ib.  (d) Voet, lib. 38, tit. 18, n. 26. (e) Voet, ib. n. 27.
When the fisc succeeds, not in consequence of an intestacy, but because the persons instituted to the inheritance have renounced it, and no other next of kin have adiated it, he is bound to pay the legacies which the deceased had bequeathed in the same manner as if any other person had adiated the inheritance. (a)

When the succession devolves on the fisc as bona vacantia, his title does not extend to any other moveable property but that which is situated or found in the dominion or country of which he is fisc, for the fisc of another country will take possession of the real property which is there situated, nor will moveable or personal property of any description follow the domicile or the fisc of the deceased. (b)

Although the fisc has taken possession of the inheritance for want of heirs, yet when a person subsequently appears and shows himself to be heir, the fisc must make restitution. (c)

Grotius considers that unless he makes his claim within a year and a day, the fisc is not bound to make restitution. (d)

(a) Voet, lib. 38, tit. 18, n. 28. (b) Voet, ib. n. 29. (c) Ib. (d) Manud. ad Juris. Holl. lib. 2, c. 30; c. 28. Voet, ib. n. 29.
SECTION III.

LAW OF FRANCE.

I. Coutumes of Paris.—Except in fiefs there was no distinction founded on primogeniture or difference of sex.—The privileges conferred on the eldest son.—Succession distinguished as being in the direct descending, ascending, and collateral lines.—Rules applicable to all these species of succession.—Seisin of heir.—Rule applicable to succession in the direct descending line.—Equal division of the succession.—Preferences to either of the children not admitted.—Succession in the ascending line.—Rules in case there are biens propres.—Succession amongst collaterals.—Biens propres.—Moveables and acquêtes.—No preference given to the double line.

II. Normandy, coutume of.—Succession to biens propres in the direct and collateral lines.—Preference of males.—Primogeniture.—Succession to biens acquêtes and moveables.

III. Code civil.—Rejects the distinction between biens propres and acquêtes, and the rule paterna paternis, materna maternis.—Representation, to what extent admitted in the descending line.—Natural children.—Ascending line.—Collaterals.—Husband and wife.

In France, previously to the introduction of the Code Napoleon, the succession ab intestato was either that of the civil law, le droit écrit, or it was regulated in some provinces by particular coutumes. (a)

These coutumes were abolished by the Code Napoleon, which established one law of succession for the whole of the French empire. But the coutume of Paris is still retained in St. Lucia and Lower Canada, and forms therefore a subject of the present inquiry.

The order of succession was in some degree affected by the nature of the property which might be the subject of it. In the descent of immovable property held in fief or franc aleu noble, the eldest son enjoyed the droit

d'ainesse and preciput, and received a larger share than his coheirs.

He was not however entitled to the privileges incident to the succession to this species of property, unless the deceased had held it as a feud. It was not enough that he had a charge on it. A rent charge on it was not that species of feudal property to which the droit d'ainesse was annexed. (a)

The elder son could claim this privilege only by his title as heir, and therefore had no right to it if he did not accept the succession. (b)

Neither was he liable to a greater extent than his other brothers to pay the debts of the intestate. (c)

It was confined to the eldest son. If he renounced the succession, the second son could not claim it. (d)

It could not be claimed by the daughters. It was not in the power of the father to deprive his eldest son of this right, nor could he diminish it by any disposition, either by donation inter vivos, or by will.

The father and mother could not in purchasing a feud stipulate for its equal distribution amongst their children.

But if the children derived it from the gift of a third person, the latter might make such a stipulation, because he might make his gift on such terms as he pleased. He might therefore settle it so that it should devolve on the younger sons, and utterly deprive the elder of the droit d'ainesse. (e)

It was allowed amongst des roturiers as well as nobles.

The children of the elder son, whether males or females, represented their parent, and by such representation succeeded to the droit d'ainesse, to the same extent as he would have taken if he had been living. (f)

The eldest son had the same privileges in lands of that

(a) Pothier, Tr. des Success. c. 2, § 2.  
(b) Ib.

(c) Pothier, ib. § 5.  
(d) Pothier, ib. 2 Argou, liv. 2, c. 25.

(e) Argou, ib.  
(f) Ib.
species of alodial (franc aleu) property described as noble.

This right was not allowed to interfere with the legitimate of the other children, and if the rest of the property was not sufficient to give them their legitimate, the elder took the property the subject of the droit d'ainesse charged with their legitimate. (a)

Subject to this exception the children of the deceased were called equally, without distinction of sex or degree, to the succession of all the intestate's property, immovable and movable. (b) "Les enfants héritiers d'un défunt, viennent également à la succession d'iceluy défunt, fors et excepté des heritages tenus en fief, ou franc aleu noble, selon la limitation mentionnée au titre des fiefs." (c)

The succession is either the direct or collateral.

Succession in the direct line is that of descendants and ascendants.

There are some rules applicable to the order of succession in the direct and collateral line, and whether it be that of the direct descending or direct ascending line. There are also rules peculiar to each of these orders of succession.

It was a fundamental principle of the law whether the succession was that of the direct line or collateral, that "le mort saisit le vivant, son hir est proche et habile à lui succéder." (d) The import of this rule was that the property and possession of the estate of the deceased passed from him to his heir without any actual or corporeal possession of it taken by the latter. He was seised par la disposition of the coutume.

The possession which the heir acquires by the death of the ancestor is precisely that which was held by the ancestor himself, and thus the heir continues the possession commenced by his ancestor. The heir presumptive is

(a) 2 Argou, liv. 2, c. 25.   (b) Cugnet, tit. 12, art. 66.
(c) Cout. Paris, art. 302.   1 Dupless. p. 194 and p. 207.
(d) Art. 318.
seised, although he should be ignorant that the
has devolved on him, or be absent, or an infant. 65
And he is so completely seised, that he may susta
complaint en cas de saisine et de nouvelleté, a remedy
competent unless the person had in fact the seisin.

Another consequence of this rule is, that the legatees
must demand their legacies from the presumptive heir
as being seised of the estate from the moment of the an-
cestor’s death. It follows also that if one of the children
die after the death of his father without having assumed
the quality of heir, or without having renounced the
succession, he is deemed heir in every case in which it
would be most advantageous to him to sustain that cha-
acter. His share in the succession to his father’s estate
does not survive to the other children who are heirs, but
it is divided amongst them as a collateral succession.

The proximity of the heir and his ability to succeed
are two essential conditions required by the coutume.
The proximity is considered with reference to the time of
the decease.

The proximity does not transfer the succession in cases
where representation is admitted, or where the succession
regards biens propres, or in the collateral succession to
fiefs or biens nobles, in which the male excludes the
female in equal degree, or where the succession has been
renounced by a nearer relation, for in the latter case it
passes to the relation who is of the next degree.

Aliens who were not naturalized were incapable of
succeeding to the property of the deceased, either by
virtue of his will or on his intestacy, but it belonged to
the crown by the droit d’aubaine. The children of such
aliens, if they were born and resided in France, were ad-
mitt ed to the succession. (a)

Illegitimate children were excluded from the succes-

(a) Argou, liv. 1, c. 11.
sion to the property as well of the reputed mother as of the reputed father. (a)

Another rule which in some measure qualifies that of *le mort saisit le vif* is, that the assumption of the quality of heir is the voluntary act of him whom the law calls to the succession: "Il ne se porte héritier qui ne veut," and he is therefore not only left at liberty to renounce the succession, but before he incurs the obligations of heir, he must do some act to demonstrate his intention to take the succession. (b)

He cannot be both heir and legatee or heir and donee by act *inter vivos* if he be heir in the direct line. But if he be heir in the collateral line he may be also a donee by act *inter vivos*. (c)

Where one of several heirs renounces, his share accrues to the survivors. (d)

The rules peculiar to succession in the direct descending line are, that the same person cannot be both heir and donee by act *inter vivos*. (e)

An equal division of the property among the children is so much the object of the *coutume* that it cannot be defeated by the father or mother. (f)

They cannot by donation *inter vivos*, or by testament or *mortis causa* disposition, or in any other manner, give to one of their children coming to the succession any exclusive or greater benefit than is given by them to the others: "Père et mère ne peuvent par donation faîte entre-vifs, par testament et ordonnance de dernière volonté, ou autrement en maniere quelconque, avantage leurs enfans, venans à leurs successions, l'un plus que l'autre." (g)

It will have been observed that the article 302 uses

(a) Pothier, Tr. des Success. c. 1, § 3. Argon, liv. 1, c. 10.
(b) Art. 316, 317. (c) Art. 300, 301. (d) Art. 310.
(e) Art. 301. (f) Art. 302, 3, 4.
(g) Cout. Paris, art. 303. 1 Dupless. p. 203, 207, 208, and 212.
the expression "enfans héritiers," and art. 303, that of "venans à leur succession." If therefore any child had received an advancement from the father in his lifetime, which he would be bound to collate in order to secure the equality, which is the object of the coutume, and he consider it more beneficial to retain the advancement, he may renounce the succession. (a)

"Neanmoins, où celuy auquel on aurait donné se voudroit tenir à son don, faire le peut, en s'abstenant de l'hérédité, la légitime réservée aux autres enfans." (b)

The obligation to collate extends to that which had been given to their children or to their father or mother. (c)

The elder son takes the preciput and droit d'ainesse, but the daughters are excluded from both. (d)

Representation takes place in the direct line in infinitum, and the children of the eldest represent their father in the droit d'ainesse.

The order in which ascendants succeed is governed by the nature of the property, which is the subject of the inheritance. It is either moveable or personal, or it has been acquired by purchase or by descent. To moveable property and acquêts and conquêts, the father and mother, and failing them, the other ascendants succeeded, and excluded brothers and sisters and all other collaterals. (e)

The coutume differs from the civil law in this respect, that it does not admit the brothers or sisters of the deceased to share with the parents, and still less with their ancestors. Ascendants are preferred to all collaterals. (f)

But they do not succeed to immoveables, which are biens propres of another line, because "propres ne remontent point." (g) But by the right de retour they return to the donor. (h)

(d) See art. 19. (e) Art. 311.
(f) Pothier, des Success. c. 2, art. 1. (g) Art. 312. (h) Art. 313.
The coutume of Paris (a) declares "propre héritage ne remonte, et n’y succèdent les père et mère, ayuel ou ayeule, ou autres ascendants." A similar rule was adopted by the coutume of Orleans. (b) Its real import is, that the ascendants on the part of the father shall not succeed to the estate which their descendants had acquired by descent from the mother's side, and that the maternal ancestors shall not succeed to an estate which had descended to the children ex parte paternâ.

This rule follows from another rule in the same coutumes, paterna paternis, materna maternis, that is, the paternal estate belongs to the ancestors ex parte paternâ, and the maternal estate to the ancestors ex parte maternâ. The object of these rules was to preserve in each family the property which originally belonged to it. (c)

If however there were none of that family from whose side the property descended, the nearest ancestor of the other family was admitted to the succession of such property. (d)

If the child dies without leaving any issue, the father and mother have the usufruct for their lives in the property which was the conquêts of their community, and on the death of one of them had come to such child, even although it should have become the biens propres of such child. After the death of the father and mother, the property of which they had thus enjoyed the usufruct, returns to those who are the nearest of kin, from whom such property had been derived. (e)

Although the article speaks only of the father and mother, yet it seems that the grandfather and grandmother have a similar title to the usufruct in the conquêts to which the grandchild had succeeded. (f)

This usufruct is not admitted when there existed no community between the parents. But the mother will

(a) Art. 312.  (b) Art. 315.  (c) Pothier, Tr. des Success. c. 2, art. 2.  
not be deprived of it, although the extent of her interest in the community had been limited by the marriage contract to a certain amount, or although she has renounced the community.

The usufruct is admitted only in case the child has died without leaving any child or children, brothers or sisters, nephews or nieces. (a)

Although there should have been a separation of the goods, yet heritage acquired before the separation is subject to this provision. Being acquired by the father and mother, it was the conquêts of the community, which continued between them until the separation. The mother therefore surviving has the usufruct of that heritage which the son acquired in his succession to the father.

If the son has acquired any immovable property, and dies leaving it to his child, and the latter dies leaving no issue of his body and without brothers or sisters, the grandfather or grandmother succeed to it in pleine propriété, and exclude all collaterals.

This property which had devolved on the grandson from the father who had acquired it is un propre paternel, and the mother could not succeed to it, but the grandfather and grandmother ex parte paternæ succeed to it as being un propre of their side. The brothers and sisters who are thus preferred must, if the property be un propre paternel, be of the same blood on the father's side, for if they were related only on the side of the mother, they could not succeed. (b)

The coutume of Paris, when it declares that "propre héritage ne remonte," adds that the parents "toujours succédent aux choses par eux données à leurs enfans, décédés sans enfans et descendans d'eux." The father and mother or other ascendant who had given an heritage to a child succeed to him in respect of this heritage. The gift must have been of real estate, because in the

(a) Art. 230, Pothier, des Success. c. 2.  
(b) Art. 315.
succession to moveables no consideration is had of the source from whence they were derived. (a)

It is only in default of children of the donee that the donor and his ascendants succeed, and then they are preferred to all collaterals. (b)

The ascendant donor is preferred to another ascendant who is of a nearer degree. Thus, if a paternal grandfather had given an estate to his grandson, the former will be preferred to the father in the succession to that estate. (c)

If a man has given an heritage to his son, and the son has given it to his son, and the latter has died without children, the son and not the grandfather will succeed to it, for he has acquired the character of donor to his son. (d)

If a man give an estate to his son, which falls to the share of one of his children, who afterwards dies without children, the brothers and sisters will succeed to it, because they are the children of the donor. (e)

It is not by the title of reversion as in the civil law, but by that of succession, properly so called, that the donor ascendant succeeds to those children in respect of the estate which he had given them. (f)

If the child has acquired the estate by descent, the ascendants who succeed him are those of the side from whence the estate originally descended.

The coutume has not declared whether the brothers and sisters of the deceased are to be preferred to the grandfather and grandmother in the succession to biens propres, but as they are preferred to brothers and sisters and all collaterals in the succession to personalty and acquêts, the same rule ought to be observed in the succession to the biens propres. (g)

In collateral succession representation is admitted

(a) Pothier, Tr. des Success. c. 2, art. 2. (b) Ib. (c) Ib.
(d) Ib. (e) Ib. (f) Ib. (g) Ib.
when the nephews and nieces come to the succession of their uncle or aunt with the brothers and sisters of the intestate, and in such case the nephews and nieces take per stirpes. (a)

But if the nephews being in equal degree succeed in their own right and not by representation, they take per capita. (b)

If the deceased left brothers and sisters, one of whom renounced the succession, the children of him so renouncing will not succeed in his place by representation with his uncles and aunts. There can be no representation of him who is still living, and thus the part renounced accrues to the coheirs, and does not pass to his children. (c)

In the case where the brother of the deceased had renounced, and there were only nephews coming to the succession of their uncle, it has been a question whether they ought to divide per stirpes or per capita.

If the brother has renounced aliquo accepto, the succession is divisible per stirpes, because that which he has received is considered to be in the place of his share in the succession. But if the renunciation were made nullo accepto, it ought to be divided per capita, as if there had been only nephews. (d)

In the collateral succession males excluded females when they were in the like degree. (e)

It is the principle of representation, that those representing can take no greater right than belonged to the person whom they represent. Therefore nephews, the children of a sister, as representing their mother, coming to the succession of their uncle, are excluded from fiefs by the brothers of the deceased. (f) Now their mother

(a) Cout. Paris, art. 320. (b) Art. 321.
(c) Ferriere sur l'art. 320. (c) Art. 25, 325, 326, 327.
(d) Arrêt, July 9th, 1602. Ferriere, ib. (f) Art. 322.
had been excluded by the rule that, in collateral succession, the males exclude the females.

It is considered by Pothier, that females, the issue of a male, ought to succeed to fiefs by representation with their uncle. (a) This opinion is warranted by an arrêt of the 25th March, 1631, but the contrary doctrine was established by a subsequent arrêt, and which Ferriere considers more conformable to the spirit of the coutume. (b)

But males, the issue of daughters amongst collaterals succeed to fiefs with their cousins german being males, and descended from males. As they all come to the succession in their own right and not per stirpes, it is immaterial whose issue they are, but it is sufficient that they are males, and not included in the prohibition which this article contains, and by which males, the issue of females, are excluded from the succession of their uncle and aunt only when they succeed par representation with their uncles.

If any part of the inheritance consist of fiefs the children of brothers do not exclude aunts the sisters of a deceased brother, but the latter as being nearer succeed in their own right, together with the children of the brothers. If there are several children of a brother, they take only pour une tête with their aunt. (c) The aunt in this case succeeds, because she is not of the like degree, but nearer to the deceased than the nephew. She succeeds therefore ex sud personæ et de son chef, whilst the nephew succeeds only by representation.

The children of an elder brother, whether males or females, surviving their father and coming to the succession of their grandfather or grandmother, represent their father in his droit d'ainesse. If there are only daughters, they all represent together their father pour une tête in

(a) Pothier, ib.  
(b) Ferriere, art. 322.  
(c) Art. 323.
the *droit d'airesse*, but amongst themselves this right is not admitted in the collateral line. (a)

In the collateral succession to *biens propres* the relations who are the most near on the side and line from whence the *biens propres* came to the deceased succeed to them, even although they should not be the nearest relations of the deceased. "Et quant aux propres héritages, lui succèdent les parens qui sont les plus proches du côté et ligne dont sont advenus et échus au défunt lesdits héritages, encore qu'ils ne soient plus proches parens du défunt. Fins et excepté qu'en fiefs le mâle exclut les femelles en pareil degré : sans aussie exclure les en-fans des frères et sœurs venans par représentation." (b)

A subsequent article explains who are intended by the description *les plus proches du côté et ligne* : "Et sont réputez parens du côté et ligne, supposé qu'ils ne soient descendus de celui qui a acquis l'héritage." (c)

It is sufficient that they are collaterally related to him by whom the estate was first brought into the family; but those who are directly descended from him exclude those who are related to him only collaterally. (d)

If there are no heirs on the side and line from whence the *biens propres* were derived, the *coutume* calls to the succession the next heir of the other side and line.

It does not limit the relationship amongst collaterals to any degree: "Et s'il n'y a aucuns héritiers du côté et ligne dont sont venus les héritages, ils appartiennent au plus prochain et habile à succeder, de l'autre côté et ligne, en quelque degré que ce soit." (e)

There is no distinction of lines in the collateral succession to moveables or immovablels being *acquêts*.

(a) Art. 324.    (b) Ferriere, art. 326.    (c) Ib. art. 329.
(e) Ferriere, art. 330.
The nearest relations of the deceased who has died without heir succeed him. The brothers and sisters, and other collateral relations who are related to the deceased only on the side of the father, or only on that of the mother, succeed equally with the other brothers, sisters, and collaterals who may be related on both the father and mother's side: "Frères et sœurs, supposé qu'ils ne soient que de père ou de mère, succedent également avec les autres frères et sœurs de père et de mère, à leur frère et sœur, aux meubles, acquests et conquests immeubles." (a) "Ce que dessus a lieu aux oncles et autres parents collatéraux, qui ne sont joints que d'un côté." (b)

It will be seen that the coutume rejects the preference given by the civil law to those who were related by the *duplex vinculum* double bond. And hence those who were related only on the side of the father and mother were transferred to those who were related only on that of the father or that of the mother. (c)

The coutume of Normandy in the order of succession which it establishes makes a distinction between immoveable estate which is propre, and that which is acquired and moveable.

In the succession to *biens propres*, whilst there are males or descendants of males, the females, or the descendants of females, are not admitted to the succession either in the direct or collateral line. (d)

Females might be called either by the father and mother to the succession together with their brothers, or the brothers might admit them to the succession instead of paying them the dot promised by the father and mother, or the daughters would become entitled to

(a) Ferrières, art. 340.  (b) lb. art. 341, 325.
(c) Pothier, Tr. des Success. c. 2, § 2.
share the common property of their parents to the extent of their marriage advancement, that is, a third of the common succession of the father and mother, if the brother refused to give them a dot corresponding with it. (a)

The elder son is seised of the real estate, being biens propres, from the death of his parents, in order that he may allot the part to the younger sons. He receives the fruits or rents for his own use, until the brothers demand a division, if the brothers are of age when the succession has devolved: If they are minors, he is bound to render an account of the rents from the time the succession has devolved, because he is regarded as the natural and lawful guardian of his brothers and sisters. (b)

So the grandson, the son of the elder son, is seised of the estate from the death of his grandfather and grandmother by representation in the place of his father, in order that he may make the allotment for his uncles, and he also receives the fruits for his own use until the uncles demand the allotment of the succession. The younger of the uncles makes the lots, but the choice of them is with the grandson. (c)

If there are no children of the elder son, the second son succeeds in his place, and to his rights of primogeniture, and so with respect to the other sons. (d)

If there be no other than a daughter of a deceased eldest son, she is called in the direct succession in the place of her father by representation, and she enjoys the rights of primogeniture which belonged to him, and even in the collateral line she enjoys the same rights in respect of biens propres. (e)

Neither the father nor mother, grandfather, grandmother, or other ascendant can ever succeed to the child so long as there is any descendant of him living. Hence

(a) Art. 249.  (b) Art. 237.  (c) Art. 238.
(d) Art. 239.  (e) Art. 240.
if a child dies without leaving issue of his body, his brothers will succeed him to the exclusion of his father, mother, or other ascendant, and of his sisters; and if he has left only sisters, they will exclude the parents and other ascendants, whether the property was *propre* or *acquêt*, moveable or immovable. And this rule holds, although the brother or sister surviving should only be of the half blood. *(a)*

Upon the death of the child without issue, and leaving neither brother nor sister, the father and mother are called to the succession to the exclusion of uncles and aunts, whether the property be *propre* or *acquêt*. If it be *propre*, the father succeeds only to such heritage as was *propre* paternal, and the mother to that which was *propre* maternal. *(b)*

The uncles and aunts exclude the grandfather and grandmother from the succession to their nephews, and also their own children, when the property is *propre*. *(c)*

In the succession to *biens propres*, representation is admitted to the seventh degree inclusive, and the estate is divisible *per stirpes* and not *per capita*.

The *propres* paternal always return to the relations *ex parte paternā*, and those which are maternal to the relations *ex parte maternā*.

Failing the side and line from whence the estate came, the relations of the other line cannot succeed to it, but it will devolve on the seigneur or fisc. *(d)*

The person in order to succeed to *biens propres* must be of the stock and line of him by whom they were acquired, and it is not sufficient to be related to him whose succession is in question, if he was not the first acquirer of the *propre*.

Males and their descendants always exclude females and their descendants in the succession to *biens propres*, both in the direct and collateral lines, although the

*(a) Art. 241.  (b) Art. 242.*

*(c) Art. 243.  (d) Art. 245.*
females and their descendants are more nearly related to
the ancestor whose succession is in question. So long
therefore as there are males, females, although descended
from males, or the descendants of such females, cannot
succeed to biens propres. This must be understood of
the case in which males and females are of the same
line and stock, for males ex parte paternâ do not exclude
daughters from biens propres maternal, nor males ex
parte maternâ exclude daughters ex parte paternâ.

This article applies to such property as may have
descended not only from the father and mother, but also
from any other paternal or maternal relations, provided
it become propre in the ancestor whose succession is in
question. The rule paterna paternis, materna maternis,
also prevails in the collateral line.

The property becomes propre in him who first acquires
it by title of succession. (a)

In the succession to immoveables being acquêts or
conquêts, and to moveables, representation is admitted
amongst nephews and nieces, and uncles and aunts in
the first degree. (b)

In the succession of a deceased brother who had left
no children, his brothers and sisters would exclude his
grandchildren. (c)

It is sufficient that the heir was capable of coming to
the succession by representation. His renunciation of
the succession does not produce less effect than the death
of the immediate heir in enabling the person capable of
succeeding by representation to enjoy the same rights
and advantages as such heir would have enjoyed if he
had not renounced the succession. (d)

The nephews and nieces who succeed by representing
their father or mother, take with the uncle and aunt
per stirpes. They can only take the share to which the
father would have been entitled if living. (e)

(a) Art. 247. (b) Art. 304. (c) Ib.
(d) Ib. (e) Art. 305.
If there were one or more sisters of the deceased surviving, they are not excluded from the succession by the children of the deceased brother, as they would have been by their father if living, but the latter succeed per stirpes with their aunts; and in this case also the children of deceased sisters succeed per stirpes as representing their mothers in the same manner as the children of the brothers. (a)

If the deceased left any brothers, the children of a deceased sister will not take with them, but if there were no brother surviving the deceased, they would take with their aunt. (b)

The children of the elder brothers succeeding by representing their father are not entitled to the droit d'ainesse in the succession of moveables, acquêts or conquêts, to the prejudice of their uncles or aunts. (c)

Brothers exclude the sisters, and the descendants of brothers exclude those of the sisters in equal degree. (d)

When the collaterals on the father's side and those on the mother's side are of equal degree, those on the paternal side are preferred. (e)

The double vinculum is not admitted. The brother on the father's side only, or on the mother's side only, succeeds equally with the brother who was descended both from the father and mother. (f)

The children of the brother on the mother's side in the first degree succeed with the children of the brother, who was both of the father and mother's side. (g)

The brother of the half blood is preferred to the sister of the whole blood, but the sister of the whole blood is not preferred to the sister of the half blood. (h)

In this succession there is a representation of the sex, and therefore when the descendants of a brother and sister are in equal degree, the descendants of the brother

(a) Art. 306.  (b) Art. 307.  (c) Art. 308.
(d) Art. 309.  (e) Art. 310.  (f) Art. 311, 312.
(g) Art. 313.  (h) Art. 313, 314, 316.
are preferred to those of the sister. Thus the descendants of a brother, whether they be male or female, exclude the descendants of a sister in equal degree. (a)

In the succession to a deceased brother or sister who has left no children, the brothers share equally without any droit d'ainesse or preciput. (b)

The nephews, great nephews, and others being in equal degree, succeed to their uncles and aunts per capita and not per stirpes, without any preciput in favour of the elder, because in this case they succeed in their own right, and not by representation. (c)

If there be on one side two sisters and a brother, and on the other side a nephew or great nephew, the succession of the uncle will be divided into four portions, three of which will belong to the brother, one in his own right, and the other two as the parts of his sisters, and the fourth will belong to the nephew or great nephew. (d)

The uterine sisters of the father are the paternal aunts of their nephews and nieces, and in that character exclude uncles and aunts on the mother's side in the succession to moveables, acquêts and conquêts. (e)

III. The code civil adopts the maxim, "le mort saisit le vif." It declares "les héritiers légitimes sont saisis de plein droit des biens, droits et actions du défunt, sous l'obligation d'acquitter toutes les charges de la succession." (f) But natural children, or the wife, or the state must cause themselves to be put into possession by the process of law. (g)

A foreigner is not permitted to succeed to property which his relation, foreigner or Frenchman, possesses in the territory of the republic, except in those cases and in the manner in which a Frenchman succeeds to

(a) Art. 317.  (b) Art. 318.  (c) Art. 320.
(d) Ib.  (e) Art. 328.  (f) Art. 724.
(g) Toullier, liv. 3, tit. 1, c. 3, n. 153, et seq.
his relation possessing property within the country of such foreigner.

It rejects the rule *paterna paternis, materna maternis*, and considers neither the nature nor origin of the property with a view to the regulation of the succession to it. *(a)*

But if the succession devolves on ascendants or collaterals, it is divided into two parts. "Toute succession échue à des ascendants ou à des collatéraux se divise en deux parts égales; l’une pour les parens de la ligne paternelle, l’autre pour les parens de la ligne maternelle." *(b)*

It admits representation in *infinitum* in the direct descending line. It is admitted in all cases, whether the children of the deceased do or do not come in competition with the descendants of a child previously dead. *(c)* There is no representation of persons living, but only of those who are civilly or naturally dead. There is therefore no representation of a person who has renounced the succession and is still living. *(d)* Children or their descendants succeed to their father and mother, grandfathers, grandmothers, or other ancestors without distinction of sex or primogeniture, and although they be the issue of different marriages. *(e)*

They succeed by equal portions and *per capita* when they are all in the first degree, and called in their own right, and they succeed *per stirpes*, when they come all or in part by representation.

The code civil gives to natural children a certain interest in the property of their reputed father or mother.

If the father or mother has left lawful descendants, the interest of the natural child extends to one third of that part of the succession which the child would have taken if he had been legitimate. It extends to a moiety when the father or mother does not leave descendants, but

many ancestors, or brothers or sisters; to three fourths, when the father or mother does not leave either descendants or ancestors, either brothers or sisters; he takes the whole of the property when his father or mother does not leave relations of a degree capable of succeeding. (a)

In case of the previous decease of the natural child, his children or descendants may claim the interest given by the preceding articles.

From this interest the natural child or his descendants must deduct all which they have received from the father or the mother whose succession is opened.

Children who are the fruit of adulterous or incestuous intercourse are not entitled to the benefit given by the preceding articles. They are entitled to a subsistence.

The succession to a natural child deceased without issue, devolves upon his father or mother who may have acknowledged him, or by moieties to both, if he has been acknowledged by both.

If the father and mother of the natural child have predeceased him, the property which he has received from them passes to the legitimate brothers or sisters. All other property passes to the natural brothers or sisters or their descendants.

Representation does not take place in favour of ascendants, the nearest in each of the two lines always excludes the more distant. (b)

If the deceased has left neither posterity, nor brother nor sister, nor descendants from them, the succession is divided into moieties between the ancestors of the paternal line and the ancestors of the maternal line.

The ascendant who is found in the nearest degree receives the moiety allotted to his line to the exclusion

(a) Art. 757. 
(b) Art. 741.
of all others. Ascendants in the same degree succeed \textit{per capita}. \(a\)

Ascendants succeed to the exclusion of all others to things given by them to their children, or descendants dead without issue, when the subjects given are found again in the succession in specie. If they have been alienated, the ascendants receive the price which they may be worth. \(b\)

When the father and mother of a party dead without issue have survived him, if he has left brothers, sisters, or descendants from them, the succession is divided into two equal portions, of which a moiety only devolves upon the father and mother, who share it equally between them. The other moiety belongs to the brothers and sisters, or descendants from them. \(c\)

If a person dead without issue leave brothers, sisters, or descendants from them, if the father or the mother be previously dead, the portion which in such case would have devolved on him or her according to the preceding article is re-united to the moiety belonging to the brothers, sisters, or their representatives. \(d\)

In the collateral line representation is admitted in favour of the children and descendants of brothers and sisters of the deceased, whether they come to the succession concurrently with uncles or aunts, or whether, all the brothers and sisters of the deceased being previously dead, the succession has devolved upon their descendants in equal or unequal degrees. \(e\)

In case of the previous decease of the father and mother of a person dead without issue, his brothers, sisters, or their descendants are called to the succession, in exclusion of ascendants and other collaterals. They succeed either in their own right, or by representation. \(f\)

\(a\) Art. 746. \hspace{1cm} (b) Art. 747. \hspace{1cm} (c) Art. 748.

\(d\) Art. 749. \hspace{1cm} (e) Art. 742. \hspace{1cm} (f) Art. 750.
If the father and mother of the party dead without issue have survived him, his brothers, sisters, or their representatives are only called to a moiety of the succession. If only the father or the mother has survived, they take three-fourths. (a)

The division of the moiety, or of the three-fourths devolved upon the brothers or sisters, according to the terms of the preceding article, is effected between them by equal portions, if they are all by the same bed; and if they are by different beds, a division is made of a moiety between the two lines paternal and maternal of the deceased. Those of the whole blood take shares in both lines, and those of the mother's side, and those on the father's side, each in their own line only. If there are brothers and sisters on one side only, they succeed to the whole, to the exclusion of all the other relations of the other line. (b)

In default of brothers and sisters, or descendants from them, and in default of ascendants in one or other of the lines, one moiety of the succession devolves on the surviving ascendants, and the other moiety on the nearest relations of the other line. If there are more collateral kindred than one in the same degree, they take *per capita*. (c)

In the case mentioned in the preceding article, the father or mother surviving has the usufruct of a third of the estate to which he or she does not succeed absolutely. (d)

Relations beyond the twelfth degree do not succeed.

In default of relations capable of succeeding in one line, the relations of the other line succeed to the whole. (e)

Where the deceased leaves neither kindred within

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(a) Art. 751.  
(b) Art. 752.  
(c) Art. 753.  
(d) Art. 754.  
(e) Art. 755.
degree capable of succeeding, nor natural children, the property in the succession belongs to the surviving husband or wife not divorced. (a)

For want of husband or wife survivor, the succession devolves on the state. (b)

(a) Art. 767. (b) Art. 768.
CHAPTER III.

SECTION I.

LAW OF SCOTLAND.

I. Succession ab intestato, to immovable property.—Distinction between immovable and moveable property in the order of succession.—In the succession to immovable.—Distinction between heritage and conquest.—Succession to heritage.—Primogeniture.—Preference of males.—Order in which it descends.—Representation.—Ascending line.—Collaterals.—Succession to conquests.

II. Succession to moveable property.

In Scotland, the succession to immoveables is in many material respects distinguished from that to moveables. The successor in immoveables alone acquires the name of heir, and therefore immoveables are called heritable rights, and that part of the moveables which belongs to the heir is called heirship moveables. Heirs in law are called universal successors, "quia sucedunt in universum jus quod defunctus habuit." They so completely represent the deceased as to be one person with him. (a)

By universum jus is understood the whole right, not simply et in solidum, but the whole rights of such a kind either in solidum or at least pro ratâ parte, as he who succeeds in a half or third part of all the defunct's rights activè et passivè, succeedeth in universa et singula jura, in all and every right, though not in totum et solidum, in the whole, or every part of every right. (b)

(a) Stair, b. 3, tit. 4, § 23.  
(b) 1b.
In the succession to immoveable property, there is a distinction between heritage and fees of conquest. The nature of conquest as distinguished from heritage has been explained in a preceding volume. (a)

In the succession to heritable property the law gives the preference to the elder by birth, and to males and their issue according to seniority. It admits representation of parents by their children. In default of males, equal partition is made among females, their issue taking their portions according to the same rules.

The heritable estate, therefore, descends ab intestato to the lawful issue of the person who died last vested and seised in the land; and of that issue, the eldest son, and his issue male and female in their order, take first; next, the second son, with his issue male and female in their order; and so on through all the sons (with their issue) in their order. (b)

Failing the male issue and their issue, the female issue (the issue of those who have died taking their mother's portion) inherit pro indiviso, as heirs portioners. And the daughters of whatever marriage succeed equally to subjects divisible. (c)

The issue of each daughter take their mother's place first, sons in their order, then daughters equally.

The eldest heir portioner by legal succession, not by provision, (d) has right (as to a praecipuum, without compensation to her sisters) to the mansion-house of an estate in the country; (e) and as connected with it, to

(b) Craig, 13, § 19; 14, § 3 and 7. Stair, b. 3, tit. 4, § 33. Erak. b. 3, tit. 8, § 5.
that share of the estate on which it stands. (a) She is also entitled, in the same way, to such peerages, dignities, and titles of honour, as are not limited otherwise.

The eldest has also right to subjects indivisible; and amongst others to superiorities. (b) This is, however, on another footing from the right to the præcipuum; she must give compensation for such subjects. (c) This applied to a house in town, (d) and to a small villa in the country. (e)

If before the opening of the succession, a descendant has died, who, if alive, would have succeeded as heir, his place is supplied, and the succession taken, by his lineal descendant. This is called representation. (f)

Failing children, grandchildren, and their descendants, the succession, instead of ascending to the grandfather, goes in the collateral line.

Heritage, after descending as far as possible, ascends gradually. On the death of a middle brother, his younger brothers (and their issue), in their order from elder to younger, succeed before the elder: and elder brothers succeeding to younger are, with their issue respectively, preferred in an inverse order, viz., from younger to elder upwards. (g)

Where a woman dies leaving heritage, her brothers and their issue succeed before her sisters, according to the order now stated. (h)

The germain or full-blood succeeds in the first place, according to the above order. (i)

(a) Houston, Dec. 18, 1742, Dict. 5366.
(b) Lady Luss, July 30, 1678, Dict. 15,028.
(d) Wallace, Jan. 20, 1758, Dict. 5371.
(e) Smith, June 12, 1792, Dict. 5381.
(h) Stair, Ib. § 33.
The half-blood *consanguinean* succeeds after the full-blood; and brothers first in the above order. If they are issue of a former marriage, the youngest brother *consanguinean* first, and gradually upwards; if of a subsequent marriage, the eldest first, and gradually downwards: (a) sisters *consanguinean* succeed to brothers *consanguinean* as heirs portioners. The half-blood *uterine* is excluded. (b)

After collaterals (or if there be none) the heritage goes to the father.

1. Heritage ascends to the father and his relations to the exclusion of the maternal line. (c)

2. The succession never ascends to the mother or her relations. Even the mother’s own estate after vesting in her son or daughter, never ascends to the mother again, or through her. (d)

The crown, as *ultimus heres*, takes the *haereditas* on failure of the three lines of succession now stated. This is a caducity right; not a right of succession. (e)

The conquest of a middle brother dying without issue, or of the son of a middle brother failing issue, goes to his immediate elder brother or uncle alive; or, if there be no elder, to the next younger alive, failing issue of intermediate brothers or uncles who have died. (f) The conquest of a sister dying without issue goes to her next elder brother; or failing elder, and their issue, to the next younger brother alive, preferable to hersisters. (g)

(a) Lady Clarkington, July 20, 1664, Dict. 14,867; 2 Craig, 15, § 19.
(d) 2 Craig, 17, § 9. Ersk. Ib. § 9, 10.
(f) Ersk. b. 3, tit. 8, § 14.
(g) Stair, b. 3, tit. 4, § 33. Cunninghame, Dec. 7, 1770, Dict. 14,875.
When there are only sisters, there is equal partition in conquest, as in heritage. (a) In conquest as in heritage, the whole blood excludes the half; (b) but if there be no brothers or sisters germain, or issue of them, the rule holds as to brothers consanguinean. (c)

There is representation as in heritage. If the succession come from the youngest brother dying without issue, the immediate elder brother takes both the heritage and the conquest. (d)

Subjects which were truly heritage in the person of the deceased do not become conquest by the interposition of a conveyance in his favour. (e)

Things which come by force of destination, and are taken up by service as heir provision, are not conquest but heritage; as an estate coming to a middle brother by deed of entail. (f)

Conquest, in descending from the heir of conquest to his heir, becomes heritage. (g)

But it seems necessary to this effect, that it should be vested in the heir of conquest by titles made up in his person; otherwise if it remained in hereditate jacente of the acquirer, it would go to his heir of conquest. (h)

Succession to conquest, as contradistinguished from succession to heritage, takes place only where a middle

(b) Fount, vol. 1, p. 6. 3 Brown’s Sup. 241.
(c) 2 Craig, 15, § 19. Lady Claxton, July 20, 1664, Dict. 14,867.
Stair, b. 3, tit. 5, § 10.
(f) Boyd, June 28, 1774, Dict. 3070. 1 Hailes, 577. Mark the error in Bro. Synopsis, 85, Voce Her. and Con. Bell’s Princ. 1674.
(g) Ersk. Ib. § 15.
(h) Hope’s Min. Fract. p. 170, § 47. See also Aitcheson’s case, March 7, 1829, 7 S. and D. 558.
brother or sister (or their issue) dies, leaving younger and elder brothers or uncles. The younger brother (or uncle) and his issue takes the heritage; the elder and his issue the conquest. (a)

The law recognises no relationship between the consanguinean relations, that is, persons born or descended of the same father, but not of the same mother; and the uterine relations, that is, persons born or descended of the same mother but not of the same father; and there is no succession ab intestato of the one to the other.

Relationship of full or half-blood, according to the books of the Feus, stopped at the seventh degree; (b) but it is reckoned in Scotland to extend as far as the evidence of propinquity will reach. (c)

II. The whole moveable estate, if the deceased die unmarried, or the dead’s part, if married, descends thus by law: 1. The free moveable estate divides among the nearest of kin at the death; 2. The full blood excludes the half; 3. The lines of succession follow the same order as in heritable succession, first, descendants, next, collateral, finally, ascendants, with their collaterals; 4. If the deceased’s heir in his heritable estate comes in with the other next of kin, and do not choose to share the heritable estate with the other next of kin, he will be entitled to no share of the moveables. (d)

(a) Craig, Stair, and Ersk. ut sup. Cunningham, Dec. 7, 1770, Dict. 14,875.
(b) Lib. 1 Feud. tit. 1, § 4.
(d) Ersk. b. 3, tit. 9, § 2-4.
SECTION II.

LAW OF ENGLAND.—SUCCESSION TO IMMOVEABLE PROPERTY.

I. Succession to immoveable property before the act 3 & 4 W. 4, c. 106.—Estates in fee simple.—Seisin of Ancestor.—Remainders.—Reversions.—Heir by the common law.—Preference to primogeniture and males.—Lineal descent.—Coparceners.—Collateral heirship.—Whole blood.—Persons incapacitated to succeed.

II. Alterations in the law of descent by that statute.—Seisin.—Admission of male ascendants.—Half-blood.—Descent and purchase.

In England the law of succession to immoveable property is in many respects essentially different from that which is admitted in the succession to moveable.

The act of the 3 & 4 W. 4, c. 106, has made some important alterations in the former law of descent of immoveable property.

That statute does not extend to nor has it been adopted in the colonies by any local acts, except in Upper Canada. It is necessary, therefore, to give a summary of the law as it existed before the statute was passed, and then to state the alterations which have been made by it.

Lands of which a person dies seised in fee simple, otherwise than as a joint tenant, and which he has not disposed of by will, lineally descend to his issue in infinitum. But they do not lineally ascend.

The seisin here intended is either actual, which supposes entry into land, or something analogous to such entry with respect to incorporeal tenements; or it is virtual, which consists in the actual possession of the tenement by another person entitled to a chattel interest therein, connected in privity, or consistent in title with
the estate in fee simple of the person thus virtually seised, no freehold estate being interposed. (a)

Where a person dies actually seised, his heir before entry is said to have a seizin in law, which qualifies him to defend his right in an action, or to receive a release of the adverse claimant's right, but does not enable him, without a seizin in deed, to transmit the estate by descent to his own heir as such. (b)

If a person have purchased (i.e. acquired by conveyance or devise) lands or tenements in fee simple, of which, from the nature of his estate, he cannot obtain seizin, these, on his intestacy, will also descend to his heir. (c) Of such a nature is a remainder expectant upon a particular estate of freehold; and this remainder vesting in the heir by descent will not, if it remained unaltered, descend to his heir as such, but still to the heir of the first purchaser. A reversion on the contrary, is not purchased at all, unless it be aliened after its creation; and where there has been no such alienation, it descends to the heir of the person who created it; and this, although it were created by will, in which case the testator from whom it descends, himself never held it. (d) And the same rule holds where a person having a remainder or reversion by descent, makes a lease of it for life, and thus creates a new reversion, for this will descend to his own heir. (e)

The male issue is admitted before daughters, and when there are two or more males in equal degree, the eldest only inherits, but the females altogether. The eldest or only legitimate son is in all cases therefore heir by the common law. By the custom of gavelkind which

(a) Doe v. Keen, 7 T. R. 386.  
(b) Litt. § 448, 681.  
(c) Co. Litt. 3 b. Co. Litt. 11 b. 14 b.  
(e) Co. Litt. 14 a.
prevails in Kent, all the sons are heirs equally. By the
custom of borough English, the youngest son is heir. (a)

The lineal descendants in infinitum of any person de-
ceased represent their ancestor; that is, stand in the
same place as a person himself would have done, had he
been living. Hence the son or grandchild, whether son
or daughter of the eldest son, succeeds before the younger
son, and the son or grandchild of the eldest brother be-
fore the younger brother. (b) And so through all the
degrees of succession, by the right of representation the
right of proximity is transferred from the root to the
branches, and gives them the same preference as the
next and worthiest of blood.

This right transferred by representation, is infinite and
unlimited in the degrees of those that descend from the
represented. For the son, the grandson, and the great
grandson, and so in infinitum, enjoy the same privilege
as those from whom they derive their pedigree had,
whether it be in descents lineal or transversal; therefore
the great grandchild of the eldest brother, whether it be
a son or a daughter, is preferred before the younger
brother, because though the female be less worthy than
the male, yet they stand in right of representation of the
eldest brother who was more worthy than the younger. (c)

So, if a man have two daughters, and the eldest dies
in the life of the father, leaving six daughters, and then
the father dies, the younger daughter shall have an equal
share with the other six daughters, because they stand
in representation, and stead of their mother, who could
have but a moiety.

On failure of lineal descendants, or issue of the person
last seised, the inheritance descends to his collateral re-
lations being of the blood of the first purchaser, subject
to the preceding rules. The great and general princi-
ple, says Sir W. Blackstone, upon which the law of

(a) Litt. 265. Ib. 165. (b) Hale's Hist. Com. Law, c. 11. (c) Ib.
collateral inheritances depends, is, that upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser; or that it result back to the heirs of the body of that ancestor from whom it either really has, or is supposed by fiction of law to have originally descended; according to the rule laid down in the year books, Fitzherbert and Hale, that he who would have been heir to the father of the deceased, and of course to the mother or any other real or supposed purchasing ancestor, shall also be heir to the son. A maxim which holds universally, except in the case of a brother or sister of the half blood. (a)

It was a maxim of the old law, that no person could inherit an estate unless he was descended from the first purchaser or acquirer of it. For when feuds first became hereditary, no person could succeed to a feudum novum, but the lineal descendants of the first acquirer, who was called the perquisitor. So that if a person died seised of a feud of his own acquiring without leaving issue, it did not go to his brothers, but reverted to the donor. If it was feudum antiquum, that is, if it had descended to the proprietor from any of his ancestors, then his brothers and such other collateral relations as were descended from the person who first acquired it, might succeed. (a)

In imitation of this rule, it has long been established in England, that every acquisition of an estate in fee simple by purchase shall be considered as a feudum antiquum, or feud of indefinite antiquity; therefore the collateral kindred of the grantee or descendants from any of his lineal ancestors, by whom the lands might possibly have been purchased, are capable of being called to the inheritance. (b)

But where an estate has really descended in a course of inheritance to the person last seised, the strict rule of the feudal law is still observed, and none are admitted

(a) 2 Bl. Comm. 221. (b) 1b. 222.
but the heirs of those through whom the inheritance has passed; for all others have demonstrably none of the blood of the first purchaser in them. (a)

Thus Lord Hale says, if the son purchase land, and die without issue, it shall descend to the heirs on the part of the father; and if he leaves none, then to the heirs on the part of the mother, because though the son has both the blood of the father and the mother is: him, yet he is of the whole blood of the mother; and the consanguinity of the mother are consanguinei cognati of the son. On the other side, if the father had purchased land, and it had descended to the son, and the son had died without issue, and without any heir on the part of the father, it should never have descended in the line of the mother, but escheated. For though the consanguinei of the mother were the consanguinei of the son, yet they were not of consanguinity to the father. But if there had been none of the blood of the grandfather, yet it might have resorted to the line of the grandmother, because her consanguinei were as well of the blood of the father, as the mother’s consanguinity is of the blood of the son; consequently also, if the grandfather had purchased lands, and they had descended to the father, and from him to the son, if the son had entered and died without issue, his father’s brothers or sisters, or their descendants; or for want of them his grandfather’s brothers or sisters, or their descendants; or for want of them, any of the consanguinity of the great grandfather, or brothers or sisters of the great grandmother, or their descendants, might have inherited; for the consanguinity of the great grandmother was the consanguinity of the father; but none of the line of the mother or grandmother, viz. the grandfather’s wife, should have inherited; for that they were not of the blood of the first purchaser. And the same rule, è converso, holds in purchases in the line of the mother or

(a) Hale’s Hist. Com. Law, c. 11, 120.
grandmother; they shall always keep in the same line that the first purchaser settled them in.

Where therefore lands descend to a person on the part of the father, none of the relations on the part of the mother can inherit. And *vice versa*, where lands descend to a person from his mother, no relation on the part of the father can take it by descent. It should however be observed, that inheritances of this kind cannot be created by any act of the parties; for if a person gives lands to another, to hold to him and his heirs, on the part of his mother, yet his heirs on the part of his father would inherit. For no person can create a new kind of inheritance not allowed by the law; therefore the words “on the part of the mother” are void. (a)

Where a person is seised in fee simple by descent *ex parte maternâ*, there are many acts which may be done by such person which will operate so as to make him a new purchaser of the estate. It will thus become a feud of indefinite antiquity, and descendible to his heirs general, whether of the paternal or maternal line.

Thus Lord Coke says, if a person be seised of lands, as heir of the part of his mother, and makes a feoffment in fee, and takes back an estate to him and to his heirs, this is a new purchase, and if he dies without issue, the heirs of the part of the father shall inherit. (b)

Mr. Hargrave has observed on this passage, that Lord Coke must be understood to speak of two distinct conveyances in fee. The first passing the use, as well as the possession to the feoffee, and so completely divesting the feoffor of all interest in the land; and the second re-granting the estate to him.

So if a person seised of lands *ex parte maternâ* make a feoffment in fee of them, reserving a rent of them to himself and his heirs, this rent will go to his heirs *ex*

parte paternâ, because the feoffment in fee was a total disposition of the estate; and the rent was acquired by purchase.

Where an estate descended ex parte maternâ is devised to an heir at law in such manner as to make him a purchaser of it, the descent will be to the heirs ex parte paternâ.

The collateral heir of the person last seised must be his next collateral kinsman of the whole blood.

First, says Sir W. Blackstone, he must be his next collateral kinsman, either personally, or jure representationis, which proximity is reckoned according to the canonical degrees of consanguinity. The issue or descendants, therefore, of the brother of the propositus, are all of them in the first degree of kindred with respect to inheritances, those of his uncle in the second, and those of his great uncle in the third, and so on as their respective ancestors, if living, would have been, and are severally called to the succession in right of such their representative proximity. And here it must be observed, that the lineal ancestors, though according to the first rule, incapable themselves of succeeding to the estate, because it is already supposed to have passed them, are yet the common stocks from which the next successor must spring. (a)

The heir need not be the nearest kinsman absolutely, but only sub modo, that is, he must be the nearest kinsman of the whole blood; for if there is a much nearer kinsman of the half blood, a distant kinsman of the whole blood will be admitted, and the other entirely excluded.

In conformity to these cases, it is laid down by Littleton, (b) that if a man has two sons by divers venters, and the elder purchases land in fee simple and dies without issue, the younger brother shall not have the land but

(a) 2 Bl. Comm. 224, et seq.
(b) Sect. 6 and 7.
the uncle of the elder brother, or some other; his next cousin shall have the same; because the younger brother is but of the half blood. So if a man has a son and a daughter by one venter, and a son by another venter, and the son by the first venter dies without issue, his sister shall be his heir. (a)

In collateral inheritances, the male stock shall be preferred to the female; that is, kindred derived from the blood of the male ancestor, however remote, shall be admitted before those from the blood of the female, however near, unless where the lands have in fact descended from a female.

Thus the relations on the father's side are admitted in infinitum, before those on the mother's side are admitted at all; and the relations of the father's father, before those of the father's mother, and so on. (b)

If no heir can be found in the male line, the lineal heir (rejecting the half blood as before) of the father's mother is to be preferred to that of the mother of the purchaser. (c) Sir W. Blackstone considers that the heir of the grandmother on the part of the father ought to be preferred to the heirs of the grandmother on the same side. His doctrine however has been disputed. (d)

If the heir is sought in the maternal line, the same rules are to be observed, begining with the issue of the mother's father. (e)

The collateral heir of a person dying seised, who was not the first purchaser, but himself entitled by descent, is to be sought in that line only in which the tenement actually descended. And thus the heir on the mother's side may be entitled, not only in preference to, but in absolute exclusion of all the paternal relations as such. Instances have occurred, where the father having married his cousin has inherited as collateral heir to his

(a) Ib. 3 Cruise, Dig. 388.  (b) Ib. 397.  
(c) Co. Litt. 12 b.  
(d) 2 Bl. Comm. 338.  3 Cruise, Dig. ib.  
(e) Co. Litt. 12 b.
own son the tenements which descended to the son from his mother. (a)

A bastard cannot inherit, and can have only lineal heirs.

A person attainted of treason or murder cannot inherit, nor have heirs; and yet, if but for his attaint he would be heir, he then interrupts the descent, and there is no heir. (b) The consequence is, that the land goes to the lord by escheat. Other felonies, committed since the stat. 54 G. 3, c. 145, do not prejudice the right of any person, except that of the offender during his own life. And indeed by the custom of gavelkind no felony has that effect, unless in consequence of the criminal's escape it be followed by outlawry. (c) An alien, by the common law, could neither receive, transmit, nor interrupt the inheritance; every thing proceeded as if he had never existed, except that, if he had children born in this country, they might inherit each other's purchases. (d) But by the statute 11 and 12 W. 3, c. 6, a natural born subject may derive his title of inheritance through alien parents or ancestors: but the person who claims, by virtue of this statute, must be in existence at the death of him to whom he makes himself heir; but so that, if the existing claimant be a female, and have afterwards a brother or sister born, the whole estate, or a share in coparcenary, will then devolve on the latter. (e)

If A. being seised of lands by descent from his mother, convey them to B. in fee, that he may reconvey them to A. in fee, which is accordingly done, this makes A. a purchaser; so that if he die without issue, his heir on the father's side will inherit. (f) But if there had only been a conveyance to B. in fee, to the use of A. in fee, A.

(e) Litt. § 3, 4. Eastwood v. Vinke, 2 P. Wms. 614.
(b) 1 P. Wms. 78. Co. Litt, 8 a.
(d) Collingwood v. Pace, 1 Vent. 413.
(f) Co. Litt. 12 b

H 2
would then be in of his old use, and the lands would descend to his maternal heirs. (a)

It was a rule of law, that where a testator made the same disposition of his estate as the law would have done if he had been silent, the will being unnecessary was void. Therefore if a person devised his lands to his heir at law in fee, it was inoperative, and the heir took by descent as his better title. So where a man, seised of land in fee on the part of his mother in fee, devised it to the heir on the part of his mother in fee, the heir was in by descent. (b) So where a man seised in fee on the part of his mother, devised it to his executors for sixteen years, for payment of his debts, remainder to his heir on the part of his mother, it was held that the heir took by descent. (c) And an heir at law was held to take by descent under a devise to him after the death of his mother, charged with the payment of sums of money. (d) So under a devise to one for life or in tail with remainder to the right heirs of the testator, immediately upon his death the heir took the reversion by descent and not under the will. (e) So a devise to the heir at law in fee, with an executory devise over in case he did not attain the age of twenty-one years, was held not to alter the quality of the estate, which he would otherwise have taken as heir; and that he therefore took by descent, and not by purchase. (f)

The common law never considered that as a purchase which it was possible to consider as a descent. (g) Thus

(a) Co. Litt. 13 a.
(c) Hedger v. Rowe, 3 Lev. 127. See 2 Wms. Saund. 8 a.
(f) Doe d. Pratt v. Timins, 1 B. and Ald. 530. See 1 Powell on Devises by Jarman, 408-429.
(g) Co. Litt. 22 b.
where a party seised in fee conveyed lands to the use of himself for life, with remainder to others for particular estates for life or in tail, with an ultimate limitation to the right heirs of the grantor, such limitation was inoperative, as he continued seised of the reversion as part of his former estate, which was consequently descpicable in the same line as it would have been, if no such conveyance had been made. (a) So where a man seised in fee levied a fine to the use of himself and his wife for life, remainder to the right heirs of the settlor, the ultimate limitation did not create a remainder, but the interest undisposed of remained in the grantor as part of the reversion as if that limitation had been omitted. (b)

II. Some of the preceding rules have been either abolished or modified by the 3 and 4 W. 4, c. 106.

The person to whom the claimant makes himself heir must be entitled to the land, that is, have a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof. (c)

In every case descent shall be traced from the purchaser, and the person last entitled to the land is, for the purposes of the act, considered to have been the purchaser thereof, unless it is proved that he inherited the same, in which case the person from whom he inherited the same is considered to have been the purchaser, unless it is proved that he inherited the same; and in like manner the last person from whom the land is proved to have been inherited is in every case considered to have been the purchaser, unless it is proved that he inherited the same. (d)

The statute calls the lineal ancestor of the purchaser

(c) 3 and 4 W. 4, c. 106, § 1.
(d) Sect. 2.
where he leaves no issue in preference to collateral persons claiming through him.

Every lineal ancestor is capable of being heir to any of his issue, and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister and a more remote lineal ancestor to any of his issue other than a nearer lineal ancestor or his issue. (a)

The male line is to be preferred. None of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting, until all his paternal ancestors and their descendants shall have failed; and no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed. (b)

When there shall be a failure of male paternal ancestors of the persons from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of male maternal ancestors of such person and their descendants, the mother of his more remote male maternal ancestor and her descendants shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor and her descendants. (c)

(a) Sect. 6.  (b) Sect. 7.  (c) Sect. 8.
SUCCESSION AB INTESTATO—ENGLAND. 103

The statute so far abolishes the distinction between the whole and half blood as to admit the latter in certain cases. Any person related to the person from whom the descent is to be traced by the half blood shall be capable of being his heir, and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother. (a)

No brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through a parent. (b)

The statute abolishes the rule of law which prevented the heir from taking as a purchaser under a devise to him, and which prevented a limitation to the grantor and his heirs from creating an estate by purchase.

When any land shall have been devised by any testator who should die after the thirty-first day of December 1833 to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee and not by descent; and when any land shall have been limited by any assurance executed after the said thirty-first day of December 1833 to the person or to the heirs of the person who shall thereby have conveyed the said land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof.

(a) Sect. 9.  (b) Sect. 5.
When any person shall have acquired any land by purchase, under a limitation to the heirs or to the heirs of the body of any of his ancestors contained in an assurance executed after the said 31st day of December 1833, or under a limitation to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator who shall depart this life after the said 31st day of December 1833, then and in any of such cases such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land. (a)

SECTION III.

SUCCESSION TO MOVEABLES BY THE LAW OF ENGLAND.

Statute of distributions.—Children.—Representatives of children.—Husband.
—Widow.—Ascendants.—Collaterals.—The order of succession under the customs of London and York.

The succession to moveable estate by the law of England is regulated, except in certain places having particular customs, by the statute of distributions, 22 & 23 Car. 2, c. 10. That statute, after empowering the ordinary on the granting of administration to take a bond of the administrator, enacts that a just and equal distribution of what remaineth clear of the goods of any person dying intestate, (after all debts, funerals, and just expences of every sort first allowed and deducted) shall be made amongst the wife and children,

(a) Sect. 4.
or children's children, if any such be, or otherwise to the next of kindred to the dead person in equal degree, or legally representing their stocks pro suo cuique jure, according to the laws in such cases, and the rules and limitation thereafter set down.

The whole surplusage of the estate of any person dying intestate, is to be distributed in manner and form following, that is to say, one third part of the said surplusage to the wife of the intestate, and all the residue by equal portions to and amongst the children of such person dying intestate, and such persons as legally represent such children, in case any of the said children be then dead, other than such child or children (not being heir at law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his lifetime, by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made. And in case any child other than the heir at law shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to the share which will be due to the other children by the said distribution as aforesaid, then so much of the surplusage of the estate of such intestate is to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of the said children to be equal as near as can be estimated; but the heir at law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent or otherwise from the intestate. (a)

(a) Sect. 5.
In case there be no children, nor any legal representatives of them, then one moiety of the said estate is to be allotted to the wife of the intestate, and the residue of the said estate to be distributed equally to every of the next of kindred of the intestate who are in equal degree, and those who legally represent them. (a)

No representation is admitted among collaterals after brothers' and sisters' children, and in case there be no wife, then all the said estate is to be distributed equally to and amongst the children; and in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives as aforesaid. (b)

The order of succession established by this statute bears some resemblance to that adopted by the Roman law. It has been considered a restoration, with some refinements and regulations, of the old constitutional law which prevailed in England as an established right and custom, from the time of King Canute downwards, many centuries before Justinian's laws were known or heard of in the western parts of Europe.

After the allotment of a third to the widow, the statute, it has been seen, directs a distribution of the residue by equal portions to and amongst the children of the intestate, and "such persons as shall legally represent such children, in case any of the said children be then dead;" in case there be no wife, then all the estate is to be distributed to and amongst the children. (c)

By the words "such as shall legally represent such children," their lineal representatives to the remotest degree are admitted. But the term must be understood of descendants, and not next of kin, as for example, if a son of the intestate is dead, leaving a widow and child, the widow shall take nothing, and the child the whole of the father's share. Yet the widow, though not strictly

(a) Sect. 6. (b) Sect. 7. (c) Ib.
one of the next of kin, is in the same sense as the child, a legal representative of the personal estate of the father. (a)

If none of the intestate's children are dead, then after the third has been allotted to the widow, the remaining two thirds are, pursuant to the statute, to be equally divided among all the children of the intestate, for in this case they all claim in their own right. (b)

A brother or sister of the half blood is equally entitled to a share with one of the whole blood, for they are both equally near of kin to the intestate. (c)

A posthumous child has the same rights. A child in ventre sa mère at the death of the father, is a person in rerum naturæ, and by the rules of the common as well as civil law is, to all intents and purposes a child, as much as if born in the father's lifetime, and consequently is entitled under the statute. (d)

If the intestate leave only one child, and also leave a wife, the latter only will be entitled to a third part, and the other two thirds will belong to such child. (e) And if he had left an only child and no widow, such only child will be entitled to the whole personal estate. (f)

If the intestate's children are all dead, all of them having left children, those children will all take an equal share. If a father leave three children, John, Mary, and Henry, and they all die before the father, John leaving for instance two children, Mary three, and Henry four, and afterwards the father die intestate, in that case all his grandchildren shall have an equal share, for as his children are all dead, their children shall take

(b) Toller's Law of Executors, 374.
(d) Wallis v. Hodson, 2 Atk. 115. Edwards v. Freeman, 2 P. Wms. 446.
(e) Williams's Law of Executors, 917.
as next of kin. (a) Such also would be the case with respect to the great grandchildren of the intestate, if both his children and grandchildren had all died before him. The parties take *per capita*, or equal shares in their own right. (b)

Where some of the intestate's children are living, and some dead, and such as are dead have each of them left children, in this case the children of the deceased children take by representation, or *per stirpes*, and not in their own right. Thus, if a father have three children, John, Mary, and Henry, and John die leaving four children, and Mary die leaving two, and Henry alone survive the father, on the death of the father intestate one third shall be allotted to Henry, one third to John's four children, and the remaining third to Mary's two children, for these grandchildren are entitled as representing their respective parents. (c)

The husband is entitled to the grant of administration to his wife's effects, and therefore before the statute of distributions, like all administrators, he had the exclusive enjoyment of the residue. It was doubted whether the statute of distributions had not superseded the husband's right, and whether therefore he was not thereby bound to distribute her personal estate among her next of kin.

By the 29 Car. 2, c. 3, s. 25, (the statute of frauds), it is declared, that neither the statute of distributions nor any thing therein contained, shall be construed to extend to the estates of *feme covertis* that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said act.


(b) Toller, 374. 2 Bl. Comm. 517.

(c) Bac. Ab. tit. Executors, ib. Toller, ib.
In case the wife dies intestate, and afterwards the husband dies without having taken out administration to her, the Ecclesiastical Court has considered itself bound by the statute 21 Hen. 8, c. 5, to grant administration to the next of kin of the wife, and not to the representative of the husband. But such administrator is considered in equity with respect to the residue as a trustee for the representatives of the husband. For the husband surviving the wife, her whole estate vested in him at the time of her death, and no person could possibly be entitled to the rights of the wife but himself, so that her whole property belonged to him.

The statute it has been seen provides that if the intestate left children as well as a widow, one third shall go to the widow, and the residue among the children. If there be no children, or lineal descendants of children subsisting, then a moiety shall go to the widow, and a moiety to the next of kindred.

The widow’s title however under the statute may be barred by a settlement before marriage excluding her from her distributive share of her husband’s personal estate, and even in the case of a female infant she may be barred of her right by such a settlement made before marriage, with the approbation of her parents or guardians.

It has been held that the statute of distributions is to be construed according to the common law. (a) But according to the more modern cases it seems to have been established, that its construction as to the proximity of degrees of kindred at least should be in conformity with the rules of the civil law. (b)

The mode of calculating the degrees in the collateral line for the purpose of ascertaining who are the next of

(a) Blackborough v. Davis, 1 P. Wms. 50. S. C. 12 Mod. 615.
kin is in conformity with that of the civil law, and is as follows: to count upwards from either of the parties related to the common stock, and then downwards again to the other, reckoning a degree for each person, both ascending and descending; (a) or, in other words, to take the sum of the degrees in both lines to the common ancestor. (b)

According to the canon law, the mode of computation is to begin at the common ancestor, and reckon downwards, and in whatsoever degree the two persons, or the more remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. It is obvious that the degrees by this calculation are fewer than by the mode of the civilians. (c)

Relations by the father's side and the mother's side are in equal degree of kindred; for, in this respect, dignity of blood gives no preference. (d) Hence it may happen that relations are distant from the intestate by an equal number of degrees, and equally entitled, who are no relations at all to each other.

The half blood is admitted as well as the whole: (e) for they are kindred of the intestate. The brother of the half blood excludes the uncle of the whole blood. (f)

As younger children must stand in the same degree of kindred as the eldest, primogeniture gives no right to preference. (g)

(b) Ib. and Mr. Christian's note to 2 Black. Comm. 207.
(c) Prec. Chan. 593. 1 Ves. 335.
(d) Moor v. Barham, cited in Blackborough v. Davis, 1 P. Wms. 53.
(f) Collingwood v. Pace, 1 Vent. 424.
(g) Warwick v. Greville, 1 Phill. 123.
When a child dies intestate, without wife or child, leaving a father, the latter is entitled as the next of kin in the first degree to the whole of the personal estate of the intestate, exclusive of all others. (a)

If a man dies intestate without a child, but leaving a widow and a father, then the personal estate shall go in moiecties between the wife and father. (b)

Before the statute of 1 Jac. 2, c. 17, if a child had died intestate, without a wife, child, or father, his mother was entitled, as his next of kin in the first degree, to his whole personal estate, but by that statute (c) it is enacted, "that if after the death of a father any of his children shall die intestate, without wife or children in the lifetime of the mother, every brother and sister, and the representatives, shall have an equal share with her." It is the object of this enactment to prevent the mother, who might marry, from transferring all to another husband.

Several questions have arisen upon the construction of this section of the statute. (d) The intestate left no child, but a wife, a mother, three brothers and sisters, and two nieces, the children of a deceased brother. It was insisted on the part of the mother that the case was not within the statute of 1 Jac. 2, c. 17, s. 7, because here the intestate left a wife, whereas the statute was only meant to operate where the mother, before the making of it, would have gone off with the whole personal estate. But Lord Chancellor King decreed that the wife of the intestate should have one moiety, and his mother should come in for no more than her share of the other moiety with the intestate's brothers and sister, and the two nieces the representatives of the deceased brother. And his lordship laid down that the intention of the statute was in prejudice of the mother,

(a) Blackborough v. Davis, 1 P. Wms. 51.
(b) Keilway v. Keilway, Gilb. Eq. Cas. 190.
(c) Sect. 7.
(d) Keilway v. Keilway, 2 P. Wms. 344.
that in every case where before the statute she would have had the whole, the deceased child’s brothers and sisters should come in equally with the mother as to the whole, and where before the statute the mother would have been entitled to the half, the deceased child’s brothers and sisters should now come in for a share of that moiety.

So where the intestate left a wife, a mother, and several nephews and nieces the children of a deceased brother. Besides raising the objections taken in the above case of Keilway v. Keilway, it was insisted on the part of the mother that from the words of the statute of James, which are in the conjunctive, “every brother and sister, and the representatives of them,” the statute could not operate in a case where there is no brother or sister of the intestate living. But Lord Hardwicke held the contrary, and after recognising Keilway v. Keilway as far as it applied, decreed, that the personal estate should be divided into four equal parts, two fourth parts to be allotted to the widow, one fourth part to the mother, and the remaining fourth to be equally divided among the nephews and nieces. And his lordship said that the word “and” in the statute, immediately preceding the words “the representatives,” must be construed in the disjunctive. (a)

In the last case a further objection was raised, that if it should be held that the nephews and nieces were entitled by representation, it might be carried to the fourth or fifth generation, which would create great confusion and factions, for there was nothing to restrain it in this act as there was in the statute of distributions. But Lord Hardwicke said, that the proviso in the statute of James was to be incorporated into the statute of Charles, which expressly says, that representation shall not be carried beyond brothers’ and sisters’ children agreeably

(a) Stanley v. Stanley, 1 Atk. 455.
to the rule that statutes made pari materia shall be construed into one another.

If the intestate left neither wife nor child nor father, and there is neither brother nor sister, nor nephew nor niece, the case is without the statute, and the whole of such intestate's effects shall devolve as before the statute to his mother. (a)

The mother in law or stepmother of an intestate, not being of his blood, can claim nothing under the statute of distributions.

If the intestate left neither children nor parents, but his nearest surviving relations are brothers and sisters, and a grandfather or grandmother, then since they are all in the second degree of kindred, in strictness they ought all to share the personal estate of the intestate equally under the statute. But it has been decided, that a grandmother should have no share with brothers and sisters of the intestate. (b)

But if the intestate leaves no nearer kindred than a grandfather or grandmother, and uncles or aunts, the grandfather or grandmother being in the second degree will be entitled to the whole personal estate, exclusive of the uncles or aunts, who are only in the third degree. (c)

Great grandfathers or great grandmothers being in the third degree are entitled to a distributive share with uncles and aunts. (d)

If the intestate leave a grandfather by the father's side, and a grandmother by the mother's side his next of kin, they take in equal moieties as being in equal degree, dignity of blood not being material. (e)

(c) Mentney v. Petty, Prec. Ch. 593. Blackborough v. Davis, 1 P. Wms. 41. 1 Lord Raym. 684.
(d) Lloyd v. Tench, 2 Ves. 215.
(e) Moor v. Barham, cited 1 P. Wms. 53.

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Aunts and nieces, uncles and nephews, being all in the third degree, are all equally entitled. Hence where the intestate left two aunts, and a nephew and niece children of a deceased brother, the surplus was divisible into four parts equally among them; and as they were all in equal degree, the children were to take in their own right and not by representation, but if their father had been living, he would have been entitled to the whole. (a)

Affinity or relationship by marriage, except in the case of the wife of the intestate, gives no title to a share of his property under the statute. If therefore the intestate had a son and daughter, and they both die, the former leaving a wife and the latter a husband, upon the intestate's death afterwards, such husband and wife have neither of them any claim on the estate. (b)

It is one of the provisions of the statute of distributions, that there shall be no representation admitted among collaterals after brothers' and sisters' children. (c) This provision must be construed to mean brothers and sisters of the intestate, and not to admit representation when the distribution falls among brothers and sisters who are remotely related to the intestate, for the intestate is the subject of the act, it is his estate, his wife, his children, and for the same reason his brothers' and sisters' children, for he is equally correlative to all. (d) Therefore if the intestate should leave an uncle, and the son of another uncle deceased, the latter shall have no distributive share. (e)

If the brother of the intestate left a grandson, and a sister left a child, the grandson shall not have distribu-

(a) Durant v. Prestwood, 1 Atk. 454.  
(b) Williams's Exors. 929.  
(c) Sect. 7.  
(e) Ib.
tion with the son or daughter of the sister. (a) Thus although lineal representatives ad infinitum shall share in the distribution of an intestate's personal estate, yet among collaterals, except only in the instance of the intestate's brothers' and sisters' children, proximity of blood shall alone give a title to it. (b)

If the intestate's brothers and sisters were at the time of his decease all dead, and have left children, such children shall all take per capita. (c) If therefore the intestate leave a deceased brother's only son, and ten children of a deceased sister, the ten children of the deceased sister shall take ten parts in eleven with the son of the deceased brother. But in the event of some of the intestate's brothers and sisters being alive, and some dead, and such as are dead having left children, such children take per stirpes, by way of representation. Therefore if an intestate left a brother alive, and ten children of a deceased sister, such ten children will take one moiety of the personal estate, and their uncle the other. (d)

In the first place the children, and their lineal descendants to the remotest degree, and on failure of children, the parents of the deceased, are entitled to the administration: then follow brothers and sisters, then grandfathers and grandmothers, then uncles or nephews, great grandfathers and great grandmothers, and lastly, cousins. (e)

In London and York, the distribution of an intestate's personal estate is governed by the customs prevailing in those cities, and which are expressly preserved by the statute of distributions. (f)

According to the custom of London, if a freeman of the city die leaving a widow and children, his personal property remaining after payment of his debts and funeral expenses, and after deducting her apparel, and the furniture of her bed chamber, is divided into three equal parts, one of which belongs to the widow, another to the children, and the third to the administrator in that character. If only a widow, or only children, they shall respectively in either case take one moiety, and the administrator the other. (a) If he have neither widow nor child, the administrator shall have the whole. (b)

The portion of the administrator is styled in law the dead man's part. It is so called, because formerly the ordinary of the grantee was to dispose of it in masses for the deceased's soul. But the statute 1 Jac. 2, c. 17, has declared, that it shall be subject to the law of distributions. If therefore there be neither wife nor child, the whole personal estate will be distributed according to the statute of distributions. (c) Hence, if a freeman die worth eighteen hundred pounds personal estate, leaving a widow and two children, this estate is divided into eighteen parts, of which the widow has eight, six by the custom, and two by the statute, and each of the children five, three by the custom, and two by the statute. If he leave a widow and one child only, she shall still have eight parts as before, and the child shall have ten, six by the custom, and four by the statute. If he leave a widow and no child, the widow shall have three fourths of the whole, two by the custom, and one by the statute, and the remaining fourth shall go by the statute to the next of kin (d) If he leave a child or children, but no wife, the child or children take the

(b) 2 Show. 175.
(c) Goodwin v. Ramsden, 1 Vern. 200. Percival v. Crispe, 2 Show. 175.
(d) 2 Bl. Comm. 518.
whole, one half by the custom, and the other by the statute. (a)

A posthumous child shall come in for his customary share with the other children. (b) But the custom extends merely to the wife and children of the freeman, and not to his grandchildren. (c)

Hence if a freeman die intestate, leaving a wife, but no child, yet if there hath been a child, and there be any legal representatives, that is, lineal descendants of such child, they are admitted to his distributive share of the dead man’s part under the statute, although they are entitled to no part of his share by the custom. In that case, therefore, by the statute, the wife shall have one third of the dead man’s part, and the representatives of the deceased child shall have the other two thirds, so that dividing the whole personal estate into six parts, she shall have four, and the representatives two. (c)

If there be neither wife nor child, nor such representative of a child, the whole shall be subject to the statute of distributions. (d)

The custom attaches, although the freeman neither resided, nor died, (e) nor left property, (f) within the city; and it extends to the distribution of the estate of honorary freemen who die intestate. (g)

The widow is entitled to her apparel and the furniture of her chamber, which is called the widow’s chamber; (h) or in lieu of it, in case the estate shall exceed two thousand pounds, it has been said, that she is entitled to fifty pounds. (i) The privilege of the widow’s chamber

(a) Northey v. Strange, 1 P. Wms. 341.
(c) 1 P. Wms. 341. 1 Vern. 397. 2 Salk. 426. Williams's Exors. 947.
(d) 1 Vern. 200.
(e) 1 Roll. Rep. 316. 1 Sid. 250. 1 Vent. 180. 1 Mod. 80. 1 Vern. 180.
2 Vern. 48, 82, 110.
(f) Priv. Lond. 288.
(g) Onslow v. Onslow, 1 Sim. 18.
(h) 2 Bl. Comm. 518.
(i) 7 Vin. Abr. tit. Customs of London, (B. 2). Biddle v. Biddle,
4 Burn, Eccl. L. 442.
is analogous to her right to paraphernalia in general cases, and like that shall in no case be exercised to the prejudice of the creditors. (a)

If the wife be divorced for adultery \textit{à mensà et thoro}, she forfeits her customary share. (b)

If a freeman leave several children, the share or the orphanage part of any one of them is not vested in him by the custom till the age of twenty-one, after which period and not before, he may dispose of it by will, or in case of his dying intestate, it shall be distributed pursuant to the statute. If he died under that age, whether sole or married, his share shall survive to the others; (c) whereas the share by the statute is vested, and therefore such child may devise it at the age of fourteen, if a son, and twelve, if a daughter. But the survivorship of the orphanage part holds only as to the orphanage part belonging to the deceased himself, for if he had by survivorship the part of any of his brothers or sisters, that shall go according to the statute. (d)

In case there be only one child, his orphanage part is vested in him in the same manner as his share by the statute, and may be devised by him at the same age. (e)

If a man marry an orphan under the age of twenty-one, it seems his right is so vested as to prevent his wife's share from surviving in case of her death before she attains that age. (f)

The custom of York, as it regards the widow, varies from that of London only in this respect, that she is allowed to reserve to her own use not only her apparel and furniture of her chamber, but also a coffer or box containing various ornaments of her person, as jewels, chains, and other articles of the like nature. (g)

(a) Swinb. p. 6, § 7. (b) Bumb. 16.
(c) 2 Bl. Comm. 519. 2 Vern. 558. Prec. Cha. 537.
(d) Prec. Cha. 537. (e) 3 P. Wms. 318, note (g). Prec. Cha. 207.
(f) 1 Vern. 88. Prec. Cha. 207. Toller's Exors. 394.
(g) Toller's Exors. 400. Swinb. p. 6, § 7.
With respect to children, the custom of York differs in two material points from the custom of London. By the latter, the child's orphanage part is not fully vested till he attains the age of twenty-one. In the province of York, it is vested immediately on the death of the intestate. (a)

According to the custom of the city of London, the advancement of the child cannot arise out of a real estate. In the province, the heir at common law who inherits any land either in fee or in tail, is divested of all claim to any filial portion. (b) And however small in point of value the land may be in comparison with the personal estate, he is nevertheless excluded; (c) and even although the estate he inherits be only a reversion. (d) He is also barred, although the land devolved upon him by settlement on his father's marriage. (e) Nor in case lands held by a mortgage in fee descend to him before redemption, shall he be entitled to a filial portion; but on redemption of the mortgage, and payment of the money to the administrator, it seems he shall be entitled to such portion, because he has nothing by inheritance, nor in fact has had any preferment. (f)

In order that the custom of York should attach, it is essential that the intestate should be resident at the time of his death within the province; but for that purpose it is immaterial where his estate is situated.

If a freeman of London die within the province, the custom of the city of London for the distribution of his property will prevail, and control the custom of the province of York. Therefore in that case, the heir will take a share of the personal estate, for the custom of the

(a) 2 Bl. Comm. 519. 4 Burn's Eccl. L. 444.
(b) 4 Burn's Eccl. L. 460, et seq. 2 Vern. 375.
(c) Burn, ib.  (d) Ib.
(e) Ib. 2 Vern. 375.  (f) Burn, ib.  Williams's Extrs. 951.
province is only local, and circumscribed to a certain district; but that of London follows the person, although distant from the city. (a)

With these distinctions, the customs of London and those of York in the main agree, and appear to be substantially the same. (b)

Thus if an intestate in the province of York die seised of an estate in fee simple, leaving a widow and three sons, the widow in that case shall have one third of the whole personal estate under the custom, the other third shall be divided equally between the two younger sons, and of the remaining third the widow shall take one third under the statute, and the other two thirds shall be divided equally among the three sons, for the heir is barred merely of his orphanage part, but not of his share by the statute. (c)

The customs do not affect the distribution in cases of equitable intestacy. Thus where a freeman of London or inhabitant of the province of York makes a will, appointing an executor, and yet either makes no disposition of his residuary property, or having made such, the residuary legatee dies before him, and the executor is not allowed to take it beneficially under his legal title, but is declared a trustee for those entitled to distribution, it becomes a question whether the residue should be distributed subject to the customs, or altogether according to the statute of distributions? Lord Hardwicke in one case held that there was no difference between legal or equitable intestacy; (d) but that decision must be considered as overruled, for subsequent cases have fully

(a) Williams's Exors. 941. 2 Vern. 47, 82.
(c) Toller's Exors. p. 403.
(d) Beard v. Beard, 3 Atk. 73. 2 Roper, Hub. and Wife, p. 5, 2nd ed.
established that the customs apply only to instances of legal intestacy. (a)

Thus where the testator resident and domiciled at the time of his death within the province of York, disposed of all the residue of his personal estate, and named executors, but this disposition failed as to part of the residue by the death of one of the residuary legatees in his lifetime, it was held by Sir Thomas Plumer, on the authority of a decision by Lord Bathurst, (b) that the share which had thus lapsed should be apportioned between the widow and the next of kin, according to the statute of distributions, and should not be affected by the custom of the province. And his honor said, that he considered it a rule fixed both on principle and authority, that where an executor is appointed, the custom does not apply. (c) This decision was followed where the testator had appointed executors, who did not take the residue beneficially, but he had made no disposition of the beneficial interest in that residue. (d)

It seems, however, that if the testator should die leaving a will, but without having appointed an executor, so that in the legal sense he is intestate, his personal estate undisposed of must be distributed subject to the customs, as if he had died actually intestate. (e)

(b) Lawson v. Lawson, ut sup.
(d) Fitzgerald v. Field, 1 Russ. 416.
(e) Wheeler v. Sheer, Moseley, 303, by Lord King.
SECTION IV.

DESCENT OF IMMOBILE AND MOVEABLE PROPERTY IN THE BRITISH COLONIES AND THE UNITED STATES.

I. In Jamaica and all the British West India Colonies, except British Guiana, St. Lucia, Lower Canada, and Trinidad, the law of descent which existed in England before the statute 3 and 4 W. 4, c. 106, prevails. — In Upper Canada that statute adopted. — Order of succession in Nova Scotia, Prince Edward's Island, New Brunswick, and Isle of Man.

II. Rules of descent to immovable property common to all the states of America. — Preference to the lineal descendants. — No preference conferred by primogeniture, or difference of sex. — Representation. — Seisin of the ancestors. — States in which seisin is not required. — Posthumous children. — Father and mother. — Collaterals. — Whole blood. — States in which no distinction between whole and half blood. — Other states in which a qualified preference is given to the whole blood. — The states in which a distinction is made between ancestral and acquired estates. — Ascending line. — Collaterals. — Representation. — Widow. — Peculiarities in different states. — Illegitimate children.

III. Distribution of moveable property in the United States.

I. In Jamaica and the other British West India Colonies, except St. Lucia, Lower Canada, British Guiana, and Trinidad, the descent of real property is governed by the law of England as it existed before the passing of the 3 and 4 W. 4, c. 106.

In Jamaica the English statutes of distribution, and the statute 1 Jac. 2, c. 17, are in force. In Barbadoes, (a) Montserrat, (b) St. Christopher's, (c) Bermuda, (d) the Bahamas, (e) and Upper Canada, (f) they have been adopted by local acts.

(a) Barbadoes Act, n. 123, 147.
(b) Montserrat Act, 3 Geo. 2, and 9 Geo. 2.
(c) St. Christopher's, n. 59, 10 Geo. 1.
(d) Bermuda Act, 3 Ann, 27 Geo. 3.
(e) Bahamas Act, 40 Geo. 3, c. 2.
(f) Upper Canada Act, 32 Geo. 3, c. 1.
In Antigua and Nevis they are considered in force under the act of the Leeward Islands. (a)

In Tobago, Dominica, St. Vincent, Grenada, and Tortola they are in force, being part of the statute law of England in existence at the time these colonies were acquired by the crown.

In Upper Canada the statute 3 and 4 W. 4, c. 106, has been adopted by a local act of the legislature of that province. (b)

In Nova Scotia (c) one third part of the personal estate is given to the wife of the intestate for ever, besides her dower in the houses and lands during life, where such wife is not otherwise endowed before marriage. Of all the residue of such real and personal estate two shares or a double portion are allowed to the eldest son then surviving, (where there is no issue of the first-born, or of any other elder son,) and the remainder of such residue is divisible equally to and amongst his other children, and such as shall legally represent them. Children advanced by settlement or portions not equal to the other’s share shall have so much of the surplusage as shall make the estate of all to be equal, except the eldest son then surviving, (where there is no issue of the first-born, or of any other elder son) who shall have two shares or a double portion of the whole.

Where any estate in houses and lands cannot be divided among all the children without great prejudice to the whole, the judge may, on evidence of the same, order the whole unto the eldest son, or upon his refusal to any other of the sons successively, he paying unto the other children of the deceased their equal and proportionable parts or shares of the true value of such houses and lands upon a just appraisement thereof, to be made by three sufficient freeholders upon oath, to be appointed and

(a) No. 31.  
(b) 4 W. 4, c. 1, U. C. Act.  
(c) Nova Scotia Act, 32 Geo. 2, c. 11, § 12 to 19.
sworn, or giving good security to pay the same in some convenient time, as the said judge shall limit, making reasonable allowance in the meantime, not exceeding six pounds by the hundred in the year. If any of the children die before he or she come of age or be married, the portion of such child deceased shall be equally divided among the survivors. In case there be no children or any legal representatives of them, then one moiety of the personal estate shall be allotted to the wife of the intestate for ever, and one third of the real estate for term of life. The residue both of the real and personal estate then goes equally to every of the next of kin of the intestate in equal degree, and those who legally represent them. No representatives to be admitted among collaterals after brothers' and sisters' children. If there be no wife, all shall be distributed among the children, and if no child, to the next of kin to the intestate in equal degree, and their legal representatives.

The lands and tenements wherewith any widow shall be so endowed, shall, after the decease of such widow, be divided in like manner as by the act is directed.

In Prince Edward’s Island (a) and New Brunswick a similar order of succession is established.

Under the New Brunswick law the interest of the wife in the real estate is reserved to her as dower, and with respect to the personal estate, it is provided that if after the death of the father any of his children shall die intestate without wife or children in the lifetime of the mother, every brother and sister and their representatives shall have equal share with her. (b)

In the Isle of Man the land descends on the eldest son, and for want thereof, on the eldest daughter, and in default of children on the next of kin, but subject always

(a) Prince Ed. Island Act, 21 Geo. 3, c. 2.
(b) New Brunswick Act, 26 Geo. 3, c. 11, § 14.
to the gift, grant, sale, mortgage, lease, or assignment by deed of the owner, and subject also to forfeiture for felony or treason. (a)

The personal estate of any person dying intestate, after payment of debts and funeral expenses, is distributed in manner following; that is to say, one half of the surplusage to the wife of the intestate, and the residue by equal portions amongst the children of the intestate, and such persons as legally represent such children in case any of the said children be then dead, other than such child or children as shall have any estate by settlement of the intestate, or shall be advanced by him in his lifetime, by portion or portions equal to the share which shall be by such distribution allotted to the other children to whom such distribution is to be made. And in case there shall be any child who shall have any estate, or be advanced as aforesaid, by portion not equal to the share which will be due to the other children by such distribution, then so much of the said surplusage is to be distributed to such child as will make the estate of all the said children to be equal, as near as can be estimated; and in case there be no children, nor any legal representatives of them, then one moiety of the said estate is to be allotted to the wife, and the residue distributed amongst the next of kin of the intestate in equal degree and those who legally represent them, provided that no representation be admitted among the collaterals after brothers' and sisters' children. If there be no widow then the said personal estate is to be distributed equally among the children; and in case there be no child, then to the next of kindred in equal degree, and their legal representatives. And if there be neither wife, nor child, the whole of the said estate is to go to the father, and in case there be no father, then to be distributed equally amongst the mother, brothers and sisters, or their legal

(a) Act of Tynwald, 1645. Mank's Jurisp. Isle of Man, p. 35.
representatives; and if there be neither father, mother, brother or sister, then to the next of kindred. (a)

II. The law of descents, as it exists in England, has been in its most essential features universally rejected by the United States. Each state has established a law of descent for itself. The laws of the individual states may agree in their great outlines, but they differ exceedingly in their details. There is no uniformity on this subject, and it is observed by Mr. Reeve in his Treatise on the Law of Descents in America, that "this nation may be said to have no general law of descents, which probably has not fallen to the lot of any other civilized country." (b)

It is a principle adopted by all the states that a preference is to be given to the descending line.

Another principle universally adopted is, that primogeniture confers no exclusive preference.

In several of the colonies the English law of primogeniture prevailed. It prevailed in Rhode Island until the year 1770; and in New York, New Jersey, Maryland and Virginia until the revolution. In Massachusetts, Connecticut and Delaware, the eldest son had only a double portion. In Pennsylvania, by the law of 1683, the law of primogeniture was abolished, but the act still gave the eldest son a double portion. (c) The act of Massachusetts, in 1692, did the same. (d) In the abstract of the laws of New England, a code digested by the Rev. Mr. Cotton, and published in 1655, it was ordered, that inheritances, as well as personal estates, should descend to the next of kin, assigning a double portion to the eldest son. (e) The old New England laws spoke of this double portion as being "according to the law of nature, and the dignity of birthright." (f)

(b) Reeve's Treatise on the law of Descents, Pref. p. 2.
(c) Chalmers' Annals, 649.
(d) 2 Hutchinson's Hist. 66.
(e) Hutchinson's State Papers, 168.
Females are admitted to share equally with males, except in the states of Vermont and New Jersey.

In the state of Vermont males take a double share to females whenever they inherit together. In New Jersey double portions are given to males in the descending line, and in the collateral line, as far as the statute provides for the collateral line, in a manner different from the common law. It does not give the double portions beyond the issue of the intestate, and the brothers and sisters both of the whole and half blood, and the issue of brothers and sisters of the whole blood, but the law of Vermont gives a double portion to males in every case where they inherit with females.

The first rule of inheritance is, that the real estate descends to the lawful descendants of the intestate in the direct line of lineal descent; and if there be but one person, then to him or her alone, and if more than one person, and all of equal degree of consanguinity to the ancestor, then the inheritance shall descend to the several persons as tenants in common, in equal parts, however remote from the intestate the common degree of consanguinity may be. Thus if A. dies, owning real estate, and leaves for instance, two sons and a daughter, or instead of children leaves only two or more grandchildren, or two or more great grandchildren, these persons being his lineal descendants, and all of equal degree of consanguinity to the common ancestor, that is, being all of them either his children or grandchildren, or great grandchildren, they will partake equally of the inheritance as tenants in common. This rule of descent was prescribed by the statute of New York of the 23rd of February, 1786, and it has been adopted by the New York revised statutes. (a) It prevails in all the United States with certain variations. Thus

(a) Vol. 1, 751, § 1, 2. Ib. 753, § 17. Ib. 754, § 19.
in South Carolina the widow takes one third of the estate in fee, and in Georgia she takes a child’s share in fee, if there be any children, and if none, she then takes in each of those states a moiety of the estate. In Rhode Island, North and South Carolina, and in Louisiana, the claimants take in all cases per stirpes, though standing in the same degree. (a)

This rule admits the lineal descendants to an equal portion of the inheritance, if they all stand in equal degree to the common ancestor. If A. dies leaving three grandchildren, two of them by B., a son who is dead, and one of them by C., a daughter who is dead, these three grandchildren, standing all in equal degree of consanguinity to the ancestor, would take equally under this rule. The civil law, before the Novell of Justinian, gave to the grandchildren and other remoter descendants, though all the claimants were in equal degree, the portion only that their parent would have taken if living, and that has been followed in the states of Rhode Island, North and South Carolina, and Louisiana.

The maxim seisin e facit stipitem is abolished by the New York revised statutes, and it is also abolished in the states of Massachusetts, Rhode Island, Connecticut, New Jersey, Pennsylvania, Delaware, Virginia, South Carolina, Georgia, Ohio, Illinois, Maine, Louisiana, Maryland, and Missouri, and there is no regard to the actual seisin of the ancestor. In the states of New Hampshire, Vermont, Maryland, North Carolina, Alabama, Kentucky, Mississippi, and Tennessee, the seisin of the ancestor seems to be required.

Posthumous children in all cases inherit in the same manner as if born in the lifetime of the in-

testate. There is an express provision for this purpose in the New York revised statutes, and in the statutes of Rhode Island, New Jersey, Pennsylvania, and Missouri. (a)

In Maryland and Virginia, a posthumous child in the collateral line cannot inherit to the intestate as heir, although he can in the lineal.

The second rule of descent is, that if a person dying seised, or as owner of land, leaves lawful issue of different degrees of consanguinity, the inheritance shall descend to the children and grandchildren of the ancestor, if any be living, and to the issue of such children or grandchildren as shall be dead, and so on to the remotest degree as tenants in common. But such grandchildren and their descendants shall inherit only such share as their parents respectively would have inherited if living. (b)

This rule, it is conceived, is adopted in the laws of every state in the union, (c) and applies to every case where the descendants of the intestate entitled to share in the inheritance are of unequal degrees of consanguinity to the intestate. Those who are in the nearest degree take the shares which would have descended to them, had the descendants in the same degree, who are dead leaving issue, been living; and the issue of the descendants who are dead, respectively take the shares which the parents, if living, would have received. It may be illustrated by the following example: A. dies seised of land, and leaves B., a son, living, and D. and E., two grandsons of C., a son who is dead. Here B., the son, and D. and E., the two grandsons, stand in different degrees of consanguinity, and B. will, therefore, under this second rule, be entitled to one half of the estate, and D. and E. to the other half, as tenants in

(a) N. Y. Rev. Stat. vol. 1, 754, § 18. Griff. Law Reg. under the head of those states, No. 6. (b) Ib. 4 Kent's Comm. 390. (c) Ib.
common. Or if A. should leave not only B., a son, living, and D. and E., two grandsons by C., who is dead, but also F. and G., two great grandsons by H., a daughter of C., who is also dead, here would be descendants living in three different degrees of consanguinity, viz. a son, two grandsons, and two great grandsons. The consequence would be, that B., the son, would take one half of the estate, D. and E., the grandsons, would take two thirds of the other half, and F. and G., the great grandsons, would take the remaining third of one half, and all would possess as tenants in common. Had they all been in equal degree, that is, had all of them been either sons, grandsons, or great grandsons, they would, under the first rule, have inherited the estates in equal portions, or *per capita*. But when they are in different degrees, they inherit *per stirpes*, or such portion only as their immediate ancestor would have inherited if living. This rule prevails throughout the United States, with the exception of Rhode Island, North Carolina, South Carolina, and Louisiana; and it agrees with the general rule of law in the distribution of personal property.

Louisiana is also an exception to the general rule, and representation applies in the collateral line to brothers and sisters, and their descendants, whether they stand in equal or unequal degrees. *(a)*

The doctrine of representation, it seems, is also admitted in collateral cases in North and South Carolina, and Rhode Island, notwithstanding the descendants in the collateral line may stand in equal degrees. *(b)*

A third canon of inheritance which prevails to a considerable extent in the United States is, that if the owner of lands dies without lawful descendants, leaving parents, the inheritance shall ascend to them, either first to the father, and next to the mother, or jointly, under certain qualifications.

*(a) Civil Code of Louisiana, No. 893. (b) 4 Kent's Comm. 392.*
The estate goes to the father in such a case, unless it
came to the intestate on the part of the mother, and
then it passes to her, or to the maternal kindred. Such
is the rule prevailing in the states of Maine, New
Hampshire, Vermont, Massachusetts, Rhode Island,
New York, Indiana, Kentucky, and Virginia. (a) In
Georgia, the widow of the intestate takes a moiety, if
there be no children, and the other moiety, or the whole,
if there be no widow, goes to the father; but only as one
of the next of kin with the brothers and sisters, for the
statute makes them equal of kin for the purpose of in-
heritance. In Maryland, if the estate was acquired by
descent, it goes to the parent or kindred in the paternal
or maternal line from which it descended. If otherwise,
it goes to the father only in default of issue, and of
brothers and sisters of the whole and of the half blood.

In Louisiana, the father and mother succeed equally
as next of kin to a moiety of the estate of the child
dying intestate, and without issue. The other moiety
goes to the brothers and sisters of the descendants. If
only one of the parents survive, that parent takes one
fourth; and such parent is a forced heir for the one
fourth of the estate, and the child cannot dispose of it by
will. (b)

In Illinois, in default of issue and their descendants,
the estate goes to the next of kin in equal degree; and
this rule would carry the estate to the parents.

In Pennsylvania, the father takes for life only, if there
be brothers and sisters of the deceased; if none, then
he takes the fee.

In Missouri, the parents take equally with brothers
and sisters of the intestate.

In South Carolina, in default of issue, or widow, (who

(b) Civil Code of Louisiana, no. 899, 907. Cole v. Cole, 19 Martin's
Rep. 414.

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takes a third or moiety of the estate, as the case may be,) the father takes the estate in conjunction with the brothers. (a)

In Connecticut, Ohio, Tennessee, and Alabama, the father only takes in default of brothers and sisters.

In Delaware, the parents are postponed to the brothers and sisters, and their descendants; and in default of brothers and sisters, the estate is distributed equally "to every the next of kindred of the intestate, who are in equal degree," who it is presumed must be the parents, if living, and thus both father and mother jointly would take the inheritance.

In North Carolina, the parents take for life only in default of issue, and of brothers and sisters; and in New Jersey, if there be no lawful issue, nor a brother nor sister of the whole blood, nor their lawful issues, the father takes the inheritance in fee, unless it came to the person last seised from the mother by descent, devise, or gift, in which case it descends, as if the person dying seised had survived his father. (b)

If the inheritance came to the intestate on the part of the mother, though his father survive him, and the mother survives, and there be a brother or sister, or their descendants, the mother takes an estate for life only, and if there be no brother nor sister, nor their issue, nor father, she takes the inheritance in fee. The same rule prevails in New York (c) and Pennsylvania. (d)

In New Jersey, the mother is wholly excluded from the inheritance; and in North Carolina, she takes with the father, or as survivor, an estate for life only, in default of issue, and in default of brothers and sisters.

She takes no other estate in Tennessee, nor even that estate, unless in default of a father.

In Illinois and Louisiana, in default of issue, she takes equally a portion of the inheritance with the father, which in Louisiana is a moiety of the estate between them. In Illinois, the parent or parents take the whole estate as next of kin.

In Georgia, the widow of the intestate takes a child’s share of the estate; and if no issue, then she takes a moiety. If no widow, issue, or father, the mother takes an equal share, as one of the next of kin, with the brothers and sisters. The mother in Vermont takes equally with the brothers and sisters of the intestate. On default of issue and widow, (for she takes half of the estates,) and father, and brothers and sisters, the mother takes the whole estate as next of kin. The law in Maine and New Hampshire is nearly similar, but with this variation, that the mother takes equally with the brothers and sisters, and they all take alike, and the widow of the intestate is confined to her common law dower.

In Massachusetts, Rhode Island, Connecticut, Ohio, Delaware, Maryland, Alabama, and Mississippi, the mother takes the inheritance in default of issue, and of brothers and sisters, and father. But if there be brothers and sisters, then by the laws of Massachusetts, Rhode Island, Indiana, Virginia, Kentucky, and South Carolina, in default of issue, and father, the mother shares equally with the brothers and sisters; and in Missouri, she shares equally with them and the father, though he be living; and in Connecticut, she shares equally with the father.

If the intestate dies without issue, or parents, the estate goes to his brothers and sisters, and their representatives. If there be several such relatives, and all of equal degree of consanguinity to the intestate, the inheritance descends to them in equal parts, however remote from the intestate the common degree of consanguinity may be. If they all be brothers and sisters,
or nephews and nieces, they inherit equally; but if some be dead leaving issue, and others living, then those who are living take the share they would have taken if all had been living, and the descendants of those who are dead inherit only the share which their parents would have received if living. The rule applies to other direct lineal descendants of brothers and sisters, and the descendants to the remotest degree take per capita when they stand in equal degree, and per stirpes when they stand in different degrees of consanguinity to the common ancestor.

The ascending line after parents is postponed to the collateral line of brothers and sisters. This rule is declared by the New York revised statutes, and it is a rule generally prevalent through the states, that brothers and sisters are preferred to grandparents, although the latter stand in an equal degree of kindred. (a)

By the civil code of Louisiana, (b) if a person dies leaving no descendants, nor father nor mother, his brothers and sisters, or their descendants, inherit the whole succession, to the exclusion of the ascendants and other collaterals. The old civil code of Louisiana was different, since according to that code, before collateral relations could set up a claim to the inheritance, they must have exhausted the relations in the ascending line. (c)

The laws of the several states very much differ from each other when the next of kin in the collateral line are nephews and nieces, and the uncles and aunts claim to share with them. Under the New York revised statutes, the descendants in the direct lineal line from brothers and sisters, however remote they may be, take exclusively so long as any of that line exist. But this rule is not universally adopted. In the greater number of the states, the nephews and nieces and their descendants take, but not exclusively. In Vermont, New

(a) Vol. 1, 752, § 7, 8, 9, 10. 4 Kent's Comm. 401.  (b) Art. 908.
Hampshire, and North Carolina, uncles and aunts take equally with nephews and nieces, as being of equal kin. But nephews and nieces, though they be all of equal consanguinity to the intestate, take in exclusion of uncles and aunts in the states of Maine, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Ohio, Indiana, Illinois, Missouri, Kentucky, Virginia, Tennessee, South Carolina, Georgia, Alabama, Louisiana, and Mississippi. (a)

The principle on which the rule is declared to be founded in the laws of Maine and Massachusetts is, that collateral kindred claiming through the nearest ancestor, are to be preferred to the collateral kindred claiming through a common ancestor more remote. The claim of the nephew is through the intestate's father, and of the uncle through the intestate's grandfather. (a)

In the states of New Hampshire, Vermont, Rhode Island, Connecticut, Ohio, Maryland, Georgia, Alabama, and Mississippi, there is no representation among collaterals after brothers' and sisters' children; nor in Delaware after brothers' and sisters' grandchildren. In New Jersey, there does not appear to be any positive provision for the case. (a)

In Louisiana, representation is admitted in the collateral line in favour of the children and descendants of the brothers and sisters of the deceased. (b)

In North Carolina, the claimants take per stirpes in every case, even though the claimants all stand in equal degree of consanguinity to the common ancestor. (c)

In the states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, New York, Illinois, North Carolina, Tennessee, and Georgia, (d) there seems to be no distinction left between the whole and the half blood. They are equally of the blood of the intestate.

(b) Civil Code, art. 803. (c) 4 Kent, ib.
(d) N. Y. Rev. Stat. vol. 1, p. 753, § 15. 4 Kent, ib.
In Connecticut, if the estate be ancestral, that is, if it came to the intestate by descent, devise, or deed of gift from some ancestor or kindred, there is no preference, but if it came from some person not of kin to the intestate, although it came by devise, or deed of gift, it is not an ancestral estate, and will descend as estates acquired by actual purchase; and in this case preference is given to the whole blood and their legal representatives, but never in such a manner, that a relative of the whole blood shall be preferred to a relative of the half blood, who is nearer of kin to the intestate than the relative of the whole blood, unless where the relative of the whole blood takes by representation. Where the whole and half blood are in equal degree, the whole blood excludes the half blood, but if the half blood are nearer of kin, they exclude the whole blood; as when the relatives were first cousins, some of the whole and some of the half blood, the cousins of the whole blood take the whole estate; but if the whole blood were second cousins, those of the half blood being first cousins would exclude the second cousins; so too, the brothers of the half blood being in the second degree, and the uncles of the whole blood being in the third degree, the brothers exclude the uncles. (a)

In New Jersey, in the collateral line, brothers and sisters of the whole blood and their issue, however remote, exclude brothers and sisters of the half blood as long as any issue of the whole blood can be found; and when brothers and sisters of the whole blood and their issue, and brothers and sisters of the half blood and their issue, are exhausted, the next collateral kinsman of the whole blood and his issue inherits; and such kinsman, if of the half blood, is not merely postponed until the issue of the whole blood fail, but is for ever excluded from the inheritance. (b)

(a) 4 Kent's Comm. 402. Reeve, ib.  
(b) Ib.
In the state of Pennsylvania, whether the estate be ancestral or otherwise acquired, the whole blood, as long as there are brothers and sisters of the whole blood or their issue, however remote, are preferred to the brothers and sisters of the half blood or their issue; but brothers and sisters of the half blood and their issue are preferred to kindred more remote from the intestate. The issue of brothers and sisters, however remote, stand in the place of brothers and sisters by representation.

In the state of Delaware, if the estate be ancestral, there is no preference given to the whole blood; if it be acquired otherwise, so far as it respects brothers and sisters of the whole blood and their issue, however remote, they are preferred to brothers and sisters of the half blood and their issue; but brothers and sisters of the half blood are preferred to kindred more remote than brothers and sisters. When there are no brothers or sisters of the half blood and their issue, the half blood are put upon the same footing as the whole blood. But if there be no brothers nor sisters of the half blood, nor any issue, but there are other relatives of the whole and half blood, as uncles, aunts, cousins, &c., in these cases the whole and half blood take equally.

In the state of Maryland, when the estate is ancestral, there is no preference of the whole blood over the half blood; when the estate is otherwise acquired, brothers and sisters of the whole blood and their issue are preferred to brothers and sisters of the half blood and their issue; but brothers and sisters of the half blood and their issue are preferred to other relatives of the whole blood, however near they may be.

In the state of Virginia, there is a preference given to the whole blood in all cases, as well when the estate is ancestral, as when otherwise acquired, but never in such a manner as to exclude or even postpone the half blood. When the whole blood inherits, so likewise does the half
blood, but the half blood take only half as much as the whole blood.

In South Carolina, the preference is given to the whole blood, whether the estate be ancestral or otherwise acquired. When the relatives living are brothers and sisters of the whole and also of the half blood, the whole blood take the whole estate; and the case would be the same, if some of the brothers and sisters of the whole blood were living and others dead, leaving children, the surviving brothers and sisters of the whole blood, and the children of the deceased brothers and sisters, who take per stirpes what their parents would have taken, are preferred to the brothers and sisters of the half blood. But if all the brothers and sisters of the whole blood be dead, some or all of them leaving children, the brothers and sisters of the half blood are put upon a footing with the children of the brothers and sisters of the whole blood. When there are no parents, nor brothers nor sisters of the whole blood, nor any of their descendants, nor any brother nor sister of the half blood, the estate goes to the next of kin, and no preference is given in that case to the whole blood. On the death of the wife before the intestate, the estate goes to the father, and brothers and sisters, both of the whole blood and half blood, there being in this case no preference of the whole blood. (a)

In the state of Ohio the whole blood is not preferred to the half blood when the estate is ancestral, but if it had been acquired otherwise than from a relative by descent, devise, or deed of gift, as when the intestate had purchased real property, the whole blood is preferred to the half blood.

In Virginia and Kentucky, the relatives of the half blood in the same degree of kindred with the whole blood take half as much as the relatives of the whole blood, and in the state of Virginia the whole blood take

(a) 4 Kent's Comm. 402. Reeve, ib.
take double portions and the half blood single portions.

There is a difference, also, in the laws of the several states between the succession to estates which the intestate had acquired in the course of descent or by purchase. If the inheritance was ancestral, and came to the intestate by gift, devise, or descent, it passes to the kindred who are of the blood of the ancestor from whom it came, whether it be in the paternal or maternal line, so as to exclude the relations in the opposite line until the other line be exhausted. This is the rule in Rhode Island, Connecticut, New York, (a) New Jersey, Pennsylvania, Ohio, Virginia, Tennessee, and North Carolina. (b) But in the states of New Hampshire, Vermont, Massachusetts, New Jersey, Virginia, South Carolina and Georgia, both estates, viz., ancestral and those which are otherwise acquired, descend to the same persons, that is, whoever takes one kind of estate, takes the other also, except that in New Hampshire and Vermont, when a minor dies unmarried, his ancestral estate derived from his father goes to his brothers and sisters, but the estate otherwise acquired goes also to the mother as well as brothers and sisters. In Virginia, the descent of ancestral estate is regulated by the acts of 1790 and 1792, as revised in 1819. (c)

In Connecticut, the ancestral estate descends to those kindred who are related to the person from whom it came as long as there are brothers and sisters and their legal representatives, and uncles and aunts and their legal representatives related to the person from whom the estate came; but if no such relatives are found, it will descend with estates otherwise acquired to any relative, and in the descending line, the same person takes both estates. (d)

(a) N. Y. Rev. Stat. vol. 1, 752, 753, § 10, 11, 12, 15.
(c) Ib.
(d) Ib.
In Delaware, the ancestral estate goes to the brothers and sisters and their legal representatives who are related to the person from whom it came, and the other estate not ancestral, goes to the brothers and sisters of the whole blood and their legal representatives; and when it exceeds the limits of brothers and sisters and their legal representatives, both estates go to the same persons. (a)

In Maryland, the ancestral estate descends to kindred related to the person from whom it came, as far as regards brothers and sisters and their descendants. An estate otherwise acquired descends to brothers and sisters of the whole blood and their descendants, and on failure of such relatives, it goes to the brothers and sisters and their legal representatives of the half blood, and in other cases both estates go to the same persons. In default of lineal descendants, and parents and brothers and sisters and their descendants, the inheritance ascends to the grandparents of the intestate, or to the survivor of them. (b)

But by the New York revised statutes (c) the grandparents are in all cases excluded from the succession, and the direct lineal ascending line stops with the father.

In New Jersey and North Carolina, they are also excluded, and in Missouri, the grandparents lose their preference as nearest of kin, but are admitted into the next degree, and take equally with uncles and aunts.

In Virginia and Kentucky, the claim of the grandmother is reduced from its natural priority to the rank of that of the aunt, but the grandfather has his right to the inheritance preserved as being nearer of kin than uncles and aunts. The grandfather takes the estate before uncles and aunts in most of the United States, as being nearer of kin to the intestate. Such is the rule in the states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, Pennsylvania,

(a) Reeve on Descents.  
(b) Ib.  
(c) Vol. 1, 752, § 10.
Delaware, Maryland, Ohio, Indiana, Illinois, South Carolina, Georgia, Alabama, Mississippi, and Louisiana. (a)

In Rhode Island, if there be no grandfather, then the estate goes to the grandmother, and uncles and aunts on the same side and their descendants, or such of them as exist. The rule is the same as that existing under the English statute of distributions of personal estates, (b) viz. that the grandmother takes the personal estate in preference to uncles and aunts, as nearer of kin.

In default of lineal descendants and parents, and brothers and sisters and their descendants and grandparents, the inheritance goes to the brothers and sisters equally of both the parents of the intestate and to their descendants. If all stand in equal degree of consanguinity to the intestate, they take per capita, and if in unequal degrees, they take per stirpes.

This is the rule declared in New York, with the exception of the grandparents, and it may be considered with some slight variations in particular instances as a general rule throughout the United States. (c)

In Rhode Island, in default of grandparents and uncles and aunts and their descendants, the estate goes to the great grandfathers; and if none, then to the great grandmothers, and the brothers and sisters of the great grandparents and their descendants. (d)

In Louisiana, representation only takes place in favour of lineal descendants and the descendants of brothers and sisters; and in the ascending line, the nearest ancestor in degree excludes the more remote. (e) In default of these, the inheritance goes to the collateral relations; and in that case, he who is nearest in degree,

(a) 4 Kent's Comm. 407.
(b) Blackborough v. Davis, 1 P. Wms. 41. Woodroff v. Wickworth, Prec. Ch. 527.
(c) N. Y. Rev. Stat. vol. 1, 752, § 10. Ib. 753, § 13. 4 Kent, ib.
(d) See Stat. of Descents, Jan. 1892. 4 Kent, ib.
(e) Civil Code, No. 892, 893.
excludes all the others; and if there be several in the same degree, they take *per capita*. (a)

Representation is confined in New York to cases in which the inheritance had not come to the intestate on the part of either of his parents. The rule is controlled in that, and in some other states, by the following rule. If the inheritance came to the intestate on the part of his father, then the brothers and sisters of the father and their descendants are preferred; and, in default of them, the estate descends to the brothers and sisters of the mother and their descendants. But if the inheritance came to the intestate on the part of his mother, then her brothers and sisters and their descendants are preferred; and, in default of them, the brothers and sisters on the father's side and their descendants take.

On failure of heirs, under the preceding rules, the inheritance descends to the remaining next of kin to the intestate, according to the rules in the English statute of distribution of personal estates, subject to the doctrine in the preceding rules in the different states, as to the half blood, and as to ancestral estates, and as to the equality of distribution. (b)

This rule is of very prevalent application in the several states.

There are some peculiarities in the laws of descent, which remain to be noticed. In North Carolina, in the descent of acquired estates, the collateral need only be the nearest relation of the person last seised; but, in descended estates he must be of the blood of the first purchaser; (c) and the rules of consanguinity are ascertained, not by the rules of the civil law as applied under the statute of distribution, but by the rule of the common law in its application to descent. In South Carolina, the widow, under this last rule, will take a moiety, or

(a) Civil Code, No. 910. (b) 4 Kent's Comm. 409. (c) Bell v. Dozier, 1 Devereux, 333. 4 Kent, ib.
two-thirds of the inheritance according to circumstances. In Rhode Island, Virginia, Kentucky, Maryland, and Alabama, the inheritance in default of heirs under the preceding rule, continues to ascend to the great grandfathers, and in default of them, to the great grandmothers, and to the brothers and sisters of them respectively, and their descendants. If there be no kindred on either side, the estate goes, in Rhode Island, Virginia, and Ohio, to the husband or wife of the intestate, or their next of kin if dead. (a)

In Louisiana, the direct lineal ascending line after failure of brothers and sisters, and their descendants, is first to be exhausted before the estate passes to the collateral relations. The ascendants take according to proximity to the intestate; so that the grandfather will exclude the great grandfather. The ascendants in the paternal and maternal lines in the same degree take equally. (b)

In Vermont, if a man dies intestate without issue, the widow is entitled to one half of the real estate for ever in lieu of dower after all the debts are paid.

In Pennsylvania and Delaware when the intestate dies without issue, the widow is entitled to one half of the real estate of the intestate for life, which is in lieu of dower. In Delaware, if a person dies intestate, without issue, the widow would be entitled to one half of the land which he owned at his death. It is inferred that this is in lieu of dower, because it cannot be supposed that the legislature intended that the widow should have a moiety for life, and a third besides, for the statute has not expressed it to be in lieu of the dower. If the legislature did not intend that it should be in lieu of dower, this is peculiar to Delaware. (c)

In South Carolina, on the death of the husband, the wife, if she chooses, may take one-third of the real pro-

(a) 4 Kent’s Comm. 410.  (b) Louisiana Code, art. 901, 904.  (c) Ib.
perty of her husband in fee simple, where there is issue of the marriage; and where there is no issue, one half; and if there be no brothers or sisters of the whole, nor half blood, nor issue of the whole blood, nor lineal ancestor, she is entitled to two thirds in fee simple. (a)

In Georgia, the wife is an heir to the real estate of her husband, if she elects to be so. (a)

In New Hampshire and Vermont, when a child dies under age without issue, although the mother, when the father is dead, is an heir with brothers and sisters of the intestate in all cases, yet she is not heir with them in this case. (a)

If the father inherit a purchased estate, the mother inherits an equal share with him. A similar law exists in Connecticut.

In New York and New Jersey, the mother cannot under any circumstances inherit to her child.

In North Carolina, on the death of the intestate without issue, or brothers or sisters, or any issue of them, if the estate was purchased with the intestate's money, or if it came to him from some ancestor to whom he is not heir, in case of such ancestor's death the estate goes to the intestate's father and mother for their joint lives, and on the death of one of them, to the survivor for his or her life.

In South Carolina when there is no issue, but the wife and the father are living, the estate is divided between them; and also, in such case, if the father be dead, but the mother be living, they divide the estate between them.

It is peculiar to Maryland and Virginia, that on the failure of relatives of the intestate, the estate descends to the wife or husband of the intestate, as the case may be; and if there be no wife nor husband, to their relatives, to take in the same manner as if he or she had

died seised thereof; and if there had been more husbands or wives than one, and all had died previous to the intestate's death, the estate descends as aforesaid to the kindred of all the wives or husbands. (a)

In Massachusetts, when a claimant to the property of the intestate is next of kin, and computes his kindred through an ancestor more remote from the intestate than other next of kin compute, he is excluded from the inheritance in favour of those next of kin, who claim through an ancestor nearer to the intestate; for example, an uncle and nephew are both alike near of kin, and for that reason, in other states take together, but in this state the nephew excludes the uncle; for the uncle claims kindred to the intestate through the intestate's grandfather, who is in the second degree, whilst the nephew claims kindred through the intestate's father who is in the first degree; and thus the nephew excludes the uncle. (a)

In Connecticut an entailed estate descends to the donee an entailed estate, and from him descends to his issue in fee simple. (a)

In New York, the statute, after it has made provision for the descent of estate to the issue of the intestate, and the brothers and sisters and their children, and the nephews and nieces of the intestate, adopts in all other cases the common law of England. (a)

The statute of descents in New Jersey, after providing for the issue of the intestate, his brothers and sisters of the whole blood, and their issue, giving them the preference to the half blood, and then providing for the brothers and sisters of the half blood without making provision for their issue, leaves all the other cases to the provision of the common law of England.

In Pennsylvania and New York, when the estate is ancestral, a preference is given to the whole blood over the half blood. (a) In the other states, where a diff-

(a) Reeve, ib. 384. 4 Kent's Comm. 404.
ference is made as to the course of descent when the estate is ancestral, from that which takes place if it be purchased, it is sufficient that the relative who claims should be of the blood of the person from whom it came, and it is not necessary that he should be a relative of the intestate of the whole blood.

It is peculiar to Delaware, that the statute which limits representation in the collateral line, extends it to brothers' and sisters' grandchildren, whereas in every other state which has a limiting clause in its statute of descents, representation extends no farther than to brothers' and sisters' children. In the states which have no limiting clause, representation is continued ad infinitum in the collateral, as it is in all states in the descending line.

In Maryland, if there be no issue, nor brother nor sister of the whole blood or half blood, nor any descendant of them, the statute provides for the grandfather, and his descendants, giving to the paternal grandfather the preference to the maternal grandfather, and his descendants, and preferring the male paternal ancestor, not only to the female, but male maternal ancestor.

It is peculiar to Virginia and Kentucky, that when there is no issue, father or mother, or any descendants from them, to divide the estate of the intestate into moieties, giving one moiety to the paternal relatives, and the other moiety to the maternal relatives.

It is also peculiar to the law of North Carolina, that an estate which came to the intestate by a settlement of his ancestor, is limited in its descent to the relatives of the blood of the ancestor from whom it came.

The New York Revised Statutes, (a) exclude illegitimate children and relatives who are illegitimate from taking by descent. But the estate of an illegitimate intestate may devolve on his mother; and, if she be

dead, on his relatives on the part of the mother, the same as if he had been legitimate.

In the States of Maine, New Hampshire, Massachusetts, (a) New Jersey, Pennsylvania, Delaware, Maryland, South Carolina, Georgia, Alabama, and Mississippi, bastards are subject to the disabilities of the English common law.

But in the states of Vermont, Rhode Island, Virginia, Kentucky, Ohio, Indiana, and Missouri, bastards can inherit from, and transmit to, their mothers, real and personal estates. The principle prevails, also, in Connecticut, Illinois, North Carolina, Tennessee, and Louisiana, with some modifications. Thus, it has been adjudged in Connecticut, that illegitimates are to be deemed children within the purview of the statute of distributions, and, consequently, that they can take their share of the mother’s real estate, equally as if they were legitimate. (b)

In North Carolina, bastards can inherit as lawful children to their mothers; but it would seem that in default of their own issue, their mother does not take, but their brothers and sisters by the same mother. The rule in Illinois and Tennessee goes as far as that in North Carolina, in respect to the capacity of the bastard to inherit. In Tennessee, the bastard does not inherit to the mother, unless she dies intestate without lawful issue. (c)

In Louisiana, natural children, unless their father is unknown, or they are the offspring of adulterous or incestuous connexions, inherit from the mother, if she has no lawful issue, and from the father likewise, if he leaves no wife, nor lawful heir. The father and mother inherit equally to their illegitimate offspring; and, in default of parents, the estate goes to the natural brothers and sisters of the bastard, and to their descendants. (d)

(c) 4 Kent, ib. 414.
(d) Louisiana Code, Art. 912, 917.
III. In the distribution of personal estate, the states of Tennessee, North Carolina, Maryland, Delaware, and New Jersey adopt the English statute of distribution. The New York Revised Statutes which took effect on the 1st of January, 1830, have essentially re-enacted this statute. The distribution which it makes is, after payment of the debts, of one-third of the surplus to the widow, and the residue by equal portions among the children, and such persons as legally represent them. If no children, or their representatives, one moiety to the widow, and the residue to the next of kin. If no descendant, parent, brother or sister, nephew or niece, the widow takes the whole surplus. If there be a brother or sister, nephew or niece, and no descendant or parent, the widow takes the whole surplus, if it does not exceed two thousand dollars. If it does, she takes her moiety and two thousand dollars only. If no widow, the surplus goes equally to the children, and those who represent them. If no widow or children, or their representatives, the surplus goes to the next of kin in equal degree, and their representatives. If no children, or their representatives, or father, a moiety of the surplus goes to the widow, and the other moiety in equal shares to the mother and brothers and sisters, or their representatives. If no widow, the whole surplus goes to the mother, and brothers and sisters, and their representatives. If there be a father, and no child or descendant, he takes a moiety if there be a widow, and the whole, if there be none. If there be a mother and no child, nor descendants, nor father, brother, sister, or representative of a brother or sister, the mother takes a moiety if there be a widow, and the whole, if there be none. When descendants or next of kin, are in equal degree, they take per capita. When they stand in unequal degrees, they take per stirpes. No representation is admitted among collaterals after brothers' and sisters' children. Relatives of the half blood take equally, and in the same man-
ner as those of the whole blood. Posthumous children, take equally as if born in the lifetime of the person they represent. (a)

In a majority of the states, the descent of real and personal property, is to the same persons, and in the same proportions, and the regulation resembles in substance that of the English statute of distributions.

This is the case, subject to the peculiarities already pointed out in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, Pennsylvania, Virginia, Ohio, Indiana, Illinois, Georgia, Kentucky, Missouri, Mississippi, South Carolina, and Alabama. (b)

SECTION V.

OF THE LAW WHICH GOVERNS THE SUCCESSION TO PROPERTY.

I. When immoveable property is the subject of the succession, the lex loci rei sitae governs.—Extent of the application of this rule.—Whether it applies to the presumption of death or survivorship.—It determines whether any and what preference is conferred by primogeniture or difference of sex.—It regulates the order in which persons are called to the succession, and to what extent representation is admitted.—The right of husband and wife to succeed each other, and the competence or incompetency of persons to succeed.

II. When the succession is to moveable property, the law of the place where the intestate was domiciled at the time of his death governs in all these particulars.—The decisions of foreign jurists and foreign tribunals concur in adopting this rule.—The decisions in England and the United States are in conformity with it.—State of the law in Scotland until the decision of the House of Lords in the case of Bruce v. Bruce.—Nature of the domicile.

The rules and order of succession established by the law of the country in which the title to the inheritance is litigated, may be different from those prescribed by the law of the country in which the intestate was domiciled at the time of his death, or in which the inheritance is situated; and those prevailing in the latter country may be different from those established in the place of the intestate's domicile. The selection of the law by which that title is decided is determined by the nature of the property which is the subject of it, as whether it is immoveable, or moveable.

I. There is an entire concurrence of opinion amongst
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jurists, and there is an uniformity in the judicial decisions of all ages and countries in support of the rule, that the succession ab intestato to immoveables or real property, is wholly governed by the lex loci rei sitae; and that it descends according to the order or law of succession prevailing in the country where it is situated. "Immobilia enim deferri ex jure, quod obtinet in loco rei sitae, adeo recepta hodie sententia est, ut nemo ausit contrà hiscere." (a)

This opinion, which necessarily follows from the maxim "immobilia sequuntur situm," is expressly adopted in deciding the title by succession to immoveable property. (b) "Concors est opinio, quod in bonis immobilibus vel solo coherentibus in diversis locis sitis, ut et in annuis reditibus, qui immobilium loco habentur, successio regulariter fiat secundum statuta loci, ubi bona illa sunt sita. Cujus rei fundamentum in jure firmum habetur hoc, quod omnes soli res sive bona immobilia, tantum sub territorio ac jurisdictione ejus sint loci, in quo jacent. Etiamsi dominus eorum alibi habeat domicilium. Ergò et statutis illius loci ac jurisdictionis obstringuntur, adeoque statuta illa, ratione bonorum sui territorii, obligant etiam non subjectos. Ipsas enim res afficiunt, sive à cive possideantur, sive ab advenâ. Verissimum ergò est, quod vulgò traditur ab interp. statuta vel jura municipalia etiam favorabila, sive in rem, sive in personam sint concepta, ad bona immobilia extra territorium sita, etiamsi illa majorem partem constituant, non extendi." (c)

Rodenburg treats as a real statute the law which regulates the distribution of an intestate succession, "conspirant," he says, "enim eò vota fere omnium bona ut dijudicentur suà lege loci, in quo sita sunt, vel

(b) Dumoulin, Com. in Cod. lib. 1, tit. 1, tom. 3, p. 556; and sur la Cout. de Senlis, Art. 140; and sur la Cout. d'Auvergne, Art. 41; D'Argentre, Art. 218, gloss. 1.
(c) Carpz. Jurisp. For. P. 3, const. 12, Def. 12.
esse intelliguntur.” (a) In another part of his treatise, speaking of the law of intestate succession, he says, “Quem diximus exigii ad locum rei sitae, si de rebus queratur immobileibus.” “Jus rebus succedendi immobileibus, semper à loco rei sitæ metiendum.” (b)

J. Voet lays down the rule “Bona defuncti immobilia et quæ juris interpretatione pro talibus habentur, deferri secundum leges loci, in quo sita sunt, adeo ut tot censeri debeat diversa patrimonio, ac tot hæreditates, quot locis diverso jure utentibus immobilia existunt.” (c)

This rule would seem to embrace every question which affects the title to succession. (c)

It has been seen in a preceding chapter that in establishing the opening of the succession, and consequently the fact that the property of another is liable to be dealt with as succession, certain presumptions are admitted as the evidence of that fact. One of these presumptions is afforded by the absence of the person whose succession is claimed. The title also may depend on the survivorship of one of two persons who had both died at the same time under circumstances which admitted of no positive proof of the fact. It may be asked, whether the presumptions adopted by the lex loci rei sitæ on these

(a) Rodenh. de Jure, tit. 2, c. 2, § 1.
questions are to be admitted by a foreign court in its adjudication on the title to immovable property. It would seem that they are obligatory only in foro rei sitae. They supply the place of proof, when that proof cannot be obtained. They therefore stand on the same footing as other rules of evidence which belong ad ordinationem litis, and are therefore governed by the lex fori. "Si de probationibus, et quidem testibus; sic eas adhibebit, sic examinabit hosce, prout exigit forum judicis, ubi producuntur." (a) "Si de instrumentis; sic exhibenda, sic edenda, ut fert loci statutum, ubi exhibentur, vel eduntur." (b)

Hertiuss proposes the question, whether a merchant's books, which by the law of the place where the debt was contracted obtain full credit, ought to be admitted as proof of the debt in another place where no such law exists. In the opinion of this jurist, as well as Mascardus and Mænius so far as it can be collected, the degree of credit to which, this species of proof is entitled must be left to the discretion of the judge, before whom it is adduced. (c)

Sir W. Grant expressed his opinion in a case already referred to, that these presumptions were not adopted by the law of England. "There are many instances in which principles of law have been adopted from the civilians by our English courts of justice, but none that I know of in which they have adopted presumptions of facts from the rules of the civil law." (d)

These presumptions are established by the code civil as rules of law, and therefore it may be supposed there is a stronger ground for recognising them in a foreign

(a) P. Voet, de Stat. § 10, cap. Unic. n. 9. Dig. lib. 22, tit. 5, l. 3.
(b) P. Voet, ib. n. 10. Cod. lib. 6, tit. 32, l. 2.
(c) Hertiuss, de Coll. leg. Sect. 4, § 68. Mascard. de Prob. Conc. 977.
tribunal. It is however conceived that they can be only obligatory in the tribunals of France, and that it must be left to the judicial tribunal before which the title to the succession is litigated, to decide not only on the nature of the evidence which it will admit as sufficient, but of the circumstances which will afford a presumption capable of supplying the place of positive proof.

The law of the situs of immoveable property must be resorted to in determining all the various questions which affect the right to succeed. It must be decided by that law on whom the inheritance descends, whether the right of primogeniture or any preference of males exists; the order in which persons are called to the succession; in what cases and to what extent representation is admitted; whether the persons take per capita or per stirpes; whether any and what preference is given to the whole over the half blood; the extent to which the right is affected by the distinction between estates by purchase and by descent.

J. Voet having classed the laws of succession amongst real statutes, because "rem principaliter efficiunt, et circa rem disponunt," says, "Quo pertinent jura successionum ab intestato; quonam ordine ad bona quæque ab intestato quisque in capita, vel stirpes, vel lineas, vel jure primogenituræ admittendus sit, quà ratione legiti, aut illegiti, agnati, cognati vocentur, quæque his sunt similia plura." (a)

Paul Voet lays down the same rule; "Quid si circa successionem ab intestato, statutorum sit difformitas? Spectabitur loci statutum, ubi immobilia sita, non ubi testator moritur." (b)

Thus with respect to primogeniture, in the language of J. Voet, "An jus primogenituræ admittendum sit, nec-

(a) Voet, lib. 1, tit. 4, n. 3.
(b) P. Voet, de Stat. § 9, c. 1, n. 3.
ne, immobile quidem intuitu spectandam esse legem loci, in quo sita sunt." (a)

"Unde primogenitus in Angliâ," says P. Voet, "tamtum patri succedit, ratione bonorum Anglicorum. Ratione bonorum in Belgio jacentium, pari jure cum fratribus concurret, nec gaudebit jure praecipui, nisi in specie id illi deferat statutum, mobilium quorumdam rationem." (b)

The right of representation is governed by the same law; "Si quaeris, cujus loci leges in representatione observandae sint? respondendum videtur eodem modo, quo supra in principali quaestionem de successione; puta immobilem respectu leges cujusque loci, in quo illa sita sunt, eo quod jus representationis omnino ad jus successionis intestatæ pertinet, imo successorem facit eum tanquam ex fictione legit prosimorum, qui verè atque naturaliter defuncto proximus non est." (c)

Dumoulin had adopted the same rule in his Commentary sur le Coutume de Senlis (d)

In determining what interest the wife takes in the moveable estate of her husband, recourse must be had to the law, not of the country in which the marriage took place, but of that in which the estate is situated.

The competence of the person to take by descent as heir must also be determined by that law. Thus it is immaterial what may be the capacity or incapacity of a bastard by the law of his domicile, if the lex loci rei sitæ excludes him from the succession. This was stated by the Court of King's Bench and afterwards by the judges in the House of Lords, in the case of Doe v. Vardell, to be the undoubted law of England, and it has been seen to be the opinion of foreign jurists. (e) That case remains

(a) Tiradelli, de jure primogen. quest. 46. Wassenaar, pract. jud. cap. 11, n. 99. Voet, lib. 38, tit. 19, n. 84.
(b) P. Voet, de Stat. § 9, c. 1, n. 3.
(c) Voet, lib. 38, tit. 18, n. 35.
(e) 6 Bligh's App. Cas. 479.
undecided. It has been however observed, that the original questions propounded to the judges and their answers assume that the party was a bastard, and that the effect which the law of Scotland gives to the subsequent marriage of the parents of an illegitimate child seems to have been overlooked. The subsequent marriage by a fiction of law affords a presumption *juris et dejure* that the marriage had taken place at the time of the intercourse, and that the child therefore was born in wedlock, and was not a bastard.

II. The opinion of foreign jurists and the decisions of foreign tribunals have concurred in establishing that the succession to moveable property is wholly governed by the law which prevails in the place where the intestate was domiciled at the time of his death.

This conclusion is founded on the doctrine that moveables or personal property are not considered to have any certain or permanent situation. They accompany their owner's person, "mobilia sequuntur personam et ejus ossibus adherent." Their situs is *in fictione juris* in the place of his domicile.

Thus Strykius, after laying down the rule regarding the succession to immoveable property, says, "Bona mobilia quod attinet, in his statuta successionum illius loci attendenda, ubi domicilium defunctus habuit. Mobilia enim in certo loco sita non dicuntur, sed potius personam sequuntur. (a) Persona vero illis se submisit statutis, ubi domicilium constituit. (b) Si itaque extra domicillii locum decedat aliquis, locus mortis non attentitur, etiamsi in loco mortis per aliquod temporis spatium commoratus fuerit; modo prius domicilium non mutaverit, et hic aliud constituerit. (c)"


(b) Sande, Decis. lib. 4, tit. 8, def. 7. Carps. Const. lib. 12, def. 13.

(c) Strykius, de Success. Dissert. 1, c. 4, n. 3.
The writings of jurists and the decisions of foreign tribunals to which reference has been already made in support of the doctrine that the succession to immovable is governed by the \textit{lex loci rei sitae}, are equally explicit and decisive in establishing that the succession to moveables is governed by the law of the place of the domicile of the intestate at the time of his death.

In all those particulars in which the \textit{lex loci rei sitae} regulates the succession to immovable property, the law which prevails in the country where the intestate was domiciled at the time of his death regulates the succession to his moveable property. It determines whether primogeniture gives any preferential right; "An jus primogeniture admitterendum sit, necne, mobilium respectu spectandum consuetudinem domicilii defuncti." (a) The admission of the right of representation and the extent of that right must be determined by the same law, "mobilium intuitu spectandas esse leges domicilii defuncti." (b) "Quoad mobilia autem licet in loco existant, ubi representatio ne quidem inter descendentes obtinet, nihilominus per representationem dividuntur, si ea in loco domicilii defuncti observetur." (c)

It determines whether the intestate is capable of being the stock of the succession, as whether his illegitimacy, or that of his children, does not prevent the former from being the stock of succession, or the latter from taking the whole or a part of his estate.

(a) Voet, lib. 38, tit. 19, n. 84.  
(b) Voet, ib. tit. 19, n. 35.  
A person born before the marriage of his parents, but legitimated by their subsequent marriage, is no longer a bastard. His right to inherit could only be controlled by some prohibitory law prevailing in the place in which that part of the succession which consisted of real or immovable property is situated. If the law of the country in which the intestate was domiciled at the time of his death, gives to the subsequent marriage of the bastard's parents the effect of legitimating him, it is perfectly clear, that the tribunals of the country which may adjudicate on the succession to his personal estate must decree him legitimate. It may happen, however, that the place of his death was not that which had conferred on him legitimacy, for he might at the time of his death have been domiciled in a country in which the law did not give to the subsequent marriage of the parents the effect of legitimation. But it is conceived, that the status of legitimacy which he had previously acquired permanently adhered to him, and was not affected by the law of the country in which he died.

The same rule would be applied in deciding whether the persons claiming as next of kin were legitimate.

The interest of a married woman in the personal estate of her husband who had died intestate will be that which the law of the place in which he was domiciled at the time of his death gives to a widow, and not that to which she would be entitled by the law of the place in which she was married, or in which she resided even if she had deserted her husband. (a)

The decisions in England have been uniform in adopting this rule. There are two early cases reported on the customs of London and York. (b) In the one it was held that the custom of London prevailed over that of York where the freeman died, and in the other that

the custom of London prevailed over the law of the domicile of the deceased. It should be observed that the decisions in both these cases are founded on the peculiar and personal nature of the custom of London, and do not derogate from the general rule. The custom attaches so completely to the person of the freeman as to control his moveable estate, and withdraw it from the operation of the rule.

In one of the earliest reported cases, Lord Hardwicke felt no hesitation in applying this rule to the distribution of the personal estate of an intestate domiciled in Jersey. At the time of the intestate’s death there was owing to him five hundred pounds bond debt in London. The plaintiffs brought their bill for a distribution of the five hundred pounds according to the statute of distributions, and the question was, whether it should be distributable according to the laws of England, it being found in the province of Canterbury, in which case the plaintiffs would be entitled to part, or whether it should be distributed according to the laws of Jersey, where the intestate resided at the time of his death, in which case the plaintiffs, by those laws, would not be entitled to any part of it. Lord Hardwicke recognised the rule that the personal estate follows the person, and becomes distributable according to the law or custom of the place where the intestate lived. “As to the usage of taking out administration,” his Lordship says, “that is only to give the party power to sue within such a jurisdiction, and does not in any way determine the equitable right which the party has to the effects; this argument holds the same as to foreign countries in relation to this question. Though Jersey is under the king’s dominion as part of his duchy of Normandy, yet it is governed by its own laws. If the question was to be determined now, I think the locality could not prevail, for it would be extremely mischievous, and would affect our commerce. No foreigner could deal in our funds but at the
peril of his effects going according to our laws, and not those of his own country.” (a)

In 1750, this doctrine was adopted by the same judge, and he held that the personal estate of an intestate who died domiciled in Scotland must be distributed according to the law of that kingdom. (b) It was followed by Lord Kenyon when he was Master of the Rolls in 1787. (c) It afterwards received the sanction of the House of Lords in the great case of Bruce v. Bruce, (d) and again in the case of Hog v. Lashley. (e) In the subsequent cases the rule that the personal property was governed by the law of the intestate’s domicile at the time of his death was admitted, and the principal, indeed only question in them was respecting what was the domicile of the intestate at the time of his death. (f)

The decisions in the states of America have fully recognised and adopted this rule. (g)

The unsettled state of the law of Scotland on this important question exhibited in the earlier history of its jurisprudence cannot fail to excite surprise, when it is considered how largely that jurisprudence has drawn on the civil law, and how explicit and uniform have been its commentators in laying down the rule that moveable property had no situs, but that it followed the person of

(a) Pilon v. Pilon, Amb. 27. (b) Thorne v. Watkins, 2 Ves. 35.
(d) April 15th, 1790. 2 Bos. and P. 229.
its owner, and the succession to it was regulated by the law of the place in which he was domiciled at the time of his death.

Lord Stair states the proposition that the law and customs of England, and of foreign countries, cannot constitute any right of succession not allowed by the law of Scotland. (a) Bankton also asserts that the laws in foreign countries can never constitute a right of succession, which must have its force from the laws of the place where the subject lies, and the maxim *mobilia sequuntur personam* is not to be understood of one's effects without the jurisdiction where the person resides. (b)

Erskine, however, entertained an opinion more in conformity with the doctrine of jurists and with the present state of the law. Where a Scotsman, he says, dies abroad *sine animo remanendi*, the legal succession of his moveable estate in Scotland must descend to his next of kin, according to the law of Scotland; and where a foreigner dies in Scotland *sine animo remanendi*, the moveables which he brought with him to that kingdom ought to be regulated, not by the law of the territory in which they locally were, but by that of the proprietor's *patria* or *domicil* whence he came, and whither he intends again to return. This rule is founded on the law of nations; and the reason of it is the same in both cases, that since all succession *ab intestato* is grounded on the presumed will of the deceased, his estate ought to descend to him whom the law of his own country calls to the succession, as the person whom it presumes to be most favoured by the deceased. (c)

In the series of reported decisions in the Courts of Scotland, commencing with *Purves v. Chisholm*, 1 Feb. 1611, and ending with *Bruce v. Bruce* in June 1788,

(a) Stair, b. 3, tit. 8, § 35.  
(b) Bankton, b. 3, tit. 8, § 5.  
(c) Erak. b. 3, tit. 9, § 4.  
Sir John Neshit's doubts, p. 126.  
Sir J. Stewart's answers, 208.
with the solitary exception of *Brown v. Brown*, (a) the court had recognised the *situs* of moveable property, and had distributed it according to the law prevailing in the place of its *situs*, and it will be found that the place of the intestate's domicile was either expressly rejected, or never recognised as affording the law by which the succession to his moveable estate could be governed. (b)

In the case of *Brown v. Brown*, the court held that the succession to the personal property of a Scotman consisting of Irish debentures was to be regulated by the law of his domicile, and not by the *lex loci rei sitae*.

Thomas Brown, of Braid, nephew to the defunct, brought an action against the executor before the commissaries of Edinburgh, wherein he insisted to have it declared, that the half of the debts for which securities were granted in Ireland belonged to him, and that the executor ought to be decreed either to account to him for the same, or to denude himself of the testament to that extent in favour of him the pursuer; on this ground, that by the laws of Ireland, the *jus representationis* is admitted in the succession of moveables, whereby the nephew and niece take along with the uncle and aunt, and that the succession to effects in foreign countries is to be governed by the law of the country where the effects happen to be situated. It being admitted by the defender, that by the law of Ireland the uncle and nephew succeeded equally in moveables, the debate turned upon this general point, by the law of what country

(a) Nov. 28th, 1744, Dict. 4604.
the succession to a defunct’s moveables was to be governed, whether by the law of the country where the moveables happen to be at the time of his death, or by the law of the country where the defunct had his domicile.

After full debate, the commissaries pronounced an interlocutor, by which it was declared that the deceased Captain Brown was origine a Scotsman, and never had any proper or fixed domicile elsewhere, having only attended his regiment in the different places to which it was called from time to time, until he at last returned to Scotland, his native country, where he resided some months before his death at Edinburgh, and that the said debentures and other nomina in question were found in his possession at his death; and it was found that the succession to the said Captain Brown’s moveable estate is to be regulated by the laws of Scotland, and that the right to his nomina belongs to the defender as his sole nearest of kin, and that the sole right to the said debentures, and sums thereby due, belonged to the defender.

The cause being brought before the lords by a bill of advocacion, it was urged for the pursuer, that as effects which happen to be locally in a foreign country are to be recovered by actions before the courts established in that jurisdiction, so the judges are to determine according to the rules and statutes by which the subjects in that territory are to be governed; and, therefore, when the matter comes to be litigated before the Courts in Scotland, where the effects are not and cannot be brought, the judge ought to determine according to the laws of the other country where the effects are to be recovered. Whatever foreign lawyers may have said upon this subject, the practice of this court was said to be with the pursuer, for which reference was made to Lord Stair, p. 11, and the decisions there quoted; and a recent case was also referred to between Duncan
of Lundie, and Murray of Ayton, whose wife was sister and nearest of kin to Adam Duncan, factor at Rotterdam, in which Lundie the nephew claiming a share of the executry, according to the laws of Holland, where the *jus representationis* in moveables takes place, the lords found that the nephew had no claim, and preferred the sister, who was executrix by the law of Scotland. On the other side, it was insisted that the present question in respect of the practice of the courts in Scotland was at least undecided; for, as to what is observed from Lord Stair, and the decisions by him quoted, they do not apply, as being either in the case of an heritable bond conveyed by testament which the law of Scotland does not permit, as it is *res immobils* and governed by the *lex loci* where the subject is situated, or in the case of nuncupative testaments made abroad, which the law of Scotland does not allow. As therefore the question is new in respect to the custom of Scotland, as nothing is to be found in our decisions or law books directly determining it, recourse must be had to the laws and practice of other countries, and to the testimonies of foreign lawyers, especially as the question may not improperly be said to concern the law of nations. And the general and received doctrine of the foreign lawyers on this subject may be reduced to these propositions: 1st, That in all countries the succession to heritage is to be governed by the *lex loci ubi res sita est*. 2nd, That proper *mobilía* are not considered *habere situm*, but follow the law of the country where the owner has his domicile, and to which it is presumed that sooner or later he intends to transfer them. 3rdly, That the same thing is true concerning *nomina debitorum*, that these are governed by the law of the domicile of the creditor, and not of the debtor. 4thly, That there are certain moveable subjects *qua habentur loco immobiliwm*.

Upon this debate the lords remitted to the ordinary to refuse the bill of advocatio.
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Some of the lords thought the greatest difficulty was in giving judgment concerning subjects not within the jurisdiction of the court: they agreed the case was to be determined by the law of nations, and by it the domicile of the creditor to be the rule, and therefore refused the advocacy. (a)

The state of the law of Scotland on this question may be collected from the arguments urged in support of the law of the domicile, and which for that reason have been cited.

Although the doctrine established by that decision is at present the admitted law of Scotland as it was then the admitted law of Europe, yet in the series of subsequent decisions it is found completely overturned, and the decision itself is treated by the bench in Morris v. Wright, (b) "as the only one that could be adduced in support of a contrary doctrine; that it was given by a thin bench upon a verbal report, and though not altered, because never brought under review, was exploded by the most eminent lawyers of the time."

The case of Bruce v. Bruce was decided on the succession to Major Bruce’s personal estate. He was the son of David Bruce, by his second wife, and a Scotsman by birth. He went to India, at first in the sea service, but afterwards, about 1767, he entered into the military service of the East India Company, on their Bengal establishment, in which he rose to the rank of major. In his letters written home to his relations, from time to time, and particularly so late as the 18th Dec. 1782, he constantly expressed an anxious desire to return to his native country, to spend his last days there, as soon as his circumstances would permit.

On the 30th of April 1783, Major Bruce died at Calcutta, a bachelor, and intestate; part of his property was then in London, part was invested in Indian bills

(a) Brown, Nov. 28th, 1744, Dict. p. 4604.
(b) Jan. 19th, 1785, Dict. 4616.
remitted by him to Messrs. A. Barclay, and on its way to Europe; and the remainder was in India. Disputes arose in the family in regard to this succession. James Bruce the brother consanguinean contended that the succession was to be regulated by the law of England, which made no distinction between the full and half blood; and the children of the second marriage contended, that as the deceased was a Scotman by birth, as his residence in England was merely occasional, and as he had expressed his intention of returning home as soon as he had acquired a competent fortune, the law of Scotland ought to be the rule; and more particularly in regard to that part of his fortune which at the time of Major Bruce's death was on its passage home, and which could not be said to be in England more than in Scotland.

The Lord Monboddo, ordinary, pronounced this judgment—"Finds, 1st, That as Major Bruce was in the service of the East India Company, and not in a regiment on the British establishment, which might have been in India only occasionally, and as he was not upon his way to Scotland, nor had declared any fixed and settled intention to return thither at any particular time, India must be considered as the place of his domicile. (a) 2ndly, That as all his effects were either in India or in the hands of the East India Company, or of others his debtors in England, though he had granted letters of attorney to some of his friends in Scotland empowering them to uplift those debts, his res sitae must be considered to be in England. Therefore finds that the English law must be the rule in this case for determining the succession to Major Bruce, and consequently David Bruce, of Kinnaird, is entitled to succeed with the defenders his brothers and sisters consanguinean, and decerns and declares accordingly." After a reclaiming

(a) Marsh v. Hutchinson, 2 Bos. and Pull. 231.
petition, the Court adhered. The children of the full blood then appealed to the House of Lords. After counsel on both sides had been heard, the Chancellor (Lord Thurlow) spoke to the following effect: "That as he had no doubt that the decree ought to be affirmed, he would not have troubled their lordships by delivering his reasons, had it not been pressed with some anxiety from the bar, that if there was to be an affirmation, the grounds of the determination should be stated, to prevent its being understood that the whole doctrine laid down by the interlocutor appealed from, and particularly that on which it was said the judges of the Court of Session proceeded principally in this and former cases similar to it, had the sanction of this house. It had been urged that the judgment should contain a declaration of what was the law, and he had revolved in his own mind whether that would be expedient. It was not usual in this house, or in the courts of law, to decide more than the very case before them, and he had particular reluctance to go farther in the present case, because as had been stated with great propriety by one of the respondent's counsel, various cases had been decided in Scotland upon principles, which if this house were to condemn, a pretext might be afforded to disturb matters long at rest. But he could have no objection to declare what were the grounds of his own opinion, and how far he coincided with the rules laid down by the court below. Two reasons were assigned for having declared that the distribution of Major Bruce's personal estate ought to be according to the law of England; 1st, That India, a country subject to that law, was to be held as the place of his domicilium. The second reason assigned by the interlocutor was, that the property of the deceased which was the subject of distribution, was at the time of his death in India or in England. As to this he founded so little upon it, that he professed not to see how the property could be considered to be in
England. It consisted of debts owing to the deceased, or money in bills of exchange drawn on the India Company. Debts have no situs, they follow the person of the creditor. That proposition in the interlocutor therefore fails in fact.

After examining the circumstances establishing the domicile of Major Bruce, and expressing his concurrence in this part of the judgment of the Court of Session, his lordship proceeded to add, "that though he would move a simple affirmance of the decree, yet he would not hesitate as from himself to lay down for law generally, that personal property follows the person of the owner, and in case of his decease must go according to the law of the country where he had his domicile; for the actual situs of the goods has no influence. He observed that some of the best writers in Scotland lay this down expressly to be the law of that country, and he quoted Mr. Erskine's institutes as directly in point. In one case it was clearly so decided in the Court of Session, and in the other cases which had been relied on as favouring the doctrine of lex loci rei sitae, he thought he saw ingredients which made the court, as in the present case, join both domicilium and situs. But to say that the lex loci rei sitae is to govern, though the domicilium of the deceased be without contradiction in a different country, is a gross misapplication of the rules of the civil law and jus gentium, though the law of Scotland on this point is constantly asserted to be founded on them." (a)

This opinion, with the judgment, settled the law of Scotland, and placed it on the true footing, conformably with the law of Europe. This decision was followed in Hog v. Lashley, and Ommaney v. Bingham. The rule laid down by Lords Thurlow and Loughborough in these cases is, that the succession to the personal

estate of the intestate is to be regulated by the law of the country in which he was a domiciled inhabitant at the time of his death, without any regard whatever to the place, either of the birth, or the death, or the situation of the property at that time. That is the clear result of the opinion of the House of Lords. (a)

In the case of Colville v. Lauder, and in Brown v. Brown, it was expressly admitted. (b)

The law of the domicile of the intestate, at the time of his death, and not that of his former domicile, is to be applied. But it must not be understood, that a residence alone constitutes a domicile for the purpose of subjecting the succession of the intestate’s property to the law which prevails there. (c) "Sed veriùs est, neque solam animi destinationem aut voluntatem, sine actuali habitacione, neque etiam solam habitacionem per se, etiamsi sit longissimi temporis, sine permanendi voluntate domicilium constituere, sed duo, voluntatem scilicet et factum habitacionis requiri, et conjunctim adesse debere; . . . . quoties ex duobus illis requisitis unum deficit, ibi non esse domicilium; adeoque omnes eos, qui ex temporali causâ in aliquo loco habitant, ibi quidem habitacionem habere, neutiquam vero domicilium contraxisse censere. (d)

"Hinc successio legitima defertur secundum leges territorii in quo defunctus domicilium habuit, licet ipse alibi mortuus sit, et leges Imperii communes hereditatem aliis deferant, ac res mobiles extra illud territorium reperiantur." (e)

A temporary residence for the purposes of trade or health, from the apprehension of the incursion of an

(a) Somerville v. Somerville, 5 Ves. 750.
(b) Dict. Success. app. 1. 4 W. and S. 28.
(c) Rodemb. de Jure, tit. 2, c. 2, n. 1.
(e) Carpa, J. F. p. 3, const. 12, def. 13, 19, et lib. 6, tit. 4, resp. 38.
enemy, or on account of the disturbances in his country, or from any other casualty, if the party has not fixed sedem suarum fortunarum, but retains an intention of returning, will not constitute a domicile.

If a person leaving his domicile at Utrecht should go into Spain, and dwell there for many years, following the business of a merchant, and afterwards should return home, and then should go to Amsterdam, and there tarry, engaged in the mercantile business, and should die, but at the same time retain his domicile at Utrecht by all those means which are used for that purpose, the law of Utrecht will regulate the succession to his personal estate. (a)

CHAPTER V.

SUCCESSION BY TESTAMENT.

I. The power of disposing by testament.—Restraints to which it was subject.—In respect of the person in whose favour it was exercised.—Of the property to which it extended.—Doctrine of the civil law.—The institution of the heir.—The diherison or pretention of children, &c.—Inofficiosum testamentum.—Persons entitled to set it aside.—Cannot be set aside if there are just causes of diherison.—What are just causes.—Not if the legitime has been given.—Other grounds on which this relief may not be competent.—Within what time the proceeding must be taken.—Effect of the judgment declaring the testament inofficious.

II. The laws of Holland, and III. of Spain, with some few exceptions, adopt the rule of the civil law.

IV. Coutume of Paris.—The institution of heir is no part of the coutume.—The testamentary power limited to certain portions and certain descriptions of property.

V. The coutume of Normandy rejects the institution of heir, and imposes still further restrictions on the testamentary power.

VI. Code civil.—Its modification of the two opposite systems under the civil law and coutumes.—As to the institution and seisin of heirs.—The restrictions on the power of disposing.

VII. Scotland.—No destination by proper testament of heritage or heritable subjects.—But heritage may be settled by a testamentary deed if proper expressions are used.—Law of deathbed.—Survivance of sixty days, going to kirk or market.—Power of disposing of moveable property by testament, but restricted in order that it may not defeat the jus relictum and children's legitime.

VIII. England.—The power of disposition of lands by testament existed before the Conquest.—Effect of the feudal system in restraining it.—Customs where the power of devising it was retained.—Removal of the restriction by the statute of wills.—Real estate of which the testator not seised at the date of his will cannot pass.—Power of disposing of moveables without restriction.
IX. Colonies in which the English statute of wills is adopted.—Alteration in the law of Lower Canada.

X. America.—The statute of wills adopted in all the states of America, except Louisiana.—But in certain states the testator need not have been seised of the property at the date of the will.—Provision in certain acts for children omitted in the will.

XI. The subjects of this chapter governed by the lex loci rei sitæ in respect of immovable property, and of moveable property by the law of the domicile.

I. The distinction in the law of succession of different countries consists in the power possessed by the owner of making any disposition of his property by testament, or of making by testament an institution to, or disposition of it different from that which the law would make, if he had died intestate.

The limits and restrictions on the exercise of that power, may extend to the whole immovable and moveable property, or to a part of it, or to the immovable property only. In some countries the power of freely disposing by testament is the predominant principle. In others, it has no existence, except so far as it is expressly conceded by the law. In the one, "voluntas hominis constituit heredem," in the other, "la loi faisait les heritiers, et non volonté de l'homme." (a)

The civil law not merely permitted, but required the deceased to nominate, or institute in his testament the person who should succeed to all his rights, active and passive. The testament was itself the law, "Pater familias uti legasset ita jus esto, dicat testator et erit lex." The law did not call to the succession heirs of the blood, unless there had been no institution of heirs by the testament. (b)

The restriction to which the civil law subjected the exercise of the testamentary power consisted in requiring the institution of heirs as essential to the validity of the

testament, and by obliging the testator, as to a portion of this estate, to institute particular persons as his heirs, or in other words, prohibiting him from disposing of it to any other persons than those particular heirs.

The institution of heirs is defined to be "designatio successoris in universum jus quod defunctus habuit tempore mortis." It is represented as the caput atque fundamentum of the testament, and is so essential to it, that an instrument which does not contain an express institution by the testator of heirs to his property, is considered only as a codicil, and not a testament. (a)

If it failed, either from the institution itself being vicious, or in consequence of the person instituted having died in the testator's lifetime, or from the instituted heir having renounced the inheritance, the testament became wholly inoperative, unless it contained what was termed the codicillary clause, namely, a declaration that if the instrument could not take effect as a testament, it should operate as a codicil. With this clause, the testament was null only as it related to the institution of the heir, but not as to its legacies, fidei-commissa, or other dispositions. These remained valid, and the heir whom the law called to the succession was charged with them. (b)

The institution could not be made in the codicil, unless the will made such a reference to it, that the contents of the codicil might be considered as incorporated into the will. If the institution had been made by the will, it could not be revoked, nor even subjected to a condition by a codicil. (c)

The institution might be inserted in any part of the will, and expressed in the fewest words, as "Titius hæres esto." It was sufficient that the testator's inten-

(a) Dig. lib. 28, tit. 5. Cod. lib. 6, tit. 24. Inst. lib. 5, tit. 20, § 34. Poth. ad Pand. lib. 28, tit. 6, § 1. Lauturb. ad Dig. lib. 28, tit. 1, § 73. Vinnius, ad Inst. lib. 2, tit. 20, § 34, p. 462. Voet, lib. 28, tit. 5, n. 1 Perez. ad Cod. lib. 6, tit. 24. (b) 1b. (c) Dig. lib. 29, tit. 7, l. 10, 13. Poth. ad h. lib. and tit. n. 8, 10, 11.
tion could be clearly collected. He might institute his heirs by referring to a codicil or any other writing, (a) as "I institute him as my heir who will be found named in a writing which I have deposited with Titius," or "Let him be my heir whose name I will write in a codicil." By this reference the will incorporated into itself that which was written in the codicil or paper, and thus the institution was considered as having been made by the will, and therefore valid. (b)

It may be made by reference to the succession established by a particular law or statute. Thus the testator may declare those to be be his heirs who are entitled to succeed according to the jus Scabinicum, the jus Aedonomicum, or the law of any other country. (c)

A mistake in the name of the person instituted will not invalidate the institution if there be sufficient demonstration of the person whom the testator intended to institute.

But if the institution had been made in consequence of the supposed relation of the party to the testator, and the latter was mistaken in supposing that he stood in that relation, the institution would be void. If a testator supposing a person to be his son or brother had instituted him as heir by the description of his son or brother, and it was proved after the testator's death that this person was neither his son nor brother, the institution would fail, and if any other person had been jointly instituted he would take the whole inheritance by the jus accrescendi, or if the inheritance had not been otherwise disposed of by the testament, the testator's heirs would take as in a case of intestacy. (d)

(a) Voet, lib. 28, tit. 5, n. 1. Dig. lib. 28, tit. 5, l. 1, 58. Perez. ad Cod. lib. 6, tit. 24, n. 3.
(c) Voet, ib. H. Grotius, Manud. ad Juriap. Holl. lib. 3, c. 29.
The testator could not die partly testate and partly intestate. (a)

The law of the Twelve Tables gave to a testator the absolute uncontrolled power of disposing of his property to whom he pleased. But this power was greatly abused. Those who from the obligations of natural duty and affection ought to have been provided for were either disinherited or wholly omitted, and it became necessary to provide a remedy for those who were unjustly disinherited, or wholly passed over by the testament. A testament in which the children of the testator were undeservedly or unjustly disinherited or passed over was considered "inofficiosum, contra officium or non ex officio pietatis;" and it was competent for them to set it aside by the suit of querela de inofficioso testamento. This proceeding was of the nature of the petitio hœreditatis. It demands the succession from the heir instituted by the testator on the ground that the will by which the complainant is unjustly disinherited or passed over was made contra officium pietatis, and therefore void. (b)

This remedy has been attributed to the Lex Gillia, but other commentators on the civil law consider that it was introduced not by any written law, but by the habits and feelings of the people which enabled the Roman lawyers to succeed in establishing as a presumption of law, that parents who could leave their whole property to others without thinking of their children, did not possess that sanity of mind which was essential to the validity of every testament. (c) "Non est enim consentiendum parentibus (qui) injuriam adversus liberos suos testamento inducent: quod plerumque faciunt malignè circa sanguinem suum inferentes judicium novercalibus delinimentis instigationibusve corrupti." (d) "Hujus autem

(a) Dig. lib. 50, tit. 17, l. 7, and lib. 28, tit. 5, l. 3.
(b) Dig. lib. 28, tit. 2.
(c) Foth. ad Pand, lib. 5, tit. 2, § 2, n. 1.
(d) Dig. lib. 5, tit. 2, l. 4.
verbi de inofficioso vis illa (ut dixi) est, docere imme-
rentem se, et ideo et indignè præteritum vel etiam
exheredatione summotum; rescue illo colore defenditur
apud judicem, ut videatur ille quasi non sane mentis
fuisse, cum testamentum inique ordinaret." (a)

Testaments made by soldiers, or which disposed only
of that which was called castrense or quasi castrense
peculium, were not subject to be set aside as inofficiosa
testamenta. (b)

If the testator had a child under his power he was
bound to institute such child as his heir, or to disinherit
him by name. A testament in which a father preter-
mitted or passed over his child in silence was void ab initio,
so that notwithstanding the child’s death in the father’s
lifetime, the inheritance could not be taken by virtue of
that testament. According to the ancient law, the will
was not rendered void by the omission to institute or dis-
inherit daughters and grandchildren of either sex,
although descended from the male line, or even sons, if
they were not under the father’s power. (c)

But these distinctions were afterwards abolished, and
the children of both sexes and those emancipated were
put on the same footing. (d)

It was required that posthumous children should either
be instituted heirs, or disinherit. A testament in which
a posthumous child is pretermitted was valid at the time
of making it, but became void by the subsequent birth
of a child. (e)

It was competent for children rendered legitimate by
the marriage of their parents subsequent to their births
to set aside the will as inofficious, if they would have been
entitled to succeed in case of an intestacy.

(a) Dig. lib. 5, tit. 2, l. 5  (b) Ib. l. 27, § 2. Cod. lib. 3, tit. 28, l. 9, 24.
(c) Perez. ad Cod. lib. 6, tit. 28, n. 1. Inst. lib. 2, tit. 13.
(d) Cod. lib. 6, tit. 28, l. 4, 5. Inst. lib. 2, tit. 13, § 5.
(e) Inst. lib. 2, tit. 13, § 1.
Natural children might also set aside such a will made by their mother, but not that made by their reputed father. (a)

An *inofficious* will might also be set aside by grand-children, if their father were dead. But if their father who had been unjustly disinherited, declined to institute proceedings for setting it aside, or failed in those which he had taken, it was not competent for his children to adopt any proceeding for that purpose; because, their father being alive, they are not called to the succession of the grandfather.

The right to impeach the will as *inofficious* is not confined to children or grandchildren. If the testator has not left any child, or if his child, having been disinherited or passed over, have not instituted proceedings to set aside the will, it is competent for the parents who are living and may have been disinherited or passed over by any of their predeceased children to adopt those proceedings.

If the deceased has left neither parents nor children, the brothers and sisters by the same father, but not those who are only of the blood of the mother, are entitled to set aside the will. This right does not exist in every case, but only when some infamous person "turpis persona juris aut facti infamia laborans" has been preferred to them, and if the testator should institute two persons, one only of whom could be objected to as infamous, the will can be impeached only in respect of the interest taken by him. (b)

No other persons than those enumerated can impeach the will as *inofficious*. The brothers or sisters of the deceased cannot join with the parents in a proceeding for that purpose, nor can they when the will has been set aside by the father participate with him in the inheritance. (c)

(a) Voet, lib. 5, tit. 2, n. 5.
(c) Voet, lib. n. 11.
No person is entitled to impeach the will on the ground of his not being instituted heir, or on that of his legitime not having been bequeathed to him, unless the law would have called him to the succession in case the testator had died intestate. (a)

To enable any of the persons to whom this remedy is granted to prosecute it with effect, it is necessary, 1st, That they should have been disinherited by or omitted in the will; and 2nd, That this disherison or omission should have been unjust or undeserved.

A person is not disinherited in the sense contemplated by this law if being under age the succession is devised to another in trust for him. (b) In this and in some other cases such a disherison is said to take place bonâ mente. Thus if a father having a son insane, prodigal or insolvent, institutes his grandsons the children of that son, assigning the motive and necessity for such institution, and leaving to his son so much only as was necessary for his maintenance, such an institution will be valid. (c)

The person is not disinherited or omitted if he receives that portion of the property which the law requires to be reserved for him, or as it is called, his legitime: "Si quis mortis causâ filio donaverit quartam partem ejus, quod ad eum esset perventurum, si intestatus paterfamilias decessisset, puto secūrē eum testari." (d)

The nature and amount of that portion will be the subject of consideration in the next chapter.

It is not sufficient that he should have been disinherited

(b) Dig. lib. 28, tit. 2, l. 18.
(d) Dig. lib. 5, tit. 2, l. 8, § 6. Poth. ad h. 1. and tit. n. 19.
or omitted, but the disherison or omission must be un-merited or unjust.

In the Novellis there are seven causes assigned on which the disherison of parents might be justified; 1. To have accused his son of any capital crime, except that of high treason; 2. To have given or offered poison to his son, his wife, or mother; 3. Criminal intercourse with the son’s wife; 4. To have prevented the son from making a will; 5. Not to have redeemed the son from captivity, although it was in the father’s power to have done so; 6. To have neglected to have maintained him in a state of madness; 7. If the father was an heretic. (a)

The disherison of the children might be justified on either of the seven preceding or of the seven following causes: 8. Personal violence to the father; 9. An atrocious injury committed on the father; 10. A grievous wrong by a calumnious accusation; 11. If the father being in prison the son will not give his own security for his liberation; 12. If the son has followed the occupation of a gladiator or comedian without the sanction of his father, unless the father himself followed either of those occupations; 13. His association with persons who deal in administering poison; 14. The daughter’s fornication or cohabitation with a slave, unless the father had delayed giving her in marriage until the twenty-fifth year of her age.

The disherisons of the brothers might be justified; 1. If he had attempted the life of his brother; 2. If he had accused him of a capital crime; 3. Or had endeavoured to depose him of his property. (b)

(a) Novell, 115, c. 4.
(b) The causes for disinheriting children are assigned in the following lines:

 Bis septem ex causis exhaeres filius esto:
  Si patrem feriat; vel maledicat ei;
 Carcer detrusum si negligat, ac furiusum:
  Criminis accuset, vel paret insidias;

N 2
It is not understood that by the preceding enumeration, other causes of a similar nature would not justify the disherson. (a)

Although the conduct of the child might have afforded a just ground for his being disinherited by his father, yet it would not justify the latter in disinheriting the children of that son who had become the lawful heirs of the grandfather. (b)

The cause of disherson will it seems be removed by the reconciliation of the deceased and the heir, but a similar effect is not attributed to penitence of the party and a reformation of his conduct. (c)

The several persons whom the testator was bound to have instituted, but whom he has disinherited or passed over unjustly and without an adequate cause, and without having bequeathed to them their legitime, might adopt the remedy of querela de inofficioso testamento.

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Si dederit damnum grave; si nec ab hoste redemit;
Testari prohibet; aut dat arena locum;
Si pravos sequitur; vel amat genitoris amicam;
Non orthodoxus; filia si meretrix.

The causes for which the parents were disinherited are assigned in the following lines:

Sed pater ex septem; si nati spernet honorem;
Hunc accusabit: dira venena dabit;
Testari vetat; aut uxorem diligit ejus;
Non redimit captum; dum furit, odit eum.

And those of the brothers in the following:

 Pellitum a fratre frater causis tribus, ut si
Arguit hunc sceleris; vel ei vult tollere vitam;
 Vel si jacturam rerum sibi moverit unquam. (*)


But this remedy was not transmissible to the heir of the person aggrieved, if the latter had not in his lifetime commenced the prosecution of it, unless he had died during the time the instituted heir was deliberating. In that case his heirs might take it up. (a)

The remedy by querela de inofficioso testamento may be prosecuted against the heirs who are instituted, whether they be strangers, or allied by blood to the deceased. (b)

Thus the disinherited son may adopt it against his brothers, the grandson against his uncles the sons of the deceased, the son against his own children who had been called to the succession by their grandfather, the son against his father whom his mother had instituted, and by the parents of the deceased against their surviving sons who had been instituted by their brother as his heir, and against all those who succeed in the place of and represent the heir who has been instituted by a testament contra officium. (c)

The remedy ceased at the expiration of five years, computed not from the death of the testator, but from

(b) This species of remedy has derived an interest from the history of the Empress Eudocia. She was the daughter of Leontius, a philosopher of Athens, and called Athenais. Her father, it is said, foresaw the brilliant destiny which awaited her, and bequeathed his whole property to his two sons, Valerius and Genesius, and gave to her only a small legacy, adding that "her fortune would be sufficient for her." The brothers having recovered the whole succession drove her from the paternal roof, when she demanded her legitime. Her suit was brought to Constantinople, and interested Pulcheria. The latter having seen Athenais was attracted by her youth and beauty, and having ascertained that she was a virgin, she caused her to be baptised by the name of Eudocia, and married her to her brother Theodosius, to whom she surrendered the imperial diadem. Athenais having thus become the Empress Eudocia sent for her brothers, and instead of resenting their conduct, acknowledged that it had been the means of elevating her to her high station, and she prevailed on the Emperor to confer on them distinguished posts.—Zonaras, tom. 3. Annal. in Theod. Jun. (cited in Leyser, Spec. 358.)
(c) Dig. lib. 5, tit. 2, l. 31, § 1. Voet, lib. 5, tit. 2, n. 12.
the time of adiation by the instituted heir, because until then, it cannot be ascertained that the latter is heir, nor can any proceeding of this nature be instituted. *(a)* In order to prevent the instituted heir from defeating or delaying the prosecution of this remedy, he is required either to adiate or renounce the inheritance within a certain time. *(b)*

It may no longer be competent to resort to this remedy in consequence of the party having done those acts which amount to an express or implied renunciation of it. He is considered to have renounced, if having commenced, he afterwards abandons its prosecution on account of his intention to repudiate the succession. *(c)*

The renunciation is implied, if he has accepted that which has been bequeathed to him, or has dealt with the person instituted as being the heir, as by purchasing from him any part of the testator's property, paying the heir a debt which he owed the testator, or by doing any other act in relation to the succession or institution from which his acquiescence in the disposition may be inferred. *(d)*

If the disinherited heir should be himself instituted, and accept the inheritance of the person who had been the object of an inofficious institution, he would not be precluded from resorting to this remedy, in respect of that part of the inheritance of the first testator, which he did not acquire under the institution by the latter. *(e)*

If the party has without foundation prosecuted this remedy, and failed in setting aside the will as inofficious, he forfeits all the benefits which he might otherwise derive from it, so far as they exceed the legitime to which he remains entitled, because the law considers it a debt

*(a)* Voet, lib. 5, tit. 2, n. 20.
*(b)* Ib.
*(c)* Dig. lib. 5, tit. 2, l. 8, § 1. Cod. lib. 3, tit. 28, l. 8.
*(d)* Dig. ib. l. 26, 21, l. 8, § 10. Voet, ib. n. 32, 33.
*(e)* Dig. ib. l. 31, § 2. Pothier, ad h. lib. and tit. n. 47.
due to him from the deceased. (a) Those benefits devolved on the fisc, but in the modern usage they pass to those who are next entitled to the succession. (b)

If the testament were pronounced by the judge to be inofficious, it was, according to the former state of the law, wholly void, and all the legacies and provisions which it contained entirely failed. But by the 115th Novell it is invalid only in respect of the institution to the inheritance, but all its other provisions and bequests remain valid and effectual. (c)

If the institution be set aside as inofficious, the heir who has been instituted is in the same situation as if he had never adiated the inheritance; he ceases to be liable to the creditors or legatees of the deceased, and all the rights and remedies to which he was entitled, but which by his adiation had become extinguished, revive. He has a right to be indemnified for all payments he has made or obligations he has incurred, or conditions he has performed on account of the succession. He may retain so much of the inheritance still remaining in his possession as may be necessary for this purpose, or if he has not any or a sufficient part of the estate remaining, he may recover from the heir what remains due to him. (d)

II. The law of Holland adopted most of the general rules of the civil law which have been stated. But it rejected some. It required the institution of one or more persons as heirs. If the testator omitted to institute his children, it left the will to be reduced by the proceeding of querela de inofficioso testamento, instead of treating it

(a) Inst. lib. 2, tit. 18, § 6. Dig. lib. 34, tit. 9, l. 22; lib. 5, tit. 2, l. 30, § 1; l. 22. Bruneman, ad Pand. lib. 5, tit. 2, l. 8, n. 2, 32. Groeneweg. ad Dig. lib. 5, tit. 2, § 14; ad Cod. lib. 6, tit. 35. Voet, ib. n. 19.


(c) Novell, 115, c. 3. Voet, ib. n. 13.

(d) Voet, lib. 5, tit. 2, n. 18.
as wholly null and void. (a) It did not admit heresy as a cause of disherison. (b)

This remedy could not be prosecuted, on account of the omission to institute or make provision for the parent, unless by law they were called to the succession in the case of intestacy.

III. The law of Spain does not allow the testator if he has children, grandchildren and their descendants, to dispose by will of more than one-fifth of his property, or rather so much of that fifth as remains after payment of funeral expenses, masses, &c. The whole property of the parent is the right, the lawful inheritance, the legitime of the children, except that part of it which he is permitted to bequeath. In the disposition which he may make among his children or grandchildren, he may advance, mejorar, to any one or more of them the addition of a third, that is, the third part of his property, the fifth being deducted; and he may also mejorar any of his children, by giving the one-fifth to them rather than to strangers. If the testator has no children or grandchildren, &c. descendants, but parents, grandfather, &c. ascendants surviving, he has a power of disposition by will over a third of his property. The whole property of a child who dies without issue belongs of right to and is the legitime of the parents, with the exception of that third. The descendants and ascendants are called necessary (forzosos) heirs. (c)

All other persons, including collateral relations, are considered strangers. (d)

(b) Grotius, Manud. ad Jursap. Holl. lib. 2, c. 24, n. 21, 22. Vost. ib. n. 25.
(c) L. 3, tit. 6, lib. 10, Nov. Rec.
(d) L. 21, tit. 3, p. 6.
SUCCESSION BY TESTAMENT.

If he has no descendants or ascendants, he may dispose of his whole property to strangers. (a)

If there be no necessary heirs, the agreement between the husband and wife, that they shall each inherit the property of the other, if they have no children, will be sustained and take effect. (b)

It seems that a testator, if he had no lawful children or descendants, might bequeath his property to his natural children, to the exclusion of his parents or descendants. (c)

If he has no natural children, he may make his adopted child his heir. (d)

Although the illegitimate children cannot inherit the property of the mother if she has legitimate children, yet she may bequeath a fifth to them, even although they are the offspring of condemned connection (de danado coito.) (e)

The father may also leave to his bastard and legitimated child the fifth of his property. (f)

It is to be observed, that it is not competent for the testator either in his lifetime or at his death to grant or bequeath in mejora more than one-fifth of his property. (g)

He may (mejorar) advance to any one of his children a third of that part of his property which must be reserved for his necessary heirs, and over which therefore he has no power to dispose by testament.

The mejora of the third may be subject to conditions, burthenis, (gravamenes) entails, (mayorazgos) trusts, (fideo comisos) charges, &c. (vinculos) amongst the lawful de-

(a) L. 9, tit. 5, lib. 3, Fuero Real.
(b) L. 9, tit. 6, lib. 3, Fuero Real. L. 1, tit. 20, lib. 10, Nov. Recop.
(c) L. 6, tit. 20, lib. 10, Nov. Recop.
(d) L. 5, tit. 6, lib. 3, Fuero Real.
(f) L. 3, tit. 3, lib. 6, Fuero Real. L. 10, tit. 8, lib. 5, Nov. Recop.
(g) L. 6, 7, tit. 20, lib. 10, Nov. Recop.
scendants, and afterwards among the illegitimate, and in
default of the latter, among the ascendants, and in default
of these, among the collateral relations, and lastly among
strangers. (a)

The grant of a mejora of the third in favor of children
and descendants may be made subject to a power of re-
vocation by the parent, and even without the reservation
of such power, it is revocable by him at any time during
his life, unless possession has been delivered, or the act
by which it has been granted executed before an escribano,
or unless it was granted for an onerous cause, as mar-
riage. (b)

The value of the mejora must be considered with
reference to the period of the death of the testator. (c)

The will must contain an institution of heirs, and
the testator, if he has children or grandchildren, should
institute them as his heirs. Rules similar to those of
the civil law prevail as to the necessity of the institu-
tion of heirs in the will, the manner of their institution,
the insufficiency of an institution by codicil, and of the
revocation or derogation by the latter instrument of an
institution by testament, and the effect of the codicillary
clause.

The neglect of the testator to institute a child or
necessary heir has the effect of invalidating, not the
whole testament, but only the institution so far as it
exceeds the part of which the testator is authorized to
dispose. The testament remains valid in all other
respects. (d)

It differs from the civil law in admitting a partial

L. 11, tit. 6, lib. 5, 10, Nov. Rec.
(b) L. 1, tit. 6, lib. 5, 10, Nov. Rec. L. 2, tit. 6, lib. 5, 10, Nov. Rec.
L. 3, tit. 6, lib. 10, Nov. Rec.
(c) L. 7, tit. 6, lib. 10, Nov. Rec. and lib. 5, Nov. Rec.
(d) L. 7, tit. 8, P. 6. L. 1, tit. 18, lib. 10, Nov. Rec. Gr. Lopes, Gl. 9,
L. 1, tit. 18, lib. 10, Nov. Rec.
succession by testament.

intestacy. If the heir be instituted only to a part of the testator's property, and the testator has no necessary heirs, (forzosos,) it seems that he will not take the whole, but the part of which the testator had made no disposition will descend on the person whom the law calls to the succession in the case of intestacy. (a)

The law of Spain enabled a testator to authorize another to make a will for him. The person thus authorized was called delegate or substitute (comisario). (b) His powers however were strictly construed, and it was required that he should have an express special authority for whatever he inserted in the testament. He could neither institute, disinherit, nor substitute the heir, nor meliorate, (mejorar,) nor appoint a trustee or guardian, nor revoke a testament previously made, nor make any disposition, without a special power for each of these purposes. (c) If the testator has not himself instituted an heir, and the comisario has not a special power for any of these purposes, but only a general power, it is only competent for him to discharge the obligations of conscience owing by the testator, viz., to pay his debts and the like, and direct the disposal of the fifth for the benefit of his soul, and divide the remainder between the heirs ab intestato, or if there be none, to dispose of it for pious uses. (d)

If the heir has been appointed by the testator, the comisario can only dispose of the fifth, and if he does not, the heirs are to distribute it for the benefit of the testator's soul. He has four months for making the necessary dispositions, if he be absent from the place, and six months, and one year if he be absent from the

(a) L. 1, tit. 18, lib. 10, Nov. Rec.
(c) L. 4, 5, 6, tit. 19, lib. 10, Nov. Rec. Gomez, ad l. 31, Tor. n. 6.
kingdom. \(a\) If there be many delegates, (comisarios,) and some die, the power survives. If there be a disagreement amongst the joint comisarios, they must have recourse to the decision of the judge. \(b\) The power given to the delegate must be executed with the same solemnity as the testament. \(c\) The power of assigning the third and fifth by way of melioration, mejoras, can never be delegated to another. \(d\)

Rules similar to those of the civil law respecting the manner of disinheriting heirs are adopted. There must be a certain designation of the party to be disinherited. \(e\)

In addition to the causes of disherison allowed by the civil law, the law of Spain adopts the following: practising of witchcraft, sorcery, the clandestine marriage of children; \(f\) if the son being more than eighteen years of age, does not take care of his insane or disabled father, he is disinherited by the judge or by his father if he returns to a sound state of mind. \(g\) The son's fighting with another man, or with beasts for money, the abandonment of the Catholic religion, or becoming heretic, are also grounds of disherison. \(h\)

Brothers cannot complain of being disinherited, even if there exist no cause, unless the testator has appointed as heir a person of infamous character, or who had been a slave of the testator, or whom he had emancipated. In either of these cases, brothers but not other collateral relations may prefer a complaint against the will, and this appointment will not be valid. \(i\)

The just causes for which a brother may be disinherited are similar to those found in the civil law. \(k\)

\(i\) L. 12, tit. 7, P. 6, and L. 2, tit. 8, P. 6. \(k\) L. 12, tit. 7, P. 6.
The heir was deprived of the inheritance, if being of age he knew the murderer of the deceased, but entered on the inheritance without preferring a charge or accusation (*guerella*) to the judge in respect of the crime, or if he alleged as a party or advocate, unless it was in his character of fiscal or guardian of a minor, that the testament in which he was established heir is a false instrument. *(a)*

The inheritance, if it be forfeited for any of these causes, devolves on the exchequer, (*camara,* the collector (*recaudador*) of which is obliged to fulfil the will of the testator in all other respects. *(b)*

IV. The power of instituting an heir, or disposing by testament of the whole succession, prevailed only in those parts of France, called *les pays de droit écrit*, where it had been established in the time of the Romans, and where the feudal law had taken less deep root. According to Argou, all the lands in *les pays de droit écrit*, were deemed to be held in *frank aleu*. *(c)*

In the other parts of France which were entirely subject to the feudal law, and called *les pays de coutume*, the institution of heir and the disposition of the whole succession were not admitted.

The maxim of the *coutume* is, "Institution d'heritier n'a lieu," *(d)* or as it is explained, a man cannot institute a stranger as his heir to the prejudice of the heirs of his blood, nor can he prevent those heirs from being seised of the estate of which the deceased was possessed at the time of his death. *(e)* It did not recognise as heirs those instituted by testament, nor any other persons than those whom the law called to the succession, viz.,


*(c)* Argou, tom. 1, p. 156.

*(d)* Art. 299.

*(e)* Art. 272, 273, Cout. Poitou.
heirs of the blood; they only were seised of the estate, and represented the person of the deceased.

The coutume adopted the maxim "la loi saisit les héritiers," and "non la volonté de l'homme," and this maxim was enforced by another equally characteristic of this distinction, "le mort saisit le vivant," or more properly speaking, the law, because the deceased could not prevent those whom the law called to the succession from being seised of his property after his decease.

The institution of an heir did not render the testament void, but it had no other effect than that of constituting the person instituted universal legatee in respect of that part of the property of which the testator had a disposing power, "mais ne laisse de valoir la disposition jusques à la quantité des biens dont le testateur peut valablement disposer par la coutume." (a)

The coutume permitted the testator to bequeath by testament all his moveable estate, his biens acquêts, and even one-fifth of his biens propres, that is, of the immovable estate which he had acquired by descent. "Toutes personnes saines d'entendement, âgées, et usants de leurs droits peuvent disposer par testament, et ordonnance de dernière volonté, au profit de personnes capables, de tous leurs biens, meubles, acquêts et conquêts immeubles, et de la cinquième partie de tous leurs propres héritages, et non plus avant: encore que ce fût pour cause pitoyable." (b)

A distinction is made in the ages, at which the power of disposing may be exercised. It is founded on the nature of the property which is the subject of the disposition. He may dispose of his moveables, biens acquêts and conquêts, after he has attained twenty years, but he must be twenty-five years of age to dispose of the one-fifth of his biens propres. If however he has no moveables,

(a) Ferriere, art. 299.
(b) Dupless. art. 292, p. 576, 587.
acquêts or conquêts, he may dispose of the fifth of the bien propres when he is twenty years of age.

The reservation of the four-fifths is only required in favour of heirs of the blood. If the testator has none, and the property would have escheated to the fisc, the restriction no longer exists, and he may dispose of the whole of his biens propres. (a)

The restriction exists only in favour of heirs of the particular line from which the biens propres are derived. If he has no heirs of that line, although he has heirs of some other line, yet as regards the latter, the biens propres would be considered only as acquêts, of which the testator might dispose to their prejudice. (b)

The permission to dispose of all his moveables, acquêts and conquêts, and one-fifth of the biens propres, is granted only when the testator has no children, or if he has children when the reserved four-fifths of the biens propres are sufficient to give them their legitime. He cannot make any disposition in favour of strangers, or of one or more of his children, to the prejudice of the legitime. If the four-fifths are insufficient for the legitime, it must be made good out of the bequests of whatever description they may be which are contained in the will, for it is a charge on the whole estate of the deceased. (c)

The four-fifths which are to be reserved, are of such biens propres as are possessed by the testator at his death, so that if he had by donation inter vivos disposed of a considerable part, he might still give by testament one-fifth of that which remained, and that which he had previously disposed of is not taken into the estimate. (d)

The restriction exists in each line, and for each line separately. Thus, if a testator devise estate A., being biens propres, which did not exceed one-fifth of the whole of his biens propres, but exceeded one-fifth of the biens

(a) 1 Dupless. 586.  
(b) lb.  
(c) lb.  
(d) lb.
propres derived from a particular line, this devise must be reduced so as not to exceed one-fifth of the descended property of that line.

A testator having a considerable personal estate, as well as biens acquêts, makes a disposition of them, but he disposes of more than a fifth of his biens propres, or having disposed of more than a fifth of propres situated under the coutume of Paris, yet has not disposed of a fifth of biens propres in another coutume, if the heir reduce the bequest so far as it exceeded the one-fifth, it has been doubted whether the legatee was entitled to have the amount of which he was thus deprived, made good from the other disposable estate. Those who maintain the negative, urge the maxim, "noluit quod potuit, sed quod non potuit voluit." (a) On the other hand, the distinction is made, if the heir who reduced the legacy is the same person who succeeds to the property of which the testator had made no disposition; in that case, the bequest ought to be made good by him, but if he does not succeed to the latter property, he is not bound to make it good. (b)

The heir may, if he be contented with the four-fifths, abandon the meubles, acquêts and conquêts, with the fifth to the legatees. In doing so, he will remain seised of the four-fifths, and the legatees will take the surplus, the debts being always previously paid out of the whole estate. (c)

The right and share of any child who abstains from and renounces the succession of his father or mother, accrues to the other children, being heirs, without any privilege as to seniority of age. (d)

V. The coutume of Normandy did not admit the in-

(a) Ferriere, art. 192, p. 268.
(b) 1 Dupless. 585. Arrêt, April 3rd, 1699, cited there.
(c) 1 Dupless. art. 295.
(d) Art. 310. Pothier, de Successe. tit. 17, tom. 10, p. 713.
situation of an heir. The restriction it imposes on the testamentary power is the boast of Basnage and its other commentators. (a)

It makes a distinction between moveable or personal, and immoveable or real property, and with respect to the latter between biens propres and biens acquisés and conquêtes. As to moveable property, a man who is not married or has not children may, after he has passed his twentieth year, dispose by testament of all his moveables to whom he pleases: "Homme non marié ou n’ayant enfans, après l’âge de vingt ans accomplis, peut disposer de ses meubles par testament à qui bon lui semble." (b)

Those who have completed their sixteenth year, whether males or females, may dispose by testament of a third of their moveables. (c)

A feme covert can make no testamentary disposition unless with the consent of her husband, or in pursuance of a provision for that purpose in her marriage contract. If the husband were absent beyond seas for a long time, the judge might authorize her to make a testament, and when made with such authority, it is valid. (d)

The testator who has children living, or the descendants of deceased children competent to succeed him at his death, can only dispose of one-third of his moveable estate, and in the case of the husband, this third is chargeable with the payment of the funeral expenses and the legacies bequeathed by his testament, but the third given by the widow is exempted from the payment of either. The legatee of the third is bound in either case to pay one-third of the debts of the testator. (e)

If he has only daughters who are already married,

(a) 2 Basnage, 158.
(b) Art. 399, in La Coutume reformée de Pays de Normandie. Art. 414, in Basnage and Merville.
(c) Art. 400, C. R. de Norm. and 415 Basnage and Merville.
(d) Art. 402, C. R. Basnage and Merville, 417.
and he has fully paid all the dowry he undertook to give them, he may dispose of one moiety of his personal estate. The other moiety belongs to his wife, and if his wife be already dead, he may dispose of the whole. (a)

It permits him to dispose by testament or donation à cause de mort of one third of his acquêts and conquêts to whom he pleases, if he has no children nor descendants of children at the time of his death. It must not be made indirectly, nor by way of fidei-commision in favour of his wife or her parents; and he must have survived three months after the testament or donation was made. He must not have previously disposed by donations inter vivos of a third of his acquêts and conquêts immeubles. (b) "Homme n'ayant enfans, peut disposer par testament ou donation à cause de mort, du tiers de ses acquêts et conquêts immeubles, à qui bon lui semble, autre toutefois qu'à sa femme et paren's d'icelle, pourvu que le testament ou donation soit faite trois mois avant le décès, et qu'il n'ait disposé dudit tiers entre vifs." (c)

This article differs from the civil law, because although according to that law a donation inter vivos by the husband to the wife could not be made, yet he might institute her as his heir.

The period of three months which the testator must have survived commences from the date of the will, and no proof is admitted that the testator had antedated it. (d)

He has no power of disposing by donation mortis causa, or by testament, even although the donation contained in the testament should assume the form of a disposition inter vivos, of his heritage or biens immeubles, or property of the nature of biens immeubles, not even in favour of the church or poor, or for any pious uses, except one third of his biens acquêts, authorized by the preceding

(d) Merlin, Rep. tit. Test. sect. 3.
article. (a) "Nul ne peut disposer de son héritage et biens immeubles ou tenans nature d'iceux, par donation à cause de mort ne par testament, ne en son testament, encore que ce soit par forme de donation ou autre disposition entre vifs, ou que ce fût en faveur des pauvres ou cas pitoyable, si ce n'est au Bailliage de Caux en faveur des puînez, ou du tiers des acquêts, comme dit est ci-dessus." (b)

This article therefore entirely prohibits the disposition of biens propres, and of property partaking of the nature of biens propres. It is reserved for the heir, and is not the subject of testamentary disposition. A legacy charged on it would be void, nor could the legatee resort to the personal estate, or acquêts or conquêts, which might have been subjected to it by the testament of the testator, "fecit quod facere non poterat, et non fecit quod facere poterat." (c)

The testament, if it contains a disposition of biens propres as well as of moveable estate, and acquêts and conquêts, is void only as to the biens propres, but not as to the other property.

The exception contained in this article empowers the parent to give by testament or donation à cause de mort, biens propres to a daughter on her marriage, or in augmentation of her dowry, provided it does not exceed a third of his moveables. The father and mother have the same power within the limits of the Bailliage de Caux, where by a particular coutume the father or mother may give by testament or donation cause de mort, a third of the acquêts to one or more, or to all the younger children.

In estimating the third of which the testator might dispose, regard is had to the acquêts and conquêts pos-

(a) Art. 412, C. R. 427 Basnage and Merville.
(b) Cout. Norm. art. 427.
(c) Merville, p. 423.
sessed by him at the time of his death, and not at the
date of his testament. (a)

The *jus accrescendi* is recognised by the commentators
on the *coutume* of Normandy, as prevailing amongst
testamentary dispositions. (b)

VI. Before the establishment of the Code Civil, the
succession by testament in France was regulated by two
conflicting systems of law. It will have been seen from
the preceding summary, that in certain parts of that
kingdom the civil law, *le droit écrit*, with all its doctrine
as to the institution of heirs and the testamentary power,
was in full force, but that in other parts, certain *coutumes*
prevailed, the fundamental principles of which were in
both these particulars directly opposed to those of the
civil law.

The code civil has adopted a rule which avoids the
extreme principles of both the opposite systems.

As it does not permit the testator, if he has descend-
ants or ascendants, to dispose by will of more than a
definite part of his property, those heirs are seised of the
whole succession, and the persons in whose favour he
has disposed of that part must demand it from them. (c)
For this case the law prevails over the will of the tes-
tator. But if the testator left neither descendants nor
ascendants, and therefore was permitted to dispose by
will of his whole estate, the persons in whose favour that
disposition is made, and not those who might be the testa-
tor’s heirs, are seised of the succession. In the latter case,
the will of the testator prevails over the law. (d)

This modification of the civil law and *coutumes*, by
giving the seisin to those heirs of the blood whose right
to a certain part of the estate cannot be defeated by the
testator, makes it incumbent on those claiming under

(a) Merville, 423.  
(b) 2 Basnage, 197.  
(c) Code Civil, art. 1004.  
(d) Art. 1006.
the testator's disposition to establish their right, and until it is established, those heirs retain the seisin of the whole succession. But there is no reason for withholding the seisin from those whom he has instituted as his heirs in pursuance of the power which the law has given him in consequence of his leaving neither descendants nor ascendants. They are therefore in this case seised of the succession to which they are thus instituted, notwithstanding the testator might have left heirs, who, if he had died intestate, would have succeeded to his property. (a)

Under whatever name the testator institutes heirs, whether by that of heirs, or of legatees, the law declares them to be seised "de plein droit de toute la succession par la mort du testateur," (b) without requiring them to demand the deliverance of the property from the heirs of the blood, who are only called to the succession, when no institution had been made by the testator. As heirs and universal legatees they succeed to all the rights active and passive, they are heirs in the legal sense of that expression, "Hi qui in universum jus succedunt, hæredis loco habentur."

The Code Civil confers the legal seisin on them in full right, in the same manner as it would confer it on the heirs of the blood if they had not been instituted, and they represent the person of the deceased.

The Code distinguishes testamentary dispositions as either universal or by universal title, or by particular title, and for each class establishes certain rules.

The effect of each of these dispositions, whether it be made by institution of heir or under the denomination of legatee, is to be determined by those rules. (c)

The universal legacy is the testamentary disposition by which the testator gives to one or several persons

(a) Toullier, liv. 3, tit. 2, c. 5, n. 494, et seq.
(b) Art. 1006.
(c) Code Civil, art. 1002.
conjointly the whole property which he leaves at his death. (a) It is not an universal legacy, if it were given to each of them separately, as a moiety to A., and another moiety to B. A. and B. would not be universal legatees, because the testator has not given to either the whole of his succession. If either of the dispositions should lapse, or B. should renounce, his moiety would belong to the heirs at law of the testator; but if it be given to A. and B. without words of severance, if B. should die in the testator’s lifetime or renounce, A. would take the whole by the droit d’accroissement. (b)

If at the death of the testator there are those heirs in whose favour the law reserves a portion of his property, they are seised absolutely by his death of all the property of the succession, and the universal legatee is bound to demand from them a transfer of the property bequeathed to him by the testament. But he is allowed to enjoy it from the day of the testator’s death, if the demand of transfer be made within a year from that event, but otherwise such enjoyment shall only commence from the day of the demand legally made, or from the day on which such transfer shall have been voluntarily consented to.

If at the decease of the testator, there are not those heirs to whom the law has reserved a portion of his property, the general legatee is seised absolutely by the death of the testator, without being bound to demand a transfer.

The seisin thus acquired by the testamentary heir or universal legatee, whether he be instituted by a mystic or holograph instrument, does not prevent the heir at law from requiring the affixing the seal, and an inventory of the effects, letters, and papers of the succession. (c)

(a) Art. 1003.
(b) Art. 1044.
SUCCESSION BY TESTAMENT.

If the will is holographic or mystic, he is bound to procure himself to be put in possession by an ordinance of the president, placed at the bottom of a request, to which shall be joined the act of deposit. (a)

The universal legatee, as between him and an heir to whom the law reserves a portion of the property is, in respect of debts and charges of the succession, personally liable for his share and portion, and in respect of the whole, there is a right of hypothec. He is also bound to discharge all legacies. (b)

The legacy by universal title is the bequest of an aliquot part of the property of which the law allows him to dispose, such as the half, a third, or all his immovable, or all his personality, or a fixed proportion of all his immovable, or of all his personalty.

Every other legacy forms only a disposition by particular title. (c)

Legatees by general title are bound to demand a delivery by the heirs, to whom a proportion of the property is reserved by the law; failing them, from general legatees, and failing the latter, from the heirs who are called to the succession by the law in cases of intestacy. (d)

As to the debts and charges of the succession of the testator, the legatee by general title is liable personally in respect of his own share and portion, and as to the whole there is an hypothec. (e)

If the testator has disposed of a part only of the disposable portion, and has done so by universal title, such legatee must contribute with the heirs on whom the undisposed part has descended to the payment of the particular legacies. (f)

Every legacy absolute and unconditional from the day of the testator’s decease, confers upon the legatee

(a) Code Civil, art. 1008. (b) Art. 1009. See articles 926, 927.
(c) Art. 1010. (d) Art. 1011.
(e) Art. 1012. (f) Art. 1013.
CONFLICT OF LAWS.

a right to the thing bequeathed, a right transmissible to his heirs or assigns. \((a)\)

The power of disposing either by donation *inter vivos* or by testament under the code civil, is subject to the following restrictions.

If the disponent leaves at his death only one legitimate child, he may dispose of one half; if he leaves two children, he may dispose of one third; and if he leaves three or more children, he may dispose of one fourth of his property. \((b)\) Under the name of children are included all descendants in any degree whatsoever, but they are only counted for the child whom they represent. \((c)\) If he leave no children nor descendants of children, but ancestors in both the paternal and maternal lines, he may dispose of one moiety, but if he leave ancestors only in one line, he may dispose of three-fourths of his property. If he leave neither ancestors nor descendants, he may dispose of his whole property.

The proportion which it is thus permitted the party to dispose of either by act *inter vivos* or by testament, is called *la portion disponible*. \((d)\)

VII. The law of Scotland does not allow heritage, or those subjects which, although moveable *ex sui naturâ*, yet when they pass by service are accounted heritable, to be disposed of by testament. Bonds excluding executors as they descend to the heir, and thus pass by service, cannot be disposed of by the creditor, either on death-bed or by any testamentary deed. \((e)\)

Bonds which are heritable by destination, *ex. gr.* devised to special heirs, have been adjudged not confirmable by an executor creditor, \((f)\) neither can they

\[(a)\text{ Art. 1014.} \quad (b)\text{ Art. 913.} \]
\[(c)\text{ Art. 914.} \quad (d)\text{ Art. 915.} \]
be confirmed by an executor nominate. (a) The same doctrine is applicable to bonds granted under substitution, for these also import a virtual exclusion of executors, and therefore cannot be bequeathed by the creditor to the prejudice of the substitute.

This rule of the law of Scotland was never considered as preventing the settlement of heritage by a writing, though it should have contained a nomination of executors, if that part of it which conveyed the heritage was made out in the form of a disposition or deed inter vivos. (b) If on the contrary, the writing appeared by its strain to be of a testamentary nature, the clause settling the heritage was disregarded as inept or improper. (c) Heritage may therefore be effectually settled in a testamentary deed, reserving to the settler the life-rent and a power of revocation, provided he makes use in the conveying clause of the words give, grant, or dispone, in place of legate or bequeath. (d) The principle of decision in instruments of this kind is thus stated: "Heritable effects, such as a debt secured by adjudication, will not be carried by a deed conceived in a testamentary form. Where, however, proper dispositive words have been used, the only question is concerning the intention of the deceased." (e)

The owner may not only make a settlement of special heritable subjects to take effect at the granter's death, but execute general dispositions of all subjects heritable or moveable which should have belonged to him at that time. It is true such a deed does not convey the feudal right of any heritage to the disponee, nor transfer the property

(a) Ersk. b. 3, tit. 8, § 20.
(b) July 11, 1733, Douglas, Dict. 15,940.
(c) Dec. 4, 1735, Brand, Dict. 15,941.
(e) Robertson, Dict. 15,947.
of the moveables to him so directly as a special assignation would have done, but it gives him a legal right in the subjects which he can complete by actions against the heir at law, or by confirmation or other proper diligence. (a)

The law endeavours to prevent such a deed from being extorted from a person under the influence of the disease of which he died. It therefore avoids a deed conveying or burdening his heritable estate to the prejudice of his lawful heir, if it be executed by him whilst sick of the disease of which he died. (b)

It is essential to death-bed, as opposed to that degree of vigour which is known by the name of liege poutie, that the deceased at the date of the deed, should have been ill of the disease of which he died. And so the presumption of weakness and yielding to importunity does not hold, if a supervening disease or accident shall have terminated his life. (c) It is not required that the disease shall be, strictly speaking, in nosological character, a mortal disease. (d)

In opposition to the presumption of death-bed, and in support of the presumed strength to resist importunity, liege poutie, notwithstanding illness at the date of the deed, two tests have been selected. These are, 1, survivance during sixty days; and 2, going to kirk or market unsupported.

(a) Ersk. b. 3, tit. 8, § 20.
To avoid the inconvenience of continuing the presumption of imbecility too long, (a) it is enacted, that "it shall be a sufficient exception to exclude the reason of death-bed as to all bonds, dispositions, contracts, or other rights that shall be hereafter made and granted by any person after the contracting of sickness, that the person live for threescore days after the making and granting of the said deeds, albeit during that time they did not go to kirk and market;" reserving a right to reduce, "if it shall be alleged and proven that the person was so afflicted by the disease at the time of the doing of the said deeds, that he was not of sound judgment and understanding." (b) In construing the act, 1, the day of making the deed is not reckoned, and the survivance till the morning of the sixtieth day is sufficient according to the maxim, "dies inceptus pro completo habetur." (c) 2. The date of the deed must be proved, as well as its authenticity. (d)

By usage sanctioned by the reference to it in the act of Parliament, and regulated in practice by act of Sederunt, it is also an exception to the plea of death-bed, that the grantor of the deed has been at kirk or market between the date of the deed and his death. (c)

The disposition of moveable property by testament is permitted by the law of Scotland, and is not subject to the law of death-bed. But a restriction is imposed on this power for the protection of those interests in it which the law has given to the widow and children.

Where a person has either wife or child, a certain portion of his moveable estate has, from the earliest period in the law of Scotland, fallen upon his death to the

(b) 1696, c. 4. 10 Acta Parl. 33.
(d) Merry, Feb. 6th, 1801, Dict. Writ, App. 3, affirmed. (e) Ersk. ib.
widow, and a certain portion to the bairns, or younger children, of which therefore he cannot dispose by will. (a) The share belonging to the widow is called *jus relictæ*; and that which falls to the children is sometimes, from the Roman law, styled the *legitim*, or the portion given them by the law; and sometimes their portion natural, or bairns' part of gear. (b) The respective interests of the wife and children in those goods are suspended during the husband's life. He can not only alienate them for a valuable consideration, but make a present of them to whom he will, provided the deed be not granted in *fraudem* of those legal rights. (c) But this unlimited right of the husband ceases before his actual death. As soon as he begins to die, as Dirleton expresses it, *i. e.* from the moment that he is first seized with that disease which ends in death, he is in the judgment of law already dead, and loses the *legitima potestas* of disposing of the society-goods, or, as the words are commonly translated by the lawyers of Scotland, his *liege poustie*. All gratuitous deeds therefore executed by him after that period tending to diminish the right of the widow or children are void, though they should not be fraudulent: Nay, the husband, though he should be in *liege poustie*, cannot dispose of his moveables to the prejudice of the *jus relictæ*, or right of *legitim*, by way of testament, or indeed by any revocable deed, for revocable grants create no debt till the death of the grantor, and at that period the right of the society-goods is fully vested in the widow and children. (d) Nevertheless, rational deeds granted by the father in relation to his moveable

(a) Reg. Maj. lib. 2, c. 37.
(b) Ersk. b. 3, tit. 9, § 15.
estate, if they be executed in the form of a disposition inter vivos, are sustained, though their effect should be suspended till his death. (a)

VIII. In England, the absolute ownership in land was subject to testamentary disposition before the Conquest, but this power, incompatible with the rules of military tenure, ceased upon the establishment of the feudal system, except in the county of Kent and some other places, where it was preserved with other Saxon privileges by particular customs. Of these, the most extensive is the county of Kent, where the custom of gavelkind, or descent amongst all the males of the same degree prevailed. But it was made a question long after the Conquest, whether the custom of devising gavelkind land continued.

The Custumal of Kent, a copy of which is in Lincoln's Inn Library, and which was printed by Lambard, and also at the end of Robinson's Treatise on Gavelkind, is of the time of Edward I. It claims for the Kentish men that they, their lands and tenements, might give and sell, without leave asked of their lords, saving to them their rights and services, but it does not define the modes of gift.

The custom in the city of Canterbury to devise land is mentioned as a special custom.

But notwithstanding the presumption which might be raised against the general custom of devising in Kent from the express mention of the special custom of Canterbury, the weight of authorities is greatly in favor of the general custom, and the statute of frauds recognises it.

The practice did not ascertain the law. Some Kentish testators resorted to feoffments, and the wills of others shew that the testators were in doubt as to their right to devise.

In Lauder v. Brookes, Jones, J., is reported to have

sessed by him at the time of his death, and not at the
date of his testament. \(a\)

The *jus accrescendi* is recognised by the commentators
on the *coutume* of Normandy, as prevailing amongst
testamentary dispositions. \(b\)

VI. Before the establishment of the Code Civil, the
succession by testament in France was regulated by two
conflicting systems of law. It will have been seen from
the preceding summary, that in certain parts of that
kingdom the civil law, *le droit écrit*, with all its doctrine
as to the institution of heirs and the testamentary power,
was in full force, but that in other parts, certain *coutumes*
prevailed, the fundamental principles of which were in
both these particulars directly opposed to those of the
civil law.

The code civil has adopted a rule which avoids the
extreme principles of both the opposite systems.

As it does not permit the testator, if he has descend-
ants or ascendants, to dispose by will of more than a
definite part of his property, those heirs are seised of the
whole succession, and the persons in whose favour he
has disposed of that part must demand it from them. \(c\)
For this case the law prevails over the will of the tes-
tator. But if the testator left neither descendants nor
ascendants, and therefore was permitted to dispose by
will of his whole estate, the persons in whose favour that
disposition is made, and not those who might be the testa-
tor's heirs, are seised of the succession. In the latter case,
the will of the testator prevails over the law. \(d\)

This modification of the civil law and *coutumes*, by
giving the seisin to those heirs of the blood whose right
to a certain part of the estate cannot be defeated by the
testator, makes it incumbent on those claiming under

\(a\) Merville, 423.
\(b\) 2 Basnage, 197.
\(c\) Code Civil, art. 1004.
\(d\) Art. 1006.
the testator's disposition to establish their right, and until it is established, those heirs retain the seisin of the whole succession. But there is no reason for withholding the seisin from those whom he has instituted as his heirs in pursuance of the power which the law has given him in consequence of his leaving neither descendants nor ascendants. They are therefore in this case seised of the succession to which they are thus instituted, notwithstanding the testator might have left heirs, who, if he had died intestate, would have succeeded to his property. (a)

Under whatever name the testator institutes heirs, whether by that of heirs, or of legatees, the law declares them to be seised "de plein droit de toute la succession par la mort du testateur," (b) without requiring them to demand the deliverance of the property from the heirs of the blood, who are only called to the succession, when no institution had been made by the testator. As heirs and universal legatees they succeed to all the rights active and passive, they are heirs in the legal sense of that expression, "Hi qui in universum jus succedunt, hæreditis loco habentur."

The Code Civil confers the legal seisin on them in full right, in the same manner as it would confer it on the heirs of the blood if they had not been instituted, and they represent the person of the deceased.

The Code distinguishes testamentary dispositions as either universal or by universal title, or by particular title, and for each class establishes certain rules.

The effect of each of these dispositions, whether it be made by institution of heir or under the denomination of legatee, is to be determined by those rules. (c)

The universal legacy is the testamentary disposition by which the testator gives to one or several persons

(a) Toullier, liv. 3, tit. 2, c. 5, n. 494, et seq.
(b) Art. 1006.
(c) Code Civil, art. 1002.
a conveyance by way of appointment of particular lands to a particular devisee. This inconvenient distinction is peculiar to the laws of England.

The power of testamentary disposition over personal property is governed by the rules of the civil law, and therefore a testator can bequeath any leasehold or other personal estate to which he may be entitled at the time of his death.

This testamentary power did not originally extend to the whole of a man’s personal estate, unless he died without either wife or issue; for by the common law, as it stood, according to Glanvil in the reign of Hen. 2, a man’s goods were to be divided into three equal parts; one of which 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. (a) The shares of the wife and children were called their reasonable parts; and the writ de rationabili parte bonorum was given to recover them. (b) This writ lay for the wife against the executors of her husband, and was founded on a complaint that the said executors unjustly detained from the plaintiff her reasonable part of the goods and chattels which were of the deceased, and refused to render the same to her. (c) And the sons and daughters were entitled to the like writ against the executors in case their third part was withheld. (d)

(a) 2 Bl. Comm. 492.
(b) F. N. B. 122, 9th edit. 1 Saund. 66, n. 9.
These restrictions in the city of London, the principality of Wales, and in the province of York, were abolished by statutes. At the present time the owner of personal estate in any part of England and Wales is allowed to bequeath the whole of it.

There is just passed an act for the amendment of the laws with respect to wills. It enacts that it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner thereafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which if not so devised, bequeathed, or disposed of, would devolve upon the heir at law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power thereby given shall extend to all real estate; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto, under the instrument by which the same respectively were created, or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will. (a)

This act does not extend to any will made before the 1st January, 1838.

IX. In all the Colonies, except British Guiana, the Cape, Ceylon, Trinidad, St. Lucia, Lower Canada, and Mauritius, real property is subject to the power of dis-

(a) 1 Vict. c. 26, § 3.
position which the law authorized before the passing of
the recent act, and the disposition by testament of
moveable property is subject to the same law which ex-
isted in the parent state. The recent act will not be in
force in the Colonies until it is adopted by their legis-
latures.

By the act passed shortly after the settlement of Lower
Canada, it was declared that resort should be had in
all matters of controversy relative to property and civil
rights to the laws of Lower Canada, as the rule for the
decision of the same; and all causes instituted in any of
the courts of justice within the said province, were, with
respect to such property and rights, to be determined
agreeably to the said laws and customs of Canada, until
they should be varied or altered by any ordinances passed
in the said province. (a)

But the act does not extend to any lands granted by
His Majesty, to be holden in free and common socage. (b)

The act also empowered every person who was owner
of any lands, goods, or credits in the said province, and
that had a right to alienate the said lands, goods, or
credits in his or her lifetime, by deed of sale, gift, or
otherwise, to devise or bequeath the same at his or her
death, by his or her last will and testament, notwith-
standing any law, usage, or custom prevailing in the
province to the contrary; such will being executed either
according to the laws of Canada, or according to the
forms prescribed by the laws of England. (c)

Doubts arose touching this clause of the act, and it
was enacted (d) that it should be lawful for all persons of
sound intellect and of age having the legal exercise of the
right, to devise or bequeath by last will and testament,
whether the same be made by husband or wife in favor
of each other, or in favor of one or more of their chil-
dren, as they shall seem meet, or in favor of any other
person or persons whatsoever, all and every his or her

(a) Lower Canada Act, 14 Geo. 3, c. 83, § 8.
(b) Sect. 9.
(c) Sect. 10.
(d) Lower Canada Act, 41 Geo. 3, c. 4.
lands, goods, or credits, whatever be the tenure of such lands, and whether they be propres, acquêts or conquêts, without reserve, restriction, or limitation whatsoever, any law, usage, or custom to the contrary thereof in anywise notwithstanding. Provided that it should not be lawful for a husband or wife making such last will and testament, to devise or bequeath more than his or her part or share of their community, or other property and estate, which he or she might hold, or thereby to prejudice the rights of the survivor or the customary or settled dower of the children.

X. Lands may be devised by will in all the United States; and the statute regulations on the subject are substantially the same as, and have been taken from the English statutes of 32 Henry 8, and 29 Charles 2. (a)

In Louisiana, the power of disposition by testament is limited to two thirds of the testator’s estate, if he leaves at his decease a legitimate child; and to one half, if he leaves two children, and to one third, if he leaves three, or a greater number of children; and to two thirds, if, having no children, the testator leaves a father, mother, or both. Under the name of children, are included descendants, of whatever degree they be. The heirs, whose portion of the estate is thus reserved to them by law, are called forced heirs, because they cannot be disinherited, except in cases where the testator has just cause to disinherit them, and which cases are defined. (b)

Forced heirs may be deprived of their legitime, or legal portion, and of the seisin granted them by law, by the effect of disinherit by the testator for just cause, and in the manner thereafter prescribed. (c)

A disinheritance to be valid must be made in one of the forms prescribed for testaments. (d)

(a) 4 Kent’s Com. 405. (b) 4 Kent, ib. Louisiana Code, art. 1402.
(c) Art. 1609. (d) Art. 1610.
It must be made by name and expressly, and for a just cause, otherwise it is null. (a)

There are no just causes of disinherison but those expressly recognized by law, in the following articles. (b)

The just causes for which parents may disinherit their children, are ten in number: 1. If the child has raised his or her hand to strike the parent, or if he or she has really struck the parent; but a mere threat is not sufficient. 2. If the child has been guilty towards a parent of cruelty, of a crime, or grievous injury. 3. If the child has attempted to take the life of either parent. 4. If the child has accused a parent of any capital crime, except, however, that of high treason. 5. If the child has refused sustenance to a parent, having the means to afford it. 6. If the child has neglected to take care of a parent become insane. 7. If the child refused to ransom them when detained in captivity. 8. If the child used any act of violence or coercion to hinder a parent from making a will. 9. If the child has refused to become security for a parent, having the means, in order to take him out of prison. 10. If the son or daughter, being a minor, marries without the consent of his or her parents. (c)

The ascendants may disinherit their legitimate descendants, coming to their succession, for the first nine causes expressed in the preceding article, when the acts of ingratitude there mentioned have been committed towards them, instead of towards their parents; but they cannot disinherit their descendants for the latter cause. (d)

Legitimate children, dying without issue, and leaving a parent, cannot disinherit him or her, unless for the seven following causes: 1. If the parent has accused the child of a capital crime, except, however, the crime of high treason. 2. If the parent has attempted to take the child’s life. 3. If the parent has, by any violence or force, hindered the child from making a will.

(a) Art. 1611. (b) Art. 1612. (c) Art. 1613. (d) Art. 1614.
4. If the parent has refused sustenance to the child in necessity, having the means of affording it. 5. If the parent has neglected to take care of the child while in a state of insanity. 6. If the parent has neglected to ransom the child, when in captivity. 7. If the father or mother have attempted the life, the one of the other, in which case the child or descendant, making a will, may disinherit the one who has attempted the life of the other. (a)

The testator must express in the will for what reasons he disinherit his forced heirs or any of them, and the other heirs of the testator are moreover obliged to prove the facts on which the disinheritance is founded, otherwise it is null. (b)

When all the forced heirs have been legally disinherit, the heir instituted universally is seised in full right of the succession, without being bound to demand the delivery of it, in the same manner as if there were no forced heirs. (c)

Donations inter vivos or mortis causa cannot exceed two thirds of the property of the disposer, if he leaves, at his decease, a legitimate child; one half, if he leaves two children; and one third, if he leaves three or a greater number.

Under the name of children are included descendants, of whatever degree they be, it being understood that they are only counted for the child they represent. (d)

Donations inter vivos or mortis causa cannot exceed two thirds of the property, if the disposer, having no children, leave a father, mother, or both. (e)

Where there are no legitimate descendants, and in case of the previous decease of the father and mother, donations inter vivos or mortis causa may be made to the whole amount of the property of the disposer, saving the reservation made hereafter. (f)

(a) Art. 1615  (b) Art. 1616.  (c) Art. 1617.  (d) Art. 1480.  (e) Art. 1481.  (f) Art. 1483.
The donation *inter vivos* shall in no case divest the donor of all his property; he must reserve to himself enough for subsistence; if he does not do it, the donation is null for the whole. (a)

No disposition *mortis causa* can be made otherwise than by last will or testament. All other form is abrogated.

But the name given to the act of last will is of no importance, and dispositions may be made by testament under this title or under that of institution of heir, of legacy, codicil, donation *mortis causa*, or under any other name indicating the last will, provided that the act is clothed with the forms required for the validity of a testament.

Thus an act of last will, by which an individual disposes of his property or of part thereof, in any manner whatsoever, whether he has instituted an heir or only named legatees; whether he has or has not charged any one with the execution of his last will, is considered as a testament, if it be in other respects clothed with the formalities required by law. (b)

Testamentary dispositions, whether they be made in form of institution of heir or in form of legacy, are either universal, under an universal title or under a particular title. (c)

Testamentary dispositions universal, are those by which the testator gives to one or more persons the whole of the property which he leaves at his death, or of which the law permits him to dispose. (d)

Testamentary dispositions under an universal title, are those by which the testator bequeaths a certain proportion of the effects of which the law permits him to dispose, as the half, the third, or the whole; or of a certain kind of property, as all his real estate, all his moveable property, or a certain proportion of the whole, as a third part of his real estate, or three fourths of his moveable property. (e)

(a) Art. 1484. (b) Art. 1563. (c) Art. 1598.
(d) Art. 1599, 1600, et seq. (e) Art. 1604.
Every legacy not included under the preceding definitions of universal legacies, and legacies under an universal title, is a legacy under a particular title. (a)

The English rule, which prior to the recent act required the testator to be actually seised of lands, devised at the time of making the will, and to continue seised at the time of his death, was the law of New York until the recent revision of the statute law. (b) There is the same language in the statute law of New Hampshire, Vermont, Massachusetts, and Rhode Island. That rule of the English law was adopted in Maine. (c)

Under the New York Revised Statutes "every estate and interest descendible to heirs may be devised; and every will made in express terms of all the real estate, or in any other terms denoting the testator's intention to devise all his real property, shall be construed to pass all his real estate which he was entitled to devise at the time of his death." (d) The law in Pennsylvania and Virginia, is the same as that now in New York as to rights of entry, which are devisable, though there be an adverse possession or disseisin. In Virginia, the will passes all the testator's lands existing at his death, if he so evidently intended. (e) This is also understood to be the law in Kentucky. (f)

There is no doubt that by the laws of all the states in America, except Louisiana, the testator may, if he pleases, devise all his estate to strangers, and disinherit his children (g)

By the statute laws of the states of Maine, Vermont, New Hampshire, Massachusetts, Connecticut, New York, (h) Pennsylvania, Delaware, Ohio, and Alabama, children born after the making of the will, and in the

(a) Art. 1618.
(f) Griffith's Reg. ut Kentucky. 4 Kent's Com. 512.
(g) 4 Kent, ib.
lifetime of the father, will inherit in like manner, as if he died intestate, unless some provision is made for them by the will or otherwise, or they be particularly noticed in the will. The statute law in Maine, New Hampshire, Massachusetts, and Rhode Island, affords the same relief to all children and their legal representatives who have no provision made for them by the will, and who have not received their advancement in their parents' life. (a)

In South Carolina, the interference with the will applies to posthumous children. It is likewise the law of that state, that marriage and the birth of a child operate as a revocation of the will.

In Virginia and Kentucky, a child born after the will, if the testator had no children before, is a revocation, unless such child dies unmarried or an infant. If he had children before, the birth of afterborn children for whom he has not provided is a revocation pro tanto. In the states of Maine, Massachusetts, Rhode Island, Connecticut, New York, and Maryland, if the devisee or legatee dies in the lifetime of the testator, his lineal descendants are entitled to his share. But in Connecticut this is limited to a child, or grandchild; in Massachusetts, Rhode Island, and Maine, to them or other relations; and in New York, to children or other descendants. (a)

In Maryland, no devise or bequest fails by reason of the death of the devisee or legatee before the testator; and it takes effect in like manner as if he had survived the testator. (a)

By the New York Revised Statutes, (b) if the will disposes of the real estate, and the testator afterwards marries, and has issue born in his lifetime, or after his death, and the wife or issue be living at his death, the

(b) Vol. 2, 64, § 43.
will is deemed to be revoked, unless the issue be pro-
vided for by the will or by a settlement, or unless the
will shows an intention not to make any provision. No
other evidence to rebut the presumption of such revo-
cation is to be received. (a)

XI. In a former part of this work it has been seen
that the power to alienate immovable property by con-
tract was a quality impressed on the property, that the
law from which it was derived or by which it was reg-
gulated was a real law, and that the existence of this
power and the validity of its exercise must be decided
by the law of the country in which that property was
situated. "Rebus fertur lex, cum certam iisdem qua-
litatem imprimit, vel in alienando, v. g. ut ne bona avita
possint alienari, vel in acquirendo, v. g. ut dominium
rei immobilitatem venditae non aliter acquiratur, nisi facta
fuerit judicialis resignatio." (b)

The power of making the alienation by testament is
no less qualitas rebus impressa, than that of making the
alienation by contract. When therefore the question
arises whether the immovable property may be dis-
posed of by testament, recourse must be had to the lex
loci rei sitae. That law must also decide whether the
full and unlimited power of disposition is enjoyed, or
whether it is given under restriction. The validity of
the testamentary disposition depends in the latter case
on its conformity to that restriction, whether the re-
striction consists in limiting the extent or description of
property over which the power of disposition may be
exercised, or the persons in whose favour the disposition
is made, or in requiring that the testator should have
survived a certain number of days after the execution
of the act by which the disposition was made.

The total or partial defect of the will on the ground
that it did not institute heirs, or that it omitted to name
the heirs, the disherison of the heirs, the grounds on
which the disherison may be justified, are essentially

(a) 4 Kent's Comm. 527. (b) Herius, de Coll. leg. § 6.
connected with the power of disposing of immovable property by testament, and are therefore dependent on the law of its situs.

Many of the restrictions on the power of disposing by testament have been considered by jurists expressly with reference to the operation of the law by which they were created. Rodenburg states the rule, "Unde certissimâ usu ac observatione regula est, cum de rebus soli agitur, et diversa sunt diversarum possessionum loca et situs, spectari semper cujusque loci leges ac jura ubi bona sita esse proponuntur, sic ut de talibus nulla cujusquam potestas sit, præter territorii leges." (a) He illustrates it by referring to a statute which prohibits a disposition of allodial property by testament. He considers such a statute a real law, which renders inoperative any testamentary disposition of the property in whatever place the testament is made. (b) Ferriere has stated this doctrine "si je legue un heritage propre situé en coutume qui en défende la disposition, tel legs est nul, et ne peut être parfourni sur les biens situez en cette coutume, quoi qu’aquest, parce qu’à l’égard des choses dont on peut disposer par derniere volonté, on considere la coutume où elles sont situées.

"Celui qui a son domicile en cette coutume peut instituer sa femme dans les biens qu’il a dans le pais de droit écrit, comme il a été jugé par arrest du 14 Aoust, 1754, rapporté par Marion au de ses plaidoyez, ce qui doit être sans difficulté." (c)

A testament made in a foreign country bequeathing heritable subjects situated in Scotland, is not sustained.


(c) Ferriere, tom. 2, p. 268, 9.
in that kingdom, though by the law of the country where the testament was made heritage might have been settled by testament, because by the law of Scotland no heritable subject can be disposed of in that form. (a)

On this principle a Scots personal bond taken to heirs and assignees, but "secluding executors," cannot be bequeathed by a foreign testament. (b) But in all questions touching heritable subjects situate abroad, the foreign testament will be given effect to according to the lex loci. (c)

Dumoulin lays down the same doctrine respecting the restriction on the testamentary power over biens propres. "Unde statutum loci inspicietur, sive persona sit subdita, sive non; itam si dicat, hereditia prouenta ab una linea, redeant ad heredes etiam remotores lineae, vel heredes lineae successant in hereditis ab illa linea proventus. Vel quod illi de linea non possunt testari de illis in totum, vel nisi ad certam partem. Hae enim omnia et similia spectant ad caput statuti agentis in rem, et precedentem conclusionem." (d)

Again the statute which prohibits a disposition to particular persons, or (which involves the same consequence), requires the disposition to be made in favour of certain persons, and therefore excludes all others, is a real law. "Directe enim in rerum alienationem scripta hae lex realis omnino dicenda est: nec enim statutum reale sit, an personale metiri oportet a ratione quae a conjugali forsan qualitate fuerit ducta, sed ab ipsa re, quae in prohibitione statuti ceciderit." (e)

So also it has been held that the law which requires


that the testator should have survived the execution of his testament, will control the disposition of property situated in the country where that law prevails, although the testament is made, or the testator domiciled in a place where no such law exists.

If a testator whose domicile and real estate were both in Normandy, made a will in some other place in which he had occasion to be present, but where the law did not require that the testator should survive forty days, it was held that the survivorship was essential to the validity of the testament, so far as it related to the real property in Normandy. (a)

If these questions arise on the power to dispose of moveable property by testament, the law by which they are decided is that of the domicile "pour les meubles, ils suivent la loi du domicile, et il ne saurait jamais y avoir de choc entre différentes coutumes, en sorte qu'il est assez inutile, quant aux meubles, d'agiter si le statut qui permet de tester, ou qui le défend, est personnel, ou s'il est réel." (b)

The rule is stated by Grotius, (c) "Ubi de formâ sive solemnitate testamenti agitur, respici locum conditi testamenti; ubi de personâ antestari possit, jus domicilii; ubi de rebus que testamento relinqui possunt, vel non, respici locum domicilii in mobilibus, in rebus soli situm loci." (d)

(a) Merville, p. 420, on this art. of the Cout. 2 Froland, 1240, et seq.  
(b) 1 Boull. 725.  
(c) Epist. 467.  
(d) 1 Boull. 726.
CHAPTER VI.

SECTION I.

LEGITIME UNDER THE CIVIL LAW—LAW OF HOLLAND—SPAIN.

I. Legitime under the civil law.—Nature of.—Persons to whom it is given. —The whole estate, immovable and moveable, subject to it.—Originally one fourth.—Afterwards augmented.—Extent of augmentation. The testator must have bequeathed it to the children and parents by instituting them under the title of heirs.—Necessity of instituting the child to the legitime by the civil law.—What is sufficient by the law of Holland.—The parent cannot by any mortis causa disposition defeat it, nor can he burthen it.—Has relation to the law of succession.—Share of parent under the law of Holland.—Share of grand-children, &c.—Who are excluded from the computation of the number of children.—The value of the estate from which the legitime is taken is that which exists at the death of testator.—Effect of its value being augmented or diminished.—Donations which would prejudice the legitime when revocable.—By the father.—By the children.—Renunciation.—Express.—Implied.—Remedies, petitio in supplementum—querela de insufficiencia donationibus et dotibus.—Within what time they must be prosecuted.—From what period heir accountable for profits of legitime.

II. The provision secured to the children in the nature of legitime by the law of Spain.—Property of which the owner can make no testamentary disposition.

I. It will have been seen that in several of the systems of jurisprudence which are the subjects of this work, the law gives to some of the persons whom it calls to the succession ab intestato a certain part of the estate of the deceased, of which he cannot deprive them
by any testamentary disposition, and which in the civil law and the jurisprudence of Holland, the *coutume* of Paris, and the law of Scotland, is known by the appellation of the *legitime*.

It exists under other names in the Code Civil, the *coutume* of Normandy, and the Louisiana Code. It has no existence in the jurisprudence of England, or in that of any of her dependencies, except in those which adopt the systems of foreign jurisprudence just mentioned, or in any of the states of America, except Louisiana.

It has been stated that the right of impeaching the testament did not exist, if the testator bequeathed a certain portion of his property to those who would otherwise possess that right. "Portio hæreditatis quam lex necessario relinquii jubes, quibus aliqui datur quærela." (a) It is a certain part of that share of the estate of the deceased which would by law have devolved on the person, if there had been an intestacy, "portio portionis ab intestato debita." Hence, although it may be stated as a general rule that those whom the law does not call to the succession have no title to *legitime*; yet it does not therefore follow that those whom the law does call to the succession are entitled to *legitime*: "Argumentum de successione ad legitimam procedit quidem negativè, ut si dicamus non est successibilis ab intestato, ergo non debetur ei legitima. Sed non rectè procedit affirmatívè. Non enim sequitur, est successurus ab intestato, ergo ex testamento relinquenda est ei legitima, ne per querelam testamentum rumpat. Certissimi quippe juris est, nemini eorum qui ab intestato sunt successibles, legitimam debéri, aut quereram inofficiosconcedi, præterquàm descendentibus, ascendentibus, et fratri, turpi personà institutâ." (b)

(b) Grivel, Decia. 88. Tyraquelus, de Jure Primogeniture, quest. 55,
By the civil law, the *legitime* was given to children born in the lifetime of the deceased, and to posthumous children, and also to grandchildren when their father had died before their grandfather, failing children, to the father and mother, and failing them, to the grandfather, grandmother, or other ascendants. But brothers and sisters were entitled to *legitime* only when the deceased had instituted *personam turpem* as his heir. A surviving parent being excluded by the law of South Holland from the succession to the children's estate, had no title to *legitime*.

The whole of the intestate's estate, immovable as well as movable, is subject to the *legitime*.

It is computed on that part of it which remained after the debts and funeral expenses of the deceased had been first deducted. (a) It was originally only one fourth of the share which the child would have taken, if there had been an intestacy. Thus if the testator's estate was of the value of £12000, and he left two children, the portion of each child, if he had died intestate, would have been half, viz., £6000, and the fourth of that share being £1500, each of the children would be entitled to the latter sum as its *legitime*.

It was afterwards increased, and its amount depended on the number of children. (b) If there were not more than four children, the *legitime* of each was a third: if there were more than four, it was the half:

"Quid pro legitimâ dant natis jura? trientem\n"Quatuor aut infra, semissem quinque vel ultra.\n"Arbitrium sequitur substantia cætera patris." (c)

Thus in the preceding case of an estate of the value of £12000, and two children, the *legitime* of each would

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(a) Dig. lib. 5, tit. 2, 1, 8, § 9.  
(b) Novell, 18, c. 1.  
(c) Lauter. lib. 5, tit. 2, n. 41.  
be £2000. But if there were five children, the legitime to be divided amongst them would be £6000, and that of each £1200.

The parents, when they are entitled to legitime, have the benefit of this augmentation: "Hoc observando in omnibus personis, in quibus ab initio antiques quartae ratio de inofficioso lege decreta est." (a)

But it has been doubted whether it extends to brothers and sisters, who, in the special case mentioned, might impeach the testament. Voet, Le Brun, and others maintain the negative, and insist that they are only entitled to the fourth. But the contrary opinion is maintained by other jurists, and is adopted by M. Merlin. (b)

The legitime might originally have been bequeathed by any title, but by the 115th Novell, it is required that it should be bequeathed to the parents and children by the title of heir, in order that the testament may not be defeated as inofficious: "Sancimus igitur non licere penitus patri vel matri, avo, vel aviae, proavo vel proaviae suum filium vel filiam, vel caestros liberum praeterire, aut exhaeredes in suo facere testamento, nisi per quamlibet donationem, vel legatum, vel fideicommissum, vel alium quemcunque modum eis dederit legibus debitam portionem." (c) "Unde plus hodie valet instituto in uno nummo facta, quam legatum mille solidorum, quod mirabile videtur P. Castrensi. Illo enim casu testamentum subsistit, hoc, tanquam inofficiosum, impugnari potest." (d)

(b) Rep. tit. Legitime, sect. 3, § 3.
The *legitime* to which the brothers might have claim could be bequeathed by any title. (a)

The child does not by such institution incur the responsibility of heir. He is not liable to the testator’s creditors beyond the amount of his *legitime*, and he is at liberty to prosecute any claim in his own right against the testator’s estate. (b)

By the law of Holland, it seems that any expressions in the testament from which it could be collected that the bequest was intended by the testator to be a satisfaction of the *legitime* would be sufficient, although the child was not expressly instituted to it by the title of heir, and the testament could not be set aside as inofficious. If the bequest was not equal to the *legitime*, the remedy would be by the *petitio in supplementum*, in order that the deficiency might be made good. (c)

It must be left free from every burthen. Conditions, *fidei-commissa*, or other provisions which would charge or delay its payment, are wholly null and void, unless in those cases when it would have been competent for the testator wholly to have disinherited the child:

“Si conditionibus quibusdam, vel dilationibus, aut aliquà dispositione moram, vel modum, vel aliud gravamen introducente, eorum jura, qui ad memoratam actionem vocabantur, imminuta esse videantur: ipsa conditio, vel dilatio, vel alia dispositio moram, vel quadcumque onus introducens, tollatur: et itsa res procedat, quasi nihil eorum testamento additum esset.” (d)


(b) Voet, lib. 5, tit. 2, n. 44. Matth. de Success. disp. 16, n. 30.


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The testator cannot by any prohibition, or by any disposition in his will, prevent the children from claiming and receiving their *legitime.* (a)

It cannot be bequeathed by giving either the *nuda proprietas* apart from the usufruct, or the usufruct apart from the *nuda proprietas*. If the children were instituted to the *nuda proprietas*, whilst the wife was instituted to the usufruct, they would retain the former, and they would be entitled to their *legitime* out of the latter; and if the children were instituted to the usufruct, and others were instituted to the *nuda proprietas*, the latter would be subject to the *legitime.* (b)

But a testator may by his testament put his children to elect within a certain time, either to take the *nuda proprietas* alone, or the usufruct alone, as the case may be, or to claim their full *legitime* out of both. (c)

In Holland it is not unusual for one of the parents to bequeath to the survivor of them the usufruct of all his estate for the maintenance of his children during their minority. In this case, until they attain their majority, they have no right to the usufruct, but on attaining it, they are entitled to receive their *legitime* free from every charge on the usufruct. (d)

The amount of the *legitime* and the number of those entitled to it have relation to and depend on the law of succession. Thus, if under the *jus Aesdomicum* the surviving parent takes a moiety of the intestate’s estate, and

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(a) Merlin, de Legitim. lib. 3, tit. 2, quest. 1.
(c) Peregrin. de Fidei-comm. art. 36, n. 96. Voet, ib. n. 64. But see Sandes, Decis. Fria. lib. 4, tit. 7, def. 2, in fine. Merlin, lib. 3, tit. 2, q. 27.
the brothers the other moiety, the *legitime* of the former would be one-half of that moiety, or one-sixth of the whole. (a)

If the testator leave surviving him five children, and also grandchildren the issue of a deceased child, the inheritance would be divisible into six parts, and the children would take each a sixth *per capita*, and the grandchildren would take the sixth of the deceased child *per stirpes*. The *legitime* of each of the children would in such case be one-twelfth, and that of all the grandchildren would be a twelfth amongst them. (b)

When there are surviving children to take with grandchildren, it matters not what may be the number of the latter, for the proportions are estimated with reference to the number of children, as if the father of the grandchildren were alive.

If there were two grandchildren and five sons, and the grandfather desired to institute one only of such grandchildren, the part which he must bequeath to that grandchild as *legitime*, is one-twenty-fourth of his estate. If the testator had only one son, who had died in his lifetime leaving children, and with no uncles nor uncles' children, it has been insisted that as the children would have divided the whole succession, they ought to have as their *legitime* one-half of the intestate's estate. (c) But it has been justly answered that they would succeed by representation, and as their father would be entitled to one-third only as his *legitime*, his children, whatever be their number, are entitled to no greater share than one-third to be divided amongst them. (d)

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(b) Voet, ib. n. 48.
(c) Barry, de Success. lib. 16, tit. 2, n. 1. Peregr. de Fidei-comm. art. 36, n. 39.
In computing the number of children in order to determine the amount of their *legitime*, it becomes a question whether a child who has been justly disinherited, or is excluded from the succession, either by statute, or by his own renunciation, is to be reckoned in the number of the children, so as to make the amount larger, or whether he is to be excluded from the number so as to reduce the amount. If a father leaving five children, institute three or four to the *legitime*, but disinherit the fifth, and the fifth is reckoned as composing the number of the children, the *legitime* of the others will not be a third, but a moiety of their share in the succession. On the other hand, if the deceased had four children, but one of them is disinherited, or excluded from the succession by his own renunciation or by statute, if he is to be reckoned as one of the children, then as the succession would be divisible into four parts the *legitime* of each of the three children would be one-third of that fourth. But if on the other hand he is not to be reckoned, the succession would be divisible into three parts, and a moiety of that third, or one-sixth, would be the *legitime* of each child.

It seems the better opinion that a child who has been condemned to the mines, or banished, or justly disinherited, or excluded by renunciation or by law from the succession, is not to be included so as to increase the number, but is to be considered as if he were dead. (a) Thus in the case first supposed, the *legitime* of each child would be a third only, and not a moiety of his share of the succession. In the second case, the child disinherited.

would not be reckoned as taking a part in the succession, and the *legitime* would be a moiety of the third of the succession which each would take. A daughter who, having received her *dos*, has renounced the inheritance, is to be included, and thus increases the number of children and the amount of the *legitime*.

In estimating the *legitime*, regard is had to the amount of the testator's property, as it existed at the time of his death, and not at any preceding period of his life. The right to the *legitime* does not accrue until his death, and therefore cannot be the foundation of any claim on the part of the children during his life. If it be said there is the risk of his dissipating by his prodigality his whole estate, and leaving nothing for their maintenance, it is answered that the law has provided a remedy by placing his property under curatorship and interdict. (a) Thus, if a daughter in consideration of her *dos*, which at the time she received it corresponded with the state of the testator's property at that time, and was equal to her *legitime*, had renounced the succession, yet if his estate between that time and his death should increase, and the *dos* become disproportioned to the increased value, and consequently to that which would then be her *legitime*, she is entitled to have the difference made good by the *petitio in supplementum*. But if between the time of the *dos* being given and the death of the father, his estate should have decreased, she is not bound to return so much of it as may exceed her share according to the diminished amount of the estate, provided there is sufficient for the *legitime* of the other children. (b)

If the testator's estate has increased in its value by a cause which existed in his lifetime, the *legitime* is in-

(a) Voet, lib. 5, tit. 2, n. 51.
ceased also, notwithstanding the computation may have already taken place, unless the party had agreed to take it as then assigned him in full satisfaction of any further claim. Thus it may be increased by the recovery of a debt which was considered desperate from the insolvency of the debtor, or by the successful termination of a suit commenced in the testator's lifetime, but not concluded until after his death. If its value has been increased from causes which had no existence in his lifetime, but had taken place after his death, the _legitime_ will be augmented if the property was increased before the computation and allotment of the _legitime_; but if that increase did not take place until afterwards, the respective parties to whom the property has been allotted will alone have the benefit of its increased value. (_a_)

The same rule is to be applied in deciding whether the _legitime_ is to be reduced in consequence of the estate having become after the testator's death diminished in value. It is subject to be reduced if the cause of such diminution existed in his lifetime, or if it had taken place before the _legitime_ had been computed and assigned, but without the default of the party bound to deliver it. (_b_)

The testator's estate subject to the _legitime_ is that which remains after deducting from it, not only the funeral expenses and the debts of the deceased, but also all the property which he held in _fidei-commissum_ for others. (_c_)

Generally property which the eldest son acquires _jure primogeniture_ is not deemed part of the mass of the estate from which the _legitime_ is to be computed and taken. But if the eldest son were bound by the law of the country to collate the price for which a new feud was purchased, the price constitutes a part of the succession,


(_b_) 1b.

(_c_) Voet, lib. 5, tit. 2, n. 56.
and if an ancient feud ceased to be descindible only to the eldest son, and became the subject of bequest, it would like all other property be deemed part of the succession, and in both cases would form part of the estate subject to the legitime. (a)

The legitime of one or more of the children may be subject to other deductions. It may be laid down generally, that whatever is subject to be collated, is subject also to be imputed in the legitime. This rule exists even when grandchildren succeed to their grandfather in consequence of the death of their father; for whatever the latter must have collated had he been living, must be imputed in their legitime, whether they were the heirs of the father or whether they succeed alone or with the uncles. (b) The consideration of these deductions will be more conveniently reserved for a subsequent chapter, which treats of the doctrine of collation.

As the parent might by the alienation of his property in his lifetime defeat the legitime of his children, it has been the object of those codes which recognize this provision to impose certain restraints on his power of alienation. In some countries the legitime, or the provision resembling it, attaches on his property at the time of his marriage, and to which his property remains subject in the hands of bonâ fide purchasers.

But neither the civil law nor the law of Holland prevented the parent from making a bonâ fide sale of any part of his property, and the bonâ fide purchaser would retain it free from any claim on the part of the children. But both by the civil law and the law of Holland, dona-


tions became subject to revocation at the instance of the parent himself, and of reduction by his children or of those entitled to the *legitime.* (a)

It has been doubted by many commentators, whether the civil law ever authorized the revocation by the father of a donation which he had made, on the ground of the subsequent birth to him of children, and there certainly seems considerable weight in the objection, that the law on which reliance is placed does not confer this authority. "Si unquam *libertas patronus* filios non habens bona omnia vel partem aliquam facultatem fuerit donatione largitus, et postea susceperit liberos, totum quicquid largitus fuerat, revertatur in ejusdem donatoris arbitrio ac ditione manusurum." (b)

But notwithstanding those doubts, practice has interpreted or extended the law; for it is generally admitted, that the birth of one or more children after the donation had been made, enabled the father to revoke it. "Cum donationem ab orbo factam, ob liberos supervenientes revocari posse in foro placuerit; quæ de hoc jure incidunt, controversiæ ex ipsis. L. 8, C. de revoc. donat. verbis dirimendæ sunt; unde rectè probatur, soli donatori, non item liberis aut hereditibus, hanc donationis revocandæ facultatem competere." (c)

Such a revocation could not be made by the father, in consequence of the birth of natural children unless they were legitimated, although it might be made by their mother. Donations were not protected from it because they had been made to the church. (c)

It was immaterial in what form the donation was made

(b) Cod. lib. 8, tit. 56, l. 8.
if its effect deprived the parent of part of his estate. Thus the gratuitous remission of a debt, or the gratuitous relinquishment of a right, was subject to revocation. (a)

The power of revocation could not be exercised if the children died before the donation had been actually revoked, but if the revocation were made, the subsequent death of the children would not revive it. (b)

If the donation could be considered as remuneratory of any service it was not revocable. (c)

If the donee had even ante litem motam alienated the subject of the donation for a valuable consideration, it could be revoked on account of the birth of children, although not for any other cause. (d)

The donation is subject to revocation when it comprises not only the whole of the parents' estate, but so considerable a part of it as to impair or prejudice the children's legitime. (e)

It becomes a question on which the discretion of the judge is to be exercised, whether the part comprised in the donation is of such value as to affect the legitime. That discretion, it is said, is to be exercised after consideration of all the circumstances which may afford the


(a) Dig. lib. 50, tit. 16, l. 49, l. 143, and lib. 41, tit. 1, l. 52.


(d) Voet. lib. 39, tit. 5, n. 24, 33.

(e) Peres. ib. n. 18. Tiraq. ad l. 8, Cod. lib. 8, tit. 56. Zoss. lib. 39, tit. 5, n. 123. Voet, ad h. lib. and tit. n. 32.
presumption whether he would have made so large a donation, if he had anticipated the birth of such a number of children. (a) Regarding is to be had to the period when the donation was made, and not to that of the parent’s death, for the purpose of ascertaining the value of his property and the right to revoke the donation. That right is not to be withheld because his estate had been increased in value, nor does the right arise because it has been subsequently diminished in value. (b)

The donation is not ipso jure revoked by the subsequent birth of one or more children, but the father must himself bring his action to revoke it. (c)

The power of revocation is given to the father to enable him to provide for his children, and proceeds on the presumption, that if the children had been born he would not have made such a disposition. It is entirely optional with him to exercise it, and it is not competent for the children to exercise it. (d)

He cannot exercise it in respect of children born at the time of the donation. (e)

The children born at or after the time when the donation was made are afforded by the querela inofficiosas donationis the means of setting aside such donation, not wholly, but only to the extent to which it prejudices their


(e) Peres. ad Cod. lib. 8, tit. 56, n. 29.
**legitime.** It is subject to reduction whether it has been made to a child or to a stranger. (a)

The same remedy is also given to parents, brothers, and others whose legitime is prejudiced. (b)

It has been considered by some commentators, that if donations are made at different times, those which were last made ought to be first reduced, before those of an earlier period, for the latter are less likely to have prejudiced the legitime. But the prevailing opinion seems to be, that all the donations, without regard to the period when they were made, should be reduced pro rata. (c)

Dotes of an unreasonable amount were also subject to be set aside as inofficious. (d)

When it is stipulated by the dotal contract on marriage, that on the death of either of the spouses without children, the survivor shall take the whole estate, if the one who predeceases the other leaves a parent, who by the law of the country would be entitled to succeed ab intestato, the latter may, by the querela de donatione inofficiosi reduce the marriage contract and obtain his legitime. (e) And the parents would not in this case be deprived of their legitime, although they had signed the dotal contract, unless it contained an express renunciation of it. (f)

It remains to be inquired in what manner the party

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(b) Ib.


(d) Cod. lib. 3, tit. 30.


might bar his title to *legitime*, or the remedies for reduc-
ing inofficious donations or dotal gifts, and for supply-
ing that which is wanting in the testator's bequests to make up the *legitime*. The text in the codex affords a strong proof of the presumption of the civil law against a renunciation or release of the *legitime*. It seems not to have permitted the renunciation of the *legitime* before it had opened by the death of the father: "Ille etiam sancimus: ut si quis à patre certas res vel pecunias accepisset, et pactus fuisse, *quatenus de inofficioso querela adversus testamento paternum minime ab eo moveretur*; et post obtum patris filius, cognito paterno testamento non agnoverit ejus judicium, sed oppugnandam putaverit, vetere júrgio exploso, hujusmodi pacto filium minime gravari, secundum Papiniani responsum, in quo definitiv, *meritis magis filios ad paterna obsequia provocandos, quam pactíonis adstringendos*. Sed hoc ita admitimus, nisi transactiones ad hærades paternos filius celebraverit, in quibus aperíssimè judicium patris agnoverit." (a)

It has been doubted whether the renunciation by a daughter of the succession to her father made by her on her marriage, in consideration of a dotal gift received by her on that occasion, and expressed in her marriage contract, would bar her title to *legitime*. (b) But such a renunciation seems effectual, and was recognized by the Parliament of Paris. (c)

The civil law rejected an implied renunciation of the *legitime*: "Et generaliter definimus quando pater minus legitimà portione filio reliquerit, vel aliquid dederit, vel mortis causà donatione, vel inter vivos, sub cā condi-

(a) Cod. lib. 3, tit. 28, l. 35, § 1.
(b) Wissemb. ad Cod. lib. 3, tit. 28, l. 35, § 1.
tione, ut hæc inter vivos donatio in quartam ei computetur: si filius post obitum patris hoc, quod relictum vel donatum est, simpliciter agnoverit, forte et securitatem hæreditibus fecerit, quod ei relictum vel datum est, accepsisse, non adiciens, nullam sibi superesse de repletione questionem; nullum sibi filium facere prejudicium, sed legitimam partem repleri: nisi hoc specialiter sive in apoca, sive in transactione scripsert, vel pactus fuerit, quod contentus relictæ vel datæ parte de eo, quod deest, nullam habeat questionem; tunc enim, omni exclusa querelâ, paternum amplecti compelletur judicium. (a)

Mornacius, in his commentary on this law, has stated its effect in the following terms: "Vult in summâ, filium nunquam summoveri petitione supplementi legitime, licet quod ei reliquit pater acceperit, nisi specialiter residuo, quaelunque illud sit renuntiaverit. Tantus nimirum favor legitime: ut quæ à naturâ magis, quàm à patre debeatur, ubi enim de quâcunque alia donatione, vel legato agitur, qui, nullâ protestatione factâ accipit, agnovisse adeò voluntatem defuncti intelligitur, ut conqueri amplius, et oppugnare testamentum sit nefas." (b)

A case was decided by the Parliament of Paris, in which full effect was given to this principle of the civil law. "Benoit Menayde, domicilié dans le Forez, pays de droit écrit, avait fait son testament le 4 Décembre, 1727, et par cet acte, il avait institué Michel Menayde, son fils, hérétique universel, à la charge de fournir à Claude Menayde, sa fille, lors de son mariage et de sa majorité, 250 liv. et quelques effets, pour tous et chacun les droits de legitime, actions et prétentions, que sadite fille pourroit avoir et espérer en ses biens, successions et hoiries. Claude Menayde s'était mariée avec Pierre Duché, et son frère

(a) Cod. lib. 3, tit. 28, l. 35, § 2.
avait promis, par le contrat de mariage, de lui payer, en six paymens égaux de chacun 50 livres, le legs que son père lui avait laissé. Le 17 Octobre, 1741, Claude Ménayde et son mari donnèrent à Michel Ménayde une quittance conçue en ces termes: 'Reconnaissent avoir reçu de Michel Ménayde la somme de 112 liv. pour solde finale et dernier payement de la constitution faite à ladite Claude Ménayde par son contrat de mariage; de laquelle somme de 112 liv., pour les causes susdites, lésdits mariés Duché et Ménayde se contentent, quit-tent, et promettent de faire tenir quitte ledit Michel Ménayde, avec promesse de ne lui en jamais plus rien demander.' Après un silence de 19 ans, Claude Ménayde, devenue veuve, fit assigner son frère en supplément de Légitime, et obtint contre lui plusieurs sentences, qui, avant faire droit, ordonnèrent l'estimation des biens, à l'effet de savoir, s'il y avait lieu au supplément; et sur l'appel qui en fut interjeté, il intervint un premier arrêt sur appointement à mettre, qui en ordonna l'exécution provisoire. Au fond, Michel Ménayde soutenait que sa sœur était non recevable en sa demande, et il tirait cette fin de non recevoir, tant de la quittance finale, du 17 Octobre, 1741, par laquelle sa sœur lui avait fait promesse de ne lui plus rien jamais demander, que du laps de temps qui s'était écoulé depuis. Claude Ménayde répondait que l'action en supplément de légitime dure 30 ans; qu'ainsi ou ne pouvait pas lui opposer de prescription; que sa quittance finale ne la rendait pas non plus non-recevable, attendu qu'en la faisant, elle n'était pas entrée en composition de patrimoine; qu'elle avait seulement suivi le jugement du père; qu'à la vérité, elle avait bien renoncé à rien demander de la constitution de dot, mais non pas à la légitime qui lui était assurée par la loi 35, § 2, C. de inofficioso testamento, et une partie des autres autorités qui sont indiquées ci-dessus. Par arrêt du 22 Octobre, 1765, la cour confirma toutes les sentences et conséquemment
jugea que Claude Menayde était recevable dans sa demande en supplément de Légitime." (a)

If the amount which has been bequeathed by a parent to his child is less than his *legitime*, the latter is entitled by the actio ad supplementum to recover the difference. This remedy differs in many respects from the *querela de inoff. testamento*, for it may be prosecuted by the heir although his ancestor should not himself have commenced any proceeding to enforce it. It may be prosecuted within thirty years from the time the inheritance is adiatted, whereas the *querela de inoff. testamento* must have been prosecuted within five years. (b)

The party does not preclude himself from this remedy by accepting any bequest in the testament. The testator cannot by any declaration therein deprive him of this remedy. (c)

The action must be brought against the heir whom the testator has instituted, and not against the legatees. (d)

It necessarily supposes that something has been bequeathed by the testament. It can never therefore be prosecuted by him to whom nothing has been bequeathed under the title of *legitime*, but his remedy is by *querela de inoff. testamento*. (e)

The remedy by which the donation or *dos* was reduced as inofficious, the *querela inofficiosae donationis or dotis*, was withheld on the same grounds, and must be prosecuted within the same time, and generally was subject to the same rules as the remedy for setting aside an inofficious testament. (f)

The action was barred if it were not prosecuted within five years computed, not from the time of adiating the inheritance, but from that of the death of the donor. (g)

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(b) Voet, lib. 5, tit. 2, n. 67. Neostad, decis. 3. Gaill, lib. 2, obs. 120.
(c) Voet, lib. 5, tit. 2, n. 69. (d) Ib. n. 70.
(e) Ib.
(f) Ib.
(g) Novell, 92, c. 1. Cod. lib. 3, tit. 29, l. 9, and tit. 28, l. 34. Voet, lib. 5, tit. 2, n. 67, 68.
It seems to be the general opinion that the profits of the *legitime* must be accounted for by the heir from the time of the testator’s death, although it may not have been demanded from him, and although he was ignorant that he was a debtor in respect of it. (a)

II. It has been stated by a commentator on the laws of Spain, that the *legitime* of the parents is the whole property of the parent, immovable and moveable, except the fifth part, of which he has the power of disposing, either to one or more of his children, or to any stranger, and with the further exception that he may dispose of a third, provided such disposition is made in favour of one or more of his children. “Hodie tamen de jure nostro regio legitima filiorum est, omnia bona patris vel matris, preter quintum, in quo pater vel mater potest ad libitum disponere pro animâ, vel in favorem extranei, vel pro quâlibet causâ. Item etiam potest disponere de tertio honorum inter filios et descendentes tantum, quia potest meliorare unum vel aliquos eorum quos voluerit in praedicto tertio in vitâ vel morte.” (b)

It seems that the fifth is to be first deducted. “Prius deducatur et detrahatur quintum honorum de hæreditate patris vel matris quàm tertium, et hoc favore animæ: ut majoris valoris et quantitatis, quàm si deduceretur et detraheretur post tertium: ita expressè disponit lex 241 in l. styli. et ita communiter servatur et practicatur in nostro regno, et practica et forma divisionis erit ista, quod tota hæreditas et patrimonium patris vel matris debet fieri unus acervus et cumulus, et ex eo prius et ante omnia sunt deducenda debita, quia non dicuntur bona nisi deducto ære alieno, et de residuo sient quinque partes æquales, et una assignabitur et distribuetur pro quinto junctim vel divisim prout testator disposit; postea verò aliae quatuor partes sient unus acervus et cumulus

et dividetur in tres partes, et una erit tertium et applicabitur filio meliorato, et alias duas partes erunt legitima filiorum, et debent dividii inter eos aequaliter.” (a)

In default of lineal descending heirs, a person cannot devise nor bequeath from his direct ascending heirs, father or mother, grandfather or grandmother, &c. more than one-third of his real and personal property, except as regards natural acknowledged children, to whom he may devise or bequeath in prejudice of ascending necessary heirs. The *legitime* of the ascendants is therefore the property of the son or grandson, with the exception of the third, of which he may dispose.

In default of necessary or lineal descending or ascending heirs, a man may freely dispose of his property in prejudice of brothers and all collateral relations, for they are considered in respect to a testator as strangers, and not necessary heirs. This right of disposition is subject in the first place of course, to the payment of all his funeral expenses and just and lawful debts, and also to the *ganancial* rights of his wife. (b)

The *mejora* of the third in favour of children and descendants may be revoked at any time before his death, except the possession of the property comprised in it has been delivered, or the deed or writing executed before an *escribano*, or unless it was made for an *onerous* cause, as marriage. (c)

A covenant by the father to meliorate (*mejorar*), or not to do so, is obligatory on him, and must be performed. (d)

The value of the *mejora* must be considered with reference to the period of the death of the testator. (e)

The *mejoras* of the third and the fifth are not taken

(a) Gomez, L. 17, n. 1, 2, p. 122.
(b) Gomez, ib.
(c) L. 1, tit. 6, lib. 5, Rec. L. 1, tit. 6, lib. 10, Nov. Rec.
(d) L. 6, tit. 6, lib. 5, Rec. L. 6, tit. 6, lib. 10, Nov. Rec.
(e) L. 7, tit. 6, lib. 5, Rec. L. 7, tit. 6, lib. 10, Nov. Rec.
out of *dotes*, donations *propter nuptias*, and other donations which are to be be brought into collation (*collacion*). *(a)*

It is valid although the testament should be set aside on account of the preterition or disherison of the heirs. *(b)*

If parents by testament or by act *inter vivos* make a donation to one child, it is, with reference to its amount, considered as given by way of the third and fifth, and his legitimate share of the parent’s property, although not so expressed by him. If its amount exceed the third and fifth, and *legitima*, it is invalid only as to its excess. *(c)*

A gift from a father to a daughter by way of *dote* or marriage portion, is reckoned as part of her *legitime* in his property. If the value of the *dote* exceed her *legitime*, the excess would be invalid, and would not be considered as a *mejora* of tercio y quinto of his property. *(c)*

The donation for want of children is revoked generally if the donor shall afterwards have them. *(d)*

The donation which is made in prejudice of the lawful share (*legitima*) of children is prohibited, *(e)* and a gift made to the child who has brothers or sisters must be collated. *(f)*

It seems that an express renunciation of the succession, unless it was accompanied by an oath, was invalid. *(g)*

*(a)* L. 9, tit. 6, lib. 5, Rec. L. 9, tit. 6, lib. 10, Nov. Rec.
*(b)* L. 8, tit. 6, lib. 5, Rec. L. 8, tit. 6, lib. 10, Nov. Rec.
*(c)* L. 10, tit. 6, lib. 5, Rec. n. 6, 22. L. 10, tit. 6, lib. 10, Nov. Rec.
*(d)* L. 8, tit. 4, p. 5.
*(e)* Ib.
*(f)* L. 3, tit. 4, p. 5.
*(g)* Gomes, ad l. 22, n. 5, 6, 7.
SECTION II.

LEGITIME UNDER THE COUTUMES OF PARIS, NORMANDY, THE CODE CIVIL, AND LOUISIANA.

I. Three modes by which the interests of the children were secured by the coutume of Paris.—The legitime naturelle.—The legitime or réserve coutumier.—Droit de donaire coutumier.—1. Legitime naturelle.—Of what it consists.—Claimable only by children and their descendants. —Donations revoked by the donor having a child or children.—Reduction of, by the children.—In what cases children who may not be entitled to share in the succession are still counted, so as to diminish the shares on which the legitime of the others is computed.—How the property is estimated in order to fix the legitime.—Order in which legacies and donations are applied in making up any deficiency. —Augmentation or diminution of the value of the property in the hands of the donee.—Remedies for the recovery of the legitime.—When barred.—2. The legitime or réserve coutumier consists of four-fifths of the biens propres.—Who are entitled to.—The succession must be accepted.—Means by which the heir is secured against the consequences of accepting a succession so burdened as to prejudice the four-fifths.—Secured only against the ancestor’s testamentary disposition, and not against his donations inter vivos.—But a donation to one of the persons entitled to share in the four-fifths deemed an advancement, and must be collated, unless he renounces the succession.—Effect of renunciation in respect of the co-heirs.—3. Droit de donaire coutumier.—Nature of.—Property subject to it.—The person claiming it must renounce the succession.—The lien prior to that of creditors whose demands have accrued subsequently to the marriage. —Must impute all donations.—Effect of renunciation.—Provisions for the children of a second marriage, and for the protection of those of the first.

II. The only legitime by the coutume of Normandy is the absolute property in a third subject to the wife’s usufruct for life therein.—The property subject to this claim secured against alienation.—What gifts or advancements are collated.—The children have a third in the mother’s immovable property.—Provision for children of second marriage.

III. The legitime or réserve of children under the Code Civil extends to descendants.—Réserve for ascendants.—Donations or dispositions which
could defeat it revocable and reducible.—Rules respecting the revocation and reduction.—Order in which the deficiency is made up from donations, &c.—Provisions in the event of a second marriage.—Remedies.

IV. The Louisiana Code follows the Code Civil on the subjects of this section.

I. There are three modes by which the coutume of Paris secures to children an interest in the property of their parents. The first is the droit de legitime, by which the children are entitled to a moiety of such part or share as each child would have had in the succession of the father and mother, grandfather or grandmother, or other ascendants, if the father, mother, or other ascendants had not disposed of any part by donation inter vivos, or by testament. This is called the legitime naturelle. The second species of legitime is obtained by a restraint on the parents’ power of disposition by testament. They can dispose only of the moveables and acqüets, and one-fifth of the biens propres. This réserve of four-fifths of the biens propres for the children was called la legitime statuaire, or coutumiere. The third is the droit de douaire coutumiere, by which the father is prohibited from disposing of more than a moiety of the real property, hérîtages, of which he was seised and possessed at the time of the marriage. (a)

The children were entitled to avail themselves of either of these provisions which was most for their benefit.

The réserve or legitime coutumiere, and legitime naturelle agree in this respect, that it is not in the power of the parent to derogate from, or withhold or diminish those rights, but they differ in other respects from each other. Thus, the person claiming the legitime naturelle must impute such donations as he had received, whilst in respect of the legitime coutumiere there is no such obligation, because the estate on which he makes the

claim not being subject to be disposed of is not lessened by any donations made to him.

The *legitime naturelle* and the *douaire* agree in this respect, that neither the one nor the other can be taken without renouncing the succession to the father. Both are debts due by the father. The persons claiming the *legitime* and *douaire* must collate. But they differ in these respects, that the *legitime* is claimable on the mother and father’s estate, but the *douaire* on that only of the father. The *legitime* is taken from the estate after the debts have been first deducted, and is preferred only to donations and bequests. But the *douaire* attached on the estate from the moment of marriage, and is preferred to all debts contracted subsequently to that event. The *legitime naturelle* cannot be withheld from the children without a sufficient cause, but the *douaire* may be excluded by the contract of marriage.

1. By the civil law the *legitime* belonged to the child in the quality not of heir, but of child. He might therefore claim his *legitime* at the same time that he renounced the succession. *(a)* But by the *coutume* of Paris the *legitime* belonged to the child in the character of heir: “Non habet legitimam nisi qui hæres est.” If he renounced the succession, he could not claim the *legitime*. *(b)* “La legitime est la moitié de telle part et portion que chacun enfant eut eu en la succession des dits père et mère, ayeul ou ayeule, ou autres ascendants, si les dits père et mère ou autres ascendants, n’eussent disposé, par donaion entre-vifs ou derniere volonté, sur le tout déduits les dettes et frais funéraux.” *(c)*

*(a)* Furgole, des Test. c. 8, § 3, n. 77, 79; c. 10, § 2, n. 39. Serres, 290.


*(c)* Cout. de Paris, art. 298.
The proportion fixed by this article is a moiety of the share which the child would have had in the estate of the parents, if the latter had not disposed of the same by donation inter vivos or by testament.

It must be left free from any charge, and any condition or burthen to which it is subjected by the parent is void. (a)

The child is deemed to have been seised of the legitime pleno jure from the instant of the parent's death. (b) But this opinion is controverted. "Inde fit ut possessio illa, sive consuetudinaria, sive edictalis dicenda est, quae à defuncto in legitimum successorem ipso jure translata intelligitur, in filium nihil nisi petendae legitimize jus habentem minime transferatur." (c)

The legitime can be demanded only by the children of the deceased, or by the representatives of those who may have died in his lifetime, if they are competent to succeed to the inheritance. (d)

Children who have been justly disinherited, or a daughter who has received a dotal gift, and who either by her marriage contract has renounced, or by the law of the place in which the parent's property is situated is excluded from the succession in consequence of her having received that dotal gift, cannot claim legitime. (e)

It seems that the dos must have been actually received by her, and not merely promised, in order to exclude her from the succession. (f)

The legitime passes to the heirs of the child to whom it belongs, and constitutes part of his estate, which might be recovered by his creditors, if he refused to demand it. (g)

(a) Dupless. ib.
(d) Ferriere, sur l'art. 298, p. 281.
(e) Pothier, ib. art. 5, § 1. Dupless. ib. (f) Ib. (g) Ib.
By the birth of legitimate children, or of a single child, a donation, whatever may be its value, and under whatever title it is made, and although it is mutual or remunerating, even that which has been made in consideration of marriage by others than the conjoints or the ascendants, is revoked pleno jure by the surviving of a child of the donor, even though it be a posthumous child or a child legitimated by the subsequent marriage. "Toutes donations entre-vifs, faites par personnes qui n'avaient point d'enfans ou de descendans actuellement vivans, dans le temps de la donation, de quelque valeur que lesdites donations puissent être, et à quelque titre qu'elles aient été faites, et encore qu'elles fussent mutuelles et rémunératoires, même celles qui auraient été faites en faveur de mariage, par autres que par les conjoints ou les ascendans, demeureront révoquées de plein droit par la survenance d'un enfant légitime du donateur, même d'un posthume, ou par la légitimation d'un enfant naturel par mariage subséquent, et non par aucune autre sorte de légitimation." (a)

Donations whether inter vivos, or by testament, and for whatever purpose made, and those to religious or charitable institutions, are subject to be reduced to the extent to which they prejudice or diminish the child's legitime, for the legitime is a debt owing to him by his parents. (b)

The dos which is given to a daughter, even that which has been furnished in money, is also subject to reduction, whether the legitime be demanded in the lifetime of the son-in-law, or after his death, and although he might have enjoyed the dos for thirty years, and the daughter may have renounced the succession by her marriage contract or otherwise, or although she should be excluded from the succession by the law or coutume: "La

(b) Poth. Tr. des Don. entre-vifs, c. 3, art. 5, § 2, p. 506. Introd. au titre 15, tom. 10, p. 485. Ord. 1731, art. 34.
dot, même celle qui aura été fournie en deniers, sera pareillement sujette au retraitement pour la légitime; ce qui aura lieu, soit que la légitime soit demandée pendant la vie du mari, ou qu’elle ne le soit qu’après sa mort, et quand il aurait joui de la dot pendant plus de trente ans, ou quand même la fille dotée aurait renoncé à la succession par son contrat de mariage ou autrement, ou qu’elle en serait exclue de droit, suivant la disposition des lois, coutumes ou usages.” (a)

Donations remuneratory, if the services or charges in respect of which they are made are not capable of being estimated in money, are subject to reduction altogether, or to the extent to which they are not capable of being so estimated. (b)

Marriage contracts are founded on a valuable consideration. (c) They are not deemed donations subject to reduction, unless indeed they degenerate into advancement, and exceed the ordinary limits. (d)

All advancements which are subject to collation are also subject to reduction so far as they diminish the legitime. (e)

The children are called to the legitime separately, and not jointly. The shares of such as are not reckoned in the number of those to whom the legitime is due, do not accrue to the other children, but contribute to the corpus of the estate, and on the other hand, the shares of such as are reckoned tend to the benefit of the donees, as often as it becomes necessary to make up the legitime by reducing donations to the extent required for this purpose.

The legitime being a moiety of the share which the child would take in the succession, the share of the legitime is diminished as the number is increased of those who are reckoned as sharing in the succession.

(a) Grenier, ib. Ord. art. 35.  
(b) Pothier, ib.  
(c) Ord. art. 17.  
(d) Pothier, ib.  
(e) Infra.
Those who are excluded from the succession by reason of their incapacity to succeed, those who have pre-deceased leaving no child, those who are civilly dead, and those who have executed an absolute and simple renunciation of the succession, are not reckoned in the number of children sharing in the succession, and therefore not in the number of those to receive the legitime. Those who renounce in consequence of donations made to them are included in the number for the purpose, not of taking any legitime themselves, but of thus diminishing the legitime of the others. (a)

In estimating the estate in respect of which the legitime is to be delivered, the debts and funeral expenses must be first deducted, the residue of the property is then taken, and there is added to it the amount of all the donations inter vivos made by the testator, of the bequests and of the dotes given to his daughters. The whole forms the general mass, and it is then to be seen what would be the share which each child would take in that mass, if no such donation, dos, or bequest were made, and a moiety of that share constitutes the legitime of each child.

If the residue of the property be sufficient to give each child his legitime thus computed, neither the donations, nor bequests are to be resorted to, but if it be insufficient, the deficiency is to be supplied, first from the residuary or universal legatees, before resort is had to the particular or specific legatees, unless the testator has directed otherwise. If the residuary estate be insufficient, then the particular legatees must make it up, and if there be still a deficiency, the donations inter vivos must be resorted to, commencing with the donation which was last made, since those which were first made never contribute, until the most remote have been first applied. (b)

(b) Ord. art. 34.
If in a marriage contract there had been a gift of all the donor's estate, present and future, the donee is alone chargeable, even before resort can be had to subsequent donees, with the payment of the whole of the legitime of the children, even although the donation itself should contain no express charge to this effect, unless he is contented to retain the donation of such of the subjects as belonged to the donor at the time of the donation, and in this case, he will not be bound to contribute in making up the legitime until after resort has been had to the subsequent donees. (a)

If the donation were only of a part of his estate present and future, unless the donor had expressly charged himself with the legitime, he will only be liable in the order prescribed by the ordinance, that is, after the subsequent donees.

But if he had expressly charged himself with the legitime, he would be bound, even before resort was had to the subsequent donees, to supply that part of the legitime which corresponds with the part of the estate of which he is donee. (b)

If the last donee, or any preceding him, should be insolvent, resort may be had to the donee preceding him, until the legitime is satisfied, although that purpose cannot be obtained without resorting to the first donee, but the donation is not, in the opinion of Pothier, to be included as part of the corpus of the estate. On the other hand, Le Brun maintains that the child is entitled to resort to the first donee, and that the subject of the donation is not to be excluded in estimating the value of the estate. (c)

If a donation subject to reduction should have been made to a child entitled to legitime, that donation is

(a) Ord. art. 36, 37.
(b) Pothier, ib. Merlin, ib. art. 1, quest. 1.
reducible only so far as it exceeds the amount of the *legitime* to which he is entitled. (a)

Donations in the hands of third persons to whom they have been assigned, are subject to the right of the children to redeem them, in order to make up the *legitime*. (b)

A deduction is to be made from the present value of a real estate, the subject of the donation, of such expenses incurred by the donee on it as are necessary and useful, but expenses simply useful are to be included in such deduction, only when they have rendered the estate more valuable. (c)

When the debts of the deceased exceed the estate which he left at his death, the children being heirs under the benefit of inventory may give up the estate for the payment of the debts, funeral expenses, and other charges, and in this case the mass from whence the *legitime* is taken will be composed entirely of the subjects of his donations. (d)

As the amount on which the *legitime* is computed is the value of the property at the time of the testator's death, the children are entitled to the benefit of any increase, and must sustain the loss consequent on any diminution of the value of the donations which have taken place since they were made. (e)

The children are entitled to their action in *rem* against the legatees and donees to recover the subjects of the bequest or donation, reducible in consequence of its being required to make up the *legitime*. It may be brought, not only by the child to whom the *legitime* is due, but by those in whom his rights are vested, either by assignment, descent, or institution, or by his creditors, because it forms part of his estate. (f)

(a) Pothier, *ib.*, § 6, and Intro. au tit. 15, n. 81.
(b) Pothier, *ib.*, § 6.
(c) Pothier, Intro. au tit. 15, n. 78.
(d) *ib*.
(e) *ib*.
(f) *ib*.
The child is entitled to the profits from the day of the parent’s decease.

The remedy is barred by the express renunciation of the child. But it has been seen that an implied renunciation is not admitted. His consent to a gift or legacy made in writing, is not a renunciation unless given with a full knowledge that its effect would extinguish the *legitime*. The prescription of thirty years, which begins to run from the death of him from whose property the *legitime* is claimed, will also bar the remedy. (a)

2. The four-fifths of the *biens propres*, which the owner cannot bequeath by testament, or by testamentary disposition, are expressly reserved to the heir. (b)

This reserve is in favour only of those who are heirs on the side and line of him who brought the estate into the family. When there is no relation of the deceased on that side, the nearest relations of the deceased become the heirs of this property, not however as *biens propres*, but as *biens ordinaires*. In the latter case there can be no claim to the reserve. The bequests in the testator’s will take effect not merely against the fifth of which the *coutume* permitted him to dispose by testament, but against the whole of the *biens propres*. (c)

In this respect the *legitime coutumiere*, or reserve, differs from the *legitime naturelle*. The latter is given to the children in the quality of children, but the former is given to the heir in his quality of heir. (d)

If he be content to retain the four-fifths, he continues seised thereof, and may declare to the legatees that he abandons the rest of the estate. “Si l’héritier se veut contenter de prendre les quatre quinze des propres, et abandonner les meubles, acquêts et conquêts immeubles, avec le quint desdits propres, à tous les légataires, faire le peut: en quoi faisant il demeura saisi

(a) Pothier, Introd. au tit. 15, n. 78.
(b) Art. 292, 297. Ferriere, sur la Coutume, p. 264, 266, et seq.
(c) Pothier, Tr. des Test c. 4, § 4. (d) Ib.
desdits quatre quints, et lesdits legataires prendront le surplus, les dettes toutefois prealablement payées sur tous les biens de l'héredité.” (a)

But it was in the power of the owner to deprive him of the four-fifths by making donations, for the article which has been just cited restrains the power of disposition by testament only, and not by donation entre-vifs. The Art. 272 expressly confers on him the power of giving and disposing of all his moveables and héritages, propres acquêts and conquêts, by donation or disposition inter vivos. “Il est loisible à toute personne âgée de vingt-cinq ans accomplis, et saine d’entendement, donner et disposer par donation et disposition faite entre-vifs, de tous ses meubles et héritages propres, acquêts et conquêts, à personne capable.” (b)

It is only by means of the title to the légitime naturelle that the children can defeat those donations, so far as they deprive them of that légitime.

The right to a share in the reserve of the four-fifths is founded on the title as heir, and it cannot be claimed unless the succession has been accepted. (c)

When the heir considers that the testator has, by the charges to which he has subjected the property, exceeded the power given to him by the coutume, and that the reserve of four-fifths is prejudiced, he may entirely relieve himself from the burthen of the legacies, by abandoning to the legatees the whole of the property of which the testator had the power of disposing, that is, the moveables, the acquêts, and the fifth of the biens propres. (c)

The liberty to make this abandonment does not exist, if the heir having knowledge of the testament should have disposed of any part of the moveable estate without an inventory. (c)

(a) Cout. Paris, art. 295. (b) Ib. art. 272. (c) Pothier, Tr. des Test. c. 4, § 5.
The property thus abandoned must bear its proportion of the debts, funeral expenses, and other charges to which the succession was subject. Thus, if the whole estate amounted to thirty thousand pounds, and the part of which the testator had the power to dispose was of the value of twenty thousand pounds, being two-thirds of the total amount, the heir would be entitled to deduct two-thirds of those debts and charges. (a)

A donation made to one of the children is considered as an advancement in respect of his share in the reserve of the four-fifths. If therefore he claims that share, he must collate the subject of the donation. If he renounces the succession, it is competent for him to retain the subject of the donation, without prejudice however to the legitime of the other children. "Père et mère ne peuvent par donation faite entre-vifs, par testament et ordonnance de dernière volonté, ou autrement en manière quelconque, avantager leurs enfans, venans à leurs successions l'un plus que l'autre." (b)

"Les enfans venans à la succession de père ou mère, doivent rapporter ce qui leur à été donné, pour avec les autres biens de ladite succession, être mis en partage entre eux ou moins prendre." (c)

"Pareillement ce qui a été donné aux enfans de ceux qui sont héritiers, et viennent à la succession de leur père, mère, ou autres ascendants, est sujet à rapport, ou à moins prendre." (d)

"Neanmoins, ou celuy auquel on aurait donné, se voudroit tenir à son don, faire le peut, en s'abstenant de l'hérité, la legitime reservée aux autres enfans." (e)

The share of him who renounces accrues to the other children being heirs. "Le droit et part de l'enfant qui s'abstient et renonce à la succession de ses père ou mère,

(a) Poth. Tr. des Test. c. 4.  (b) Cont. Paris, art. 303.
(c) Art. 304.  (d) Art. 306.  (e) Art. 307.
accroist aux autres enfans héritiers, sans aucune prérogative d'aînesse de la portion qui accroist." (a)

3. The coutume of Paris, when it establishes a douaire for the wife, has the further object of providing a suitable maintenance not only for her during her life if she survived her husband, but also for the children. (b)

The wife enjoys the usufruct during her life if she survive her husband, and after her death it is the absolute property of the children, in case they survive their parent and renounce the succession. "Femme mariée est douée de douaire coutumier; posé que par exprès au traité de son contrat de mariage, ne lui eût été constitué, ni octroyé aucun douaire." (c)

"Douaire coutumier est de la moitié des héritages que le mari tient et possede au jour des épousailles et benediction nuptiale; et de la moitié des héritages qui depuis la consommation dudit mariage et pendant icelui, échéent et aviennent en ligne directe audit mari." (d)

"Le douaire coutumier de la femme est le propre héritage des enfans venans dudit mariage; en telle manière que les père et mère desdites enfans dés l'instant de leur mariage, ne le peuvent vendre, engager, ni hypotequer au préjudice de leurs enfans." (e)

This douaire may be considered as a species of legitime, although in many respects different from the legitime naturelle. Thus the parents cannot by their marriage contract deprive the children of the latter, but they may by their marriage contract deprive them of the former. The douaire of the children is so dependent on that of the mother, that if she excludes herself from it on her marriage, it cannot be claimed by the children. (f)

The title to the douaire is acquired by the celebration of the marriage alone. It consists of a moiety of all the

(a) Art. 310.  (b) Art. 247.  (c) Art. 247.
(d) Art. 248.  (e) Art. 249.
real property of which the husband was possessed, or to which he was entitled at the time of the celebration of the marriage, as well of that which was acquired, as of that which had been derived from succession, donation inter vivos, or by testamentary disposition devolved on or made to him in the direct line during the marriage. But neither moveables, nor the property of the community, nor that which has descended on him by collateral succession during the marriage, is subject to it. (a) It extends to all property which is known to the law as real or immovable. Rentes constituées are subject to it, and although they may have been redeemed during the coverture, and thus converted into personality, yet the wife and children may have a lien on other property not otherwise subject to the douaire for the amount. (b) It comprises real property of which the husband may have only the usufruct during the life of another, if the estate continues by the cestui que vie surviving the husband. (c)

The succession in the direct line to which the article refers is in the descending and not the ascending line, and therefore property which the father has acquired by succeeding to his son is not included. (d)

So completely is the title to it vested in the children, that the father and mother can neither sell nor pledge the property which is subject to it.

If the father in fraud of the douaire should, in the division of a succession which has devolved on him, take as his share all the moveables and leave to his co-heirs all the estate, the widow and children would be entitled to be indemnified out of his other estate. So, if he renounced the succession, in order to accept it for his children, and thus defraud his wife of the douaire, it would remain liable to it.

The widow and children take the estate in the con-

(a) Ferriere, sur la Cout. de Paris, p. 137.
(b) Ferriere, ib. p. 130. Poth. Tr. de Douaire, n. 22. (c) Ib.
(d) Poth. ib. n. 37, et seq.
dition in which they find it at the opening of the douaire with any increase or decrease in its value. But if the father had caused the decrease in its value by his own default, as if he had pulled down part of a building and taken the materials to another place, or had sold them, they would be entitled to be indemnified out of his other estate.

Debts which were subsisting charges on the estate prior to the marriage, and those to which any succession devolving on the father during the coverture was subject, diminish the amount of the douaire. (a)

Under the term enfans are included the grandchildren by whom their father and mother are represented, and to whom the rights of the latter are transmitted. They cannot enjoy it until the death of both the father and mother. If the latter dies first, the right vests in possession and immediate enjoyment, but if she survives him, the enjoyment is postponed until her death; for she is entitled to the usufruct during her life. But their right is transmissible to their heirs.

To entitle them to receive it, they must renounce the succession of their father, the rule being "nul ne peut être héritier et douairier ensemble, pour le regard de douaire coutumier et préfix." (b)

If they adiate the inheritance, or do any act as heir, the right is extinguished, and they are for ever excluded from it. But if they had adiated under the benefit of inventory, as they might afterwards renounce, so they may become entitled to the douaire. (c)

But those who take the douaire are not subject to any debts contracted after the marriage.

They have a lien for it on all the estate of the father and mother from the time of the marriage, so that they will be preferred to all creditors, whose demands have ac-

(a) 1 Dupless. p. 243. (b) Art. 250, 251.
(c) Ferriére, sur la Cout. de Paris, p. 140. Poth. Tr. de Douaire, n. 351.
Dumoulin, sur l'art. 178, Cout. de Senlis.

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crued since the marriage. It is also competent to re-
cover all the property subject to the dower which has
been alienated. (a)

The rule "nul n'est douairier et héritier de son père" 
applies only to the same succession. The children may 
claim their douaire out of the father's estate, and succeed 
as heirs to that of the mother, or the paternal grand-
father, who has died after them.

Another condition to which the title to douaire is 
subject is, that there must be imputed such donations 
and other advantages as the child has received from his 
father, but not those received from his mother. "Celuy 
qui veut avoir le douaire, doit rendre et restituer ce 
qu'il à eu et reçu en mariage, et autres avantages de 
on père, ou moins prendre sur le douaire." (b)

It seems, however, that a person succeeding to the 
douaire is not bound to impute a gift made to him by 
his grandfather. But if the father in coming to the 
succession of his grandfather would have been obliged 
conformably to the preceding article to have collated a 
donation made to his son by the said grandfather, as the 
father in this case brings into the account the donation 
made to his son, he is considered as coming in the place 
of the grandfather as donor, in respect of that which 
the grandfather has given, and the child therefore must 
impute it. So if the child as representing his father or 
mother succeeds to the douaire of the grandfather, he 
must impute not only a donation made to himself, but 
that which has been made to the person whom he re-
opresents.

As the douaire, in case the wife survives the husband, 
is not enjoyed by the children until her death, it seems 
that they are not bound to collate their gifts until her 
death, nor are they bound to restore the profits until that 
event takes place.

If any child dies in his father's lifetime leaving no 

(a) Ib. 

(b) Art. 252.
child, or if any child who survives the parent do not succeed to the *douaire* because he is disinherited, or incapable of succeeding, or is civilly dead, his share accrues to the other children. But the share of a child who preferred to accept the succession, and has thus excluded himself from the *douaire* to retain his donation, does not accrue to the other children, but remains part of the succession. *(a)*

The share of a child who simply and without any consideration renounces, it seems also accrues to the other children, unless he had expressly renounced it in favour of his father's succession. *(b)*

The articles of the *coutume* which have hitherto been considered provided only for the children by the first or only marriage of the parent. Those which follow provide for the children of a second marriage when there are also children of the first marriage.

The *douaire* of the children of the second marriage consists, 1st, of one-fourth of the immoveables which are subject to the *douaire* in favour of the children of the first marriage. 2ndly, a moiety of the *conquêts* belonging to the husband, made during the first marriage. 3rdly, a moiety of the immovable property acquired by him after the dissolution of the first, and until the day of the celebration of the second marriage; and 4thly, a moiety of such immovable as have descended on him during the second marriage in a direct line. "Et le douaire coutumier des enfans du second lit, est le quart desdits immeubles, ensemble moitié, tant de la portion des conquêts appartenans au mari, faits pendant le dit premier mariage, que des acquêts par lui faits depuis la dissolution dudit premier mariage, jusques au jour de la consommation du second; et la moitié des immeubles, qui lui échéent en ligne directe, pendant

*(a)* Poth. ib. n. 394. *(b)* Ib. n. 396, 7.
ledit second mariage et ainsi consequemment des autres mariages."

The *douaire* of the children of the first marriage is preferred to the *legitime* of the children of the second marriage, and even to the *dot* and *douaire* of the second wife.

If the husband had no issue by his first marriage, or if they died before his second marriage, the article does not take effect, and the *douaire coutumiere* is that of a first marriage.

If however the children of the first marriage died before the father after the second marriage had taken place, the *douaire* of the widow and children of the second marriage is not thereby augmented, the rule is *douaire sur douaire n'a lieu*. "Si les enfans du premier mariage meurent avant leur père, pendant le second mariage, la veuve et autres enfans dudit second mariage les survivans, n'ont que tel douaire qu'ils eussent eu, si les enfans dudit premier mariage estoient vivans. Telle-ment, que par la mort des enfans dudit premier mariage, le douaire de la femme et enfans dudit second mariage, n'est augmenté. Et ainsi consequemment des autres mariages." *(b)*

If the *douaire* is excluded by the contract of the parties to the first marriage, it has been doubted whether the rule "*douaire sur la douaire n'a lieu*" applies, and whether there is to be any reduction of the *douaire* of the second marriage upon the immovable property of which the husband was possessed at the time of the first, and also at the time of the second marriage. But it seems that the rule does apply, and the *douaire* is subject to the provisions of this article. *(c)*

Under this head may be ranked the restriction im-

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*(a) 1 Dupless. art. 253, p. 236.*

*(b) Art. 254.*

posed on the husband or wife forming a second marriage. The article 279 of the coutume provides that the wife having children by her former marriage marrying a second time, cannot give to her second husband from the biens propres and acqûêts more than the share of one of her children. This part of the article is in conformity with the edict of Francis II., touchant secondes nôces. "Femme convolant en secondes ou autres nôces, ayant enfans, ne peut avantage son second mari, de ses propres et acqûêts plus que l’un de ses enfans." (a)

Although the edict and article speak only of the wife, yet it has been uniformly held that they equally apply to the husband. (b)

The latter part of this article restrains the disposition by sale, gift, or otherwise of conquêts made by the husband or wife during the former marriage, if there be children of that marriage. "Et quant aux conquêts faits avec ses précédens maris, n’en peut disposer aucunement au préjudice des portions, dont les enfans desdits premiers mariages, pourroient amender de leur mère. Et néanmoins succedent les enfans des subséquens mariages ausdits conquêts, avès les enfans des mariages précédens, également, venans à la succession de leur mère. Comme aussi les enfans des précédens lits succedent pour leurs parts et portions aux conquêts faits pendant et constant les subséquens mariages. Toutefois si ledit mariage est dissolu, ou que les enfans du précédent mariage decedent, elle en peut disposer comme de sa chose." (c)

It has been decided on this part of the article, that moveables of the former community are secured in favour of the children of the first bed no less than immovable, and that the survivor cannot dispose of

(a) Ferriere, tom. 2, p. 213, art. 279.  
(b) Ib. p. 216.  
(c) Ferriere, ib. art. 279.
them in favour of the second *conjoint* or otherwise, to the prejudice of those children. (a)

This article also restrains the parent from making any provision in favour of the children of the second bed, or to any other persons, in prejudice of the shares to which those of the first bed were entitled.

The article only restrains the power of disposition by the parent which might prejudice the children of the former marriage. But all the children of the first and second marriage equally succeed to the *conquêts* of the former community, for they form with the rest of her estate part of her succession, and the children of the first marriage succeed to the *conquêts* of the second community equally with the children of the second marriage. (b)

The restriction no longer exists if the children of the first marriage are dead.

The *douaire* cannot be prescribed during the life of the father, however long it may continue, but after his death it may be prescribed against the widow, and after her death against the children.

Although the right of the wife does not accrue till the death of her husband, and therefore the prescription runs against her only from his death, yet it has been doubted whether, as the children have at the father’s death the *jus proprietatis* subject to the life interest of the widow, it does not also run against them. It has however been decided that if the wife has joined with the husband in the sale, the prescription does not run against the children until her death. (c)

II. “En Normandie,” says Basnage, “ce que nous apelons legitime est le tiers coutumier, parce que nous n’avons point d’autre legitime.” (d)

(a) Arrêt, March 4th, 1697. 2 Ferriere, 218. Pothier, Tr. de Mariage, n. 631, and Tr. des Don. sect. 3, § 1. (b) 2 Ferriere, 219.
(c) Des Audiences, tom. 1, lib. 7, c. 2, 16th Jan. 1652. 1 Dupless. 259.
(d) 2 Basnage, Cout. de Normandy, art. 399.
The coutume of Normandy, when there was no contract between the parties on their marriage, gave to the wife the usufruct of a third of all the immoveable or real estate of which the husband was seised at the time of the marriage, or which came to him pending the coverture in the direct line, either by succession, donation, or bequest, and the same coutume gives to the children of that marriage the absolute property in that third; the interest of the wife in this provision is called la douaire coutumier, and that of the children le tiers coutumier. "La femme gagne son douaire au coucher, et consiste le douaire en l’usufruit du tiers des choses immeubles dont le mari est saisi lors de leurs épousailles, et de ce qui lui est depuis échû constant le mariage en ligne directe, encore que lesdits biens fussent échûs à ses père et mère, ou autre ascendant par succession collaterale, donation, acquêts ou autrement." (a)

"La propriété du tiers de l’immeuble destiné par la coutume pour le douaire de la femme, est acquis aux enfants du jour des épousailles, et ce pour les contrats de mariage qui se passeront par ci-après; et neanmoins la jouissance en demeure au mari sa vie durant, sans toutefois qu’il le puisse vendre, engager ni hipotequer; comme en pareil, les enfants ne pourront vendre, hipotequer ou disposer dudit tiers avant la mort du père, et qu’ils aient tous renoncé à sa succession." (b)

Although the wife may by contract on her marriage stipulate for a douaire less beneficial than that which is given by the coutume, yet she cannot by such contract prejudice that to which the children are entitled under the coutume. (c) It is a debt due to the children as children, and not as heirs, and to entitle them to it, they must renounce the succession: "Et ne pourront les enfants accepter ludit tiers, si tous ensemble ne renoncent

(a) Cout. Normand. art. 367.  
(b) Ib. art. 399.  
(c) Merville, sur la Cout. Norm. p. 399.
à la succession paternelle, et rapportent toutes dona-
tions et autres avantages qu’ils pourroient avoir de
lui.” (a)

The renunciation must be express and absolute, and
made in the terms required by the coutume for the renun-
ciation of successions. The non-acceptance or the mere
abstaining from the succession is not sufficient. (b)

Having once accepted the succession, although under
benefit of inventory, the child cannot as against his
co-heirs afterwards renounce it, in order to claim his
tiers, but as against creditors he may. (c)

The time for renouncing the succession is forty days
from the day of the death of the party to whose estate
the question relates. (d)

By the 89th article of the Ordinance of 1666, altering
in this respect the 401st article of the coutume, it is not
necessary that all the children should renounce the
succession, but one or more of them may accept it, and
retain the tiers. But those who renounce can have no
greater share of the tiers than if all of them had re-
nounced, for the shares of those who accept the suc-
cession do not accrue to those who have renounced it,
but are added to the succession.

In renouncing the succession and claiming the tiers,
the children must collate all the gifts and advance-
ments in immovable or real property received by them
from their father. Grandchildren cannot claim the
tiers from their grandfather’s estate, without collating
that which their father had received from their grand-
father.

The tiers coutumier cannot be enjoyed until the death
of the father, for he has the possession of it during his
life. (e)

It belongs to females as well as males, if the former

(a) Cout. Normand. art. 401. (b) Ib.  
(d) Ib. art. 401, 235. (c) Ib.  
(e) Ib. 396-
have not married during the father's life, or if they remain the only children. If they have married in the father's lifetime they take nothing, and if they have not been married, the brothers owe them a proper marriage portion out of the tiers.

It belongs only to the children of a lawful marriage, or their children, where the parents of the latter have died before their grandfather. The children legitimate by birth, or by the subsequent marriage of their parents, although they are the issue of an alien or bastard, are capable of succeeding to it. (a)

The coutume does not give the parents of a child any tiers or legitimate in his property. (b)

It does not pass to the collateral heirs of children or grandchildren who die without children before the parent whose estate was subject to this right. The collateral heirs of the children or grandchildren are not competent to renounce the succession of the father of the children, or that of the grandfather, in order to demand the tiers coutumier on the estate of one or the other. (c) But if the collateral heirs be the brothers or sisters of the children or grandchildren, the droit du tiers coutumier which belonged to the latter will pass to the brothers or sisters, notwithstanding the children or grandchildren may not in their lifetime have renounced the succession to the estate on which it attached, and made their option to take the tiers. (d)

This right in the property of the parent is conferred on the issue of the marriage as children and not as heirs, and it is not in his power to deprive them of it by disinheriting them. He cannot alienate it by sale or gift, nor pledge nor charge, nor subject it to any conditions not warranted by the coutume. It cannot be confiscated

(a) Merville, ib.  (b) 2 Bamnage, 101,  
(c) Arrêt du Parl. de Normandie, July 17th, 1653.  
(d) Merville, p. 396.
during the father's life, either for his crime or that of his children.

Neither can the children, during the father's lifetime, make any disposition of it, or subject it to any charge.

The children take it with all the improvements it has received. The contracts or obligations by which during the life of their father or ascendant ancestor they have sold or charged le tiers, may be enforced against any other property of which they may then or thereafter be possessed.

They are not bound to contribute to any debts, although charged on the property, if they were contracted and charged subsequently to the marriage. They are not liable for debts of the parent purely personal, at whatever period they were contracted.

It is permitted the father who has survived his wife to put his children into the possession and enjoyment of the property which ought to form the tiers coutumier, notwithstanding it may prejudice his creditors.

The eldest son enjoys le droit d'ainesis and preciput.

If the estate of the father situated in Normandy should be exhausted by charges contracted before the marriage, so that there remained no property out of which the tiers coutumier can be satisfied, the children cannot claim it out of other property of the parent situated in a country where no such coutume existed.

If there are children of several marriages, they all take but one and the same tiers of all the property whereof the father was seised at the time of the marriage, or which had devolved on him in a direct line during the coverture. Those of the first bed have no preferable interest over those of the second or last marriage. Although the douaire of the wife can be claimed only out of the property of the husband at the time of her marriage, yet the children have the option to take their tiers out of the immoveable property of which the
father was seised at the time of the second or any succeeding marriage, as may be most advantageous, and they have a right to have the state of his affairs ascertained, to enable them to exercise this right of option. But the second or other wife is not prejudiced in her douaire out of the property of which her husband was seised at the time of their marriage: “S’il y a enfans de divers lits, tous ensemble n’auront qu’un tiers; demeurant à leur option de le prendre au regard des biens que leur père possèdeit lors des premiers, secondes, ou autres nôces, et sans que ledit tiers diminue le douaire de la seconde, tierce, ou autre femme, lesquelles auront plein douaire sur le total bien que le mari ait lors de ses épousailles, si autrement n’est convenu.” (a)

The child of the first marriage transmits his right of option to his sister of the second marriage, although she was not then born, but in utero matris, and it is preferable to creditors whose demands were contracted before the second marriage, but subsequent to the first marriage. The douaire of the second wife cannot prejudice the title of the children of the first marriage to their tiers.

The portion which the daughters have received from their father in moveables or personal estate does not diminish the tiers of the children, and the creditors of the succession cannot deduct from it the moveable or personal estate given by the father to his daughter on her marriage, but if he had given her real or immovable property on her marriage, she must have accounted for it to the creditors in respect of the tiers.

The action for the recovery of the tiers is not subject to prescription during the father’s life.

The children have a third of the immovable property, not only of the father but also of that of the mother: “Parreillement la propriété du tiers des biens que la femme a

(a) Cout. Normand. art. 400.
lors du mariage, ou qui lui écherront constanl le mariage, ou lui appartiendra à droit de conquêtes, appartiendra à ses enfans, aux mêmes charges et conditions que le tiers du mari.” (a)

The tiers of the mother’s property is more extensive than that of the father’s property, for the latter, it has been seen, is limited to the immovable or real estate of which he was seised on the day of the marriage, and which devolved on him in a direct line during the coverture, but the mother’s property subject to the tiers is not only that of which she was seised at the time of the marriage, and which during the coverture came to her in a direct line, but also that which devolved on her by collateral succession, donation, bequest, purchase, “aut alio quovis modo.” (b)

The latter is subject to the same rules as those which relate to the tiers of the father’s property.

The interest acquired by the children in the property is so absolute by force of the coutume, that the mother can neither sell, pledge, charge, or otherwise dispose of the tiers. The children cannot sell, mortgage, charge, or otherwise dispose of it during her life.

There must be first deducted from the mother’s immovable or real estate a third of the real debts incurred before her marriage, and all other debts and charges to which the tiers on the father’s property was subject. The children take it not as heirs of the mother, but as a debt established in their favour by the coutume from the moment of their mother’s marriage; they must therefore renounce the succession to the mother’s estate.

If the widow enters into a second marriage she cannot give to her second husband more than the least share which any of the children will take in the succession: “La femme convolant en secondes nôces, ne peut donner

(a) Cout. Normand. art. 404. (b) Merville, art. 404.
de ses biens à son mari en plus avant que ce qui en peut échoir à celui de ses enfants qui en aura le moins." (a)

This article is derived from the edict of Francis II., of 1560, commonly called L'Edit des Second Nôces. It applies only to the widow, and not to the widower. The donation is to be reduced with reference to the number of children who may survive, and not those whom she might have at the time of her second marriage.

III. The Code Civil restrains the owner, if he leaves children or ascendants, from disposing of more than a certain portion of his property. It reserves the remainder for his children and their descendants, and failing them, for his ascendant. The reserved portion is their *legitime*.

He can make no donation, either by act *inter vivos*, or by will, exceeding a moiety of his property, if he leaves at his decease but one legitimate child; a third, if he leaves two children; a fourth, if he leaves three or a greater number. (b)

Descendants, in whatsoever degree they may be, are comprised in the preceding article under the name of *children*; but they are only reckoned for the child whom they represent in the succession of the disponer. (c)

The portion reserved is a part of the inheritance to which the children are entitled only in the quality of heirs, and therefore the child who renounces the succession cannot claim the reserve. (d)

When one of the children renounces the succession, his share in the reserve accrues to the children who accept it, and not to the donee or instituted heir. The

(a) Cout. Normand. art. 405. (b) Art. 913.
(c) Art. 914. Grenier, Tr. des Don. tom. 2, p. 355.
(d) Art. 917, 1006, 1011, 1013, 1014, 2 Grenier, Tr. des Don. n. 589, et seq. Toullier, liv. 3, tit. 2, c. 3, n. 106.
reserve being once fixed according to the number of children living or represented at the death of the disposer is not decreased by the renunciation of either of them. (a)

It has been a question whether the child who renounces the succession, in order that he may retain the donation, can, if the donation exceeds the disposable portion, retain beyond the disposable portion the share which he would have had in the reserve if the donation had been made to a stranger. M. Toullier maintained that he could not, in opposition to the opinion of Grenier. (b) But the opinion of the former has been sanctioned by judicial decision. (c)

Donations by acts inter vivos, or by will cannot exceed a moiety of the property, where, in default of a child, the deceased leaves one or more ascendants in each of the paternal and maternal lines; and three-fourths when he leaves ascendants but in one line. (d)

The property so reserved in favour of ascendants is to be taken by them in the order in which the law calls them to the succession; (e) they will alone have the right to this reserve in all cases where a partition in concurrence with collaterals would not give them the quantum of property at which it is fixed. (f)

In default of descendants and ascendants, the whole property may be disposed of by act of gift or will. (g)

Where the disposition by act of gift or by will is of an usufruct or of an annuity, the value of which exceeds the disposable portion, the heirs in whose favour the law makes the reservation, have the option, either of

(a) Grenier, Tr. des Don. tom. 2, n. 564, et seq.
(b) Toullier, ib. n. 110.
(c) Grenier, ib. p. 271. Arrêt, Court of Cassation, Feb. 18th, 1818. Toullier, ib.
(d) Code Civil, art. 915. Grenier, ib. p. 288, 293. (e) 1b.
(g) Art. 916.
executing such disposition, or of abandoning the ownership of the disposable portion. (a)

The value in full ownership of the property alienated, either subject to an annuity, or sunk altogether, or with reservation of usufruct to a person capable of succeeding in the line direct, is charged with the disposable portion, and the excess, if there be any, is to be brought back into the mass. Such charge and such return are not to be demanded by the others capable of succeeding in the line direct who have consented to such alienations, nor, in any case, by those capable of succeeding in the collateral line. (b)

The disposable portion may be given in the whole or in part, by act of gift or by will, to children or others capable of succeeding to the donor, without being subject to return by the donee or legatee coming to the succession, provided such disposition has been made expressly by title of preciput, or hors part.

The declaration that the gift or legacy is by title of preciput, or hors part, may be made either by the act containing the disposition, or subsequently in the form of disposition by gift or will. (c)

Dispositions either by gift or after death which exceed the disposable portion, are reducible to such portion at the time of the opening of the succession. (d)

Such reduction can be demanded only by those in whose favour the law makes this reserve, by their heirs or those claiming on their behalf. But donees, legatees, or creditors of the deceased cannot demand such reduction, nor derive any advantage from it. (e)

Reduction is made by forming a mass of all the property existing at the decease of the donor or testator.

(b) Art. 918. Grenier, ib. Toullier, ib. n. 134.
(c) Art. 919. (d) Art. 920.
(e) Art. 921. Grenier, ib. n. 593.
To this is added by fiction such as may have been disposed of by gift, according to its condition at the time of the gift, and its value at the time of the decease of the donor. Upon all this property, after having deducted the debts, the portion is estimated of which he might dispose. (a)

The reduction of donations is not permitted until the value of all the property comprised in the testamentary dispositions has been exhausted; and where there is ground for such reduction, it is to be made by commencing with the latest gift, and so on rising from the latest to the prior ones. (b)

If the later donee be insolvent, resort may be had to the prior donee. (c)

If the gift which is subject to reduction has been made to a party capable of succeeding, he may retain out of the property given the value of the share which shall belong to him as heir in the property not disposable, if it be of the same nature. (d)

If the value of the donation exceed or equal the disposable portion, all the testamentary dispositions lapse. (e)

If the testamentary dispositions exceed either the disposable portion, or that part of such portion which remains after deducting the value of the donations, the reduction is made rateably without any distinction between general legacies and particular legacies. (f) But in all cases where the testator has expressly declared that he intended any particular legacy should be paid in preference to others, such preference takes place; and the legacy, the object of it, is reduced so far only as the value of the others shall not make up the legal reservation. (g)

The donee is liable to restore the fruits of that which

(a) Art. 922.
(c) Toullier, ib. n. 137. (d) Art. 924. (e) Art. 925.
(f) Art. 926. (g) Art. 927.
exceeds the disposable portion, reckoning from the day of the decease of the donor, if the demand in reduction has been made within the year, if not, from the day of the demand. \((a)\)

Immoveables recovered are not liable to debts contracted or mortgages created by the donee. \((b)\)

The action in reduction may be prosecuted by the heirs against third persons, detainers of immoveables making part of the gifts and alienated by the donees, in the same manner, and in the same order, as against the donees themselves, discussion previously being made of their property. \((c)\)

All donations made by persons who had not children or descendants actually living at the time of the gift, of what value soever such gifts may be, and under what title soever they may be made, and although they were mutual or remuneratory, even those which have been made in favour of marriage by others than descendants to the married parties, or by the married parties the one to the other, are revoked \textit{ipso jure} by the subsequent birth of a legitimate child of the donor, even posthumous, or by the legitimation of a natural child by subsequent marriage, if it is born since the gift. \((d)\)

Such revocation takes place, even if the child of the donor was conceived before the time of the gift. \((e)\)

The gift is in like manner revoked, where even the donee has entered into the possession of the property given, and has been allowed by the donor to continue in the quiet possession since the birth of the child; but the donee is liable to make restitution of the fruits taken by him only from the day on which the birth of the child, or its legitimation by subsequent marriage, has been notified to him by an official or other act in due form; and that, where even the demand of re-entry into the

\((a)\) Art. 928. \((b)\) Art. 929. \((c)\) Art. 930.
\((d)\) Art. 960. \((e)\) Art. 961.
property given shall only have been made after such notice. (a)

The property comprised in the gift revoked of right returns into the patrimony of the donor, free from all charges and mortgages created by the donee, without its being liable, even subsidiarily, for the restitution of the dowry of the wife of such donee, of her reprises, or other marriage stipulations. This rule is to be applied even where the gift has been made in favour of the marriage of the donee and inserted in the contract, and the donor has bound himself as surety by the gift for the execution of the marriage contract. (b)

Gifts thus revoked can never revive, nor take effect again, either by the death of the child of the donor or by any act of confirmation. If the donor be desirous of giving the same property to the same donee, either before or after the death of the child by whose birth the gift became revoked, he must make a new disposition. (c)

Every clause or agreement by which the donor may have renounced revocation of the gift on the birth of a child is null, and produces no effect. (d)

The donee, his heirs or assigns, or other detainers of the subjects of the donation, cannot set up prescription to give validity to the donation revoked by the birth of a child, until after a possession of thirty years, which cannot commence running but from the day of the birth of the last child of the donor, even posthumous. (e)

The man or the woman who, having children of another bed, contracts a second or subsequent marriage, cannot give to such second husband or wife beyond the portion of a legitimate child taking the smallest share, nor can such gifts in any case exceed a fourth part of the property. (f) Nor can the husband and wife

(a) Art. 962. (b) Art. 963. (c) Art. 964. (d) Art. 965. (e) Art. 966. (f) Art. 1098.
give to each other indirectly more than is permitted to them by the particular articles therein-mentioned.

Every gift, either disguised or made to persons interposed, is null. (a)

A gift by one of them, the husband and wife, to the children, or to one of the children of the other of them born of another marriage, and that made by the donor to kindred whose presumptive heir the other of them is on the day of the gift, although the latter shall not survive his kindred donee, will be deemed made to persons interposed. (b)

IV. By the Louisiana code, the reserve consists of one-third of the property of the disposer, if he leaves, at his decease, a legitimate child; one-half if he leaves two children; and two-thirds if he leaves three or a greater number.

Under the name of children, are included descendants, of whatever degree they be, it being understood that they are only counted for the child they represent. (c) Donations inter vivos or mortis causa cannot exceed two-thirds of the property if there be one child, half if there be two, or a third if there be three or more children.

They cannot exceed two-thirds of the property, if the disposer having no children, leave a father, mother, or both. (d)

When there are no legitimate descendants, and in case of the previous decease of the father and mother, donations inter vivos or mortis causa may be made to the whole amount of the property of the disposer, saving the reservation (e) following, that is, that the donation inter vivos shall in no case divest the donor of all his property; he must reserve to himself enough for subsistence; if he does not do so, the donation is null for the whole. (f)

(a) Art. 1099.  (b) Art. 1100.  (c) Louis. Code, Art. 1480.

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The legitimate portion of which the testator is forbidden to dispose to the prejudice of his descendants, being once fixed by the number of children living or represented at the death of the testator, does not diminish by the renunciation of one or any of them. The part of those who renounce goes to those who accept. (a)

If the disposition made by donation inter vivos or mortis causâ be of an usufruct, or of an annuity, the value of which exceeds the disposable portion, the forced heirs have the option, either to execute the disposition, or to abandon to the donee the ownership of such portion of the estate as the donor had a right to dispose of. (b)

The value in full ownership of property which has been alienated, either for an annuity for life or with reservation of an usufruct, to one of those who succeed to the inheritance in the direct descending line, shall be imputed to the disposable portion, and the surplus, if any, shall be brought into the succession; but this imputation and this collation cannot be demanded by any of the heirs in the direct descending line who have consented to those alienations. (c)

The disposable quantum may be given in whole or in part by an act inter vivos or mortis causâ to one or more of the disposer’s children or descendants entitled to succeed, to the prejudice of his other children or descendants entitled to succeed, without its being liable to be brought into the succession by the donee or legatee, if it be expressly declared by the donor, that this act is intended to be over and above the legitimate portion. This declaration may be made, either by the act containing the disposition, or subsequently by an instrument executed before a notary public, in presence of two witnesses. (d)

Any disposition of property, whether inter vivos or mortis causâ, which exceeds the quantum of which a per-

(a) Art. 1485.  (b) Art. 1486.  
(c) Art. 1487.  (d) Art. 1488.
son may legally dispose to the prejudice of the forced heirs, is not null, but only reducible to that quantum. (a) It retains all its effect during the life of the donor. (b)

On the death of the donor or testator, the reduction of the donation, whether inter vivos or mortis causa, can be sued for only by forced heirs, or by their heirs or assigns; neither the donees, legatees, nor creditors of the deceased, can require that reduction, nor avail themselves of it. (c)

To determine the reduction to which the donations, either inter vivos or mortis causa, are liable, an aggregate is formed of all the property belonging to the donor or testator at the time of his decease; to that is fictitiously added the property disposed of by donation inter vivos, according to its value at the time of the donor's decease, in the state in which it was at the period of the donation. The sums due by the estate are deducted from this aggregate amount, and the disposable quantum is calculated on the balance, taking into consideration the number of heirs and their qualities of ascendant or descendant, so as to regulate their legitimate portion by the rules established. (d)

In the fictitious collation of effects given by act inter vivos by the deceased, those which have perished by accident in the hands of the donee, are not included; those which have perished through his fault only are to be included. (e)

Donations inter vivos can never be reduced, until the value of all the property comprised in donations mortis causa has been exhausted; and when that reduction is necessary, it is to be made by beginning with the last donations, and thus successively ascending from the last to the first. (f)

When the last donee is insolvent, the heir can, after

(a) Art. 1489. (b) Art. 1490. (c) Art. 1491.
(d) Art. 1492. (e) Art. 1493. (f) Art. 1494.
the previous discussion of his effects, claim from the donee who precedes the last, his legitime, and so on to the one preceding him. (a)

If the donation inter vivos, subject to reduction, was made to one of those who succeed to any part of the estate, the latter is authorized to retain of the property given the value of the portion which would belong to him as heir in the property not disposable, if it be of the same nature. (b)

When the value of donations inter vivos exceeds or equals the disposable quantum, all dispositions mortis causa are without effect. (c)

When the dispositions mortis causa exceed either the disposable quantum, or the portion of that quantum which remains after the deduction of the value of the donations inter vivos, the reduction is to be made pro rata, without any distinction between universal dispositions and particular ones. (d)

But if the testator has expressly declared that any particular legacy should be paid in preference to the others, that preference will take place, and the legacy which is the object of it shall not be reduced, if the value of the others does not fall short of the legal reservation. (e)

Remunerative donations can never be reduced below the estimated value of the services rendered. (f)

Donations, by which charges are imposed on the donee, can never be reduced below the expenses, which the donee has incurred to perform them. (g)

The donee restores the proceeds of what exceeds the disposable portion only from the day of the donor's decease, if the demand of reduction were made within the year, otherwise from the day of the demand. (h)

Immoveable property which becomes part of the succes-

(a) Art. 1495.  (b) Art. 1496.  (c) Art. 1497.
(d) Art. 1498.  (e) Art. 1499.  (f) Art. 1500.
(g) Art. 1501.  (h) Art. 1502.
sion by means of reduction, is not subject to any charge of debts or mortgages created by the donee.\(^{(a)}\)

The action of reduction or revendication may be brought by the heirs against third persons holding immovable property, which has been alienated by the donee, in the same manner and order that it may be brought against the donee himself, but after discussion of the property of the donee. \(^{(b)}\)

If the donee has successively sold several objects of real estate, liable to an action of revendication, that action must be brought against third persons, holding the property, according to the order of their purchases, beginning with the last, and ascending in succession from the last to the first. \(^{(c)}\)

A man or woman, who contracts a second or subsequent marriage, having children by a former one, cannot give to his wife, nor she to her husband, more than the least child’s portion, and that only as an usufruct; and in no case can the portion, of which the donee is to have the usufruct, exceed the fifth part of the donor’s estate. \(^{(d)}\)

If a person who marries a second time has children of his or her preceding marriage, he or she cannot in any manner dispose of the property given or bequeathed to him or her by the deceased spouse, or which came to him or her from a brother or sister of any of the children who remain.

This property by the second marriage becomes the property of the children of the preceding marriage, and the spouse, who marries again, only has the usufruct of it. \(^{(e)}\)

All donations disguised, or made to persons interposed, are null and void. \(^{(f)}\)

Those made by one of the married parties to the

\(^{(a)}\) Art. 1503. \(^{(b)}\) Art. 1504. \(^{(c)}\) Art. 1505.
\(^{(d)}\) Art. 1745. \(^{(e)}\) Art. 1746. \(^{(f)}\) Art. 1747.
children, or to any one of the children of the other party by a former marriage, and those made by the donor to relations to whom the other party is presumptive heir on the day of the donation, although the other may not survive the relation who is the donee, are deemed made to persons interposed. (a)

SECTION III.

LEGITIME UNDER THE LAW OF SCOTLAND.

Amount of legitime.—When a widow, and a child, or children.—When no widow, but children.—Moveable estate of the father alone subject to it.—Immediate children only entitled to it.—Including children of the father’s former marriage.—Dispositions defeating the legitime void.—Exclusion of heirs from legitime, unless they collate.—Extent of this rule.—Exclusion by the provisions of the father’s marriage settlement.—Renunciation.—Forisfamiliation.—Not implied from marriage portion given to a child on marriage.—When it is a satisfaction of the legitime.—Renunciation by a child.—By the wife.—Legitime taken by children in their proper right.—Confirmation not necessary.

The law of Scotland gives to the children a legitime out of the moveable estate of the father. It is distinguishable from that which has been considered in the preceding section, because moveable property is alone subject to it. Children alone, and not their descendants, are entitled, and amongst those children, the heir taking the heritage is excluded, unless he collates that heritage.

This legitime is called the portion natural or bairns’ part of gear. (b)

If the father leaves both widow and children, though all his children should have been of a former marriage, the division of the moveables is tripartite; the widow

(a) Art. 1748.  
(b) Erskine, b. 9, tit. 2, § 17.
takes one third by herself, another third goes to the children equally among them as legitime, and the remaining third is the dead's part. If he leave a widow and but one child, who succeeds to his heritage, still the goods divide in three, because such only child is entitled to a legitime. Though the proper subject which falls to the heir is the heritage, the moveables being the fund intended by the law for providing for the younger children, yet the heir's right of legal succession to his father's heritage cannot preclude him from his natural right as the only child to his father's moveable estate. Neither is the circumstance of his being an only child, a reason for enlarging the widow's share from a third to a half. (a)

If he has left children, one or more, but no widow, the testament is only bipartite, for the children are entitled to one half as legitime, and the other is dead's part, which if it be not actually bequeathed by testament, goes also to the children in the character of next of kin.

But if he leave a widow and no children, the goods divide into two equal parts; of which one goes to the widow, and the other is dead's part. The expression that the testament of the deceased divides in two, is not accurate, because the testament has no effect on the widow's part, and the only subject of the testament is the dead's part, for that only can be disposed of by the testament.

The legitime is claimable by children only out of the moveable estate of their father at the time of his death. There is no right to it upon a mother's death, although she should survive her husband, not even out of that part of the goods in communion which she had received jure relictæ upon her husband's death; for her share of these became, upon the division, her own absolute property.

(a) Stair, Jan. 12, 1681, Trotter, Dict. 2375. Ersk. b. 3, tit. 9, § 19.
The *legitime* can be claimed by immediate children only, and not by grand-children or remoter descendants. *(a)*

A widow who has renounced her *jus relictae* by the acceptance of a special provision in her marriage contract as a satisfaction of it, cannot concur in the division, and in that case the *legitime* is the half of the executrix. *(b)*

The law considers the *legitime* as a right so personal to the child himself, that unless he claim it during his lifetime, it falls by his death, for it is a *præsumptio juris et de jure*, that as the immediate father did not claim it, he had renounced it before his death upon receiving his just share of the effects of his father. *(c)* All the husband's children of whatever marriage they may have been procreated, are equally entitled to a *legitime* on their father's death. *(d)*

Upon the dissolution of a marriage, by the predecease of the wife without issue, the goods falling under a communion divide in two; the one half is retained by the surviving husband, who was one of the *socii*, and who, *stante matrimonio*, had the absolute management of the whole; the other half, being the share falling to the wife the other partner upon the division of the society-goods, descends as her absolute property to her next of kin. *(e)* A bipartite division ought also to be made in a testament, where the predeceasing wife leaves issue of the marriage; for a proper tripartite division does not take place, except in the case of a *legitime*, but *legitime* is not due to children out of the mother's effects, nor out of those of the father so long as he is alive. Even in that case, however, the society-goods are divided in

*(a)* Erskine, ib. § 17.
*(c)* Erskine, ib. § 17
*(d)* Erskine, ib.
*(e)* Erskine, ib. § 21.
three in the same way as on the predecease of the father leaving issue. (a) Two-thirds therefore remain with the surviving father, as if one of the thirds were due to him proprio nomine, and another as legitime, to the administration of which he is entitled for the behoof of his children; the remaining third, being the wife's share, divides in capita among her children, whether of that or any former marriage; for all her children are equally her next of kin. (b)

Where the husband predeceases, neither the widow nor children can claim a right in any part of the heirship moveables as goods falling under the communion, because those are truly appurtenances of the heritable rights which belong to the heir. But where the wife dies before the husband, her next of kin are entitled to a share of the whole moveables, without deducting any part as heirship; (c) because heirship is a certain share of the moveable estate at the precise time of the death of the husband, and therefore while he is alive, he can have no heirship. (d)

The father cannot exclude the children by legacies or by donations in contemplation of death, or by any other gratuitous deed done on death-bed. An assignation to a moveable bond granted on death-bed was found null as to the relict and bairns' part. (e) The gift of money by the deceased out of his own hand on death-bed was held to be null as to the children. (f)

He has only power to dispose of such a part of his goods as are the dead's part, unless he has neither wife nor bairns, in which case he may dispose of the whole. (g)

(a) Haddinton, Dec. 18, 1606, Home, Dict. 8161.
(b) Stair, b. 3, tit. 8, § 43.
(c) Jan. 1727, Lindsay, Dict. 5406.
(d) Erskine, b. 3, tit. 9, § 21.
(f) Ib. Stair, Ib.
(g) Stair, ib. Ersk. b. 3, tit. 9, § 16, et seq.
As, however, the father has while in _liege poustie_ the absolute disposal of the family effects, if he has fairly exercised his power, his acts will be valid. An irrevocable delivered deed will therefore be effectual. (a) But whilst a deed is undelivered, no right passes by it, and it may be cancelled or destroyed by the party. Such a deed, though in an irrevocable form, will not be available. (b) The deed or act calculated to defeat the _legitime_ must not be done _dolosè_. (c)

Legatees, when the legacies exceed the disposable portion, abate rateably, unless the testator has given a preference to any of the legatees.

Heirs are excluded from the bairns' part, though in the family, because of their provision by the heritage, except in two cases: First, if the heir renounce the heritage in favour of the remanent bairns, for then the heir is not to be in a worse case than they, but they come in _pari passu_ both in heritable and moveable rights, which is a kind of _collatio bonorum_. (d) Secondly, if there be but one child in _familia_, and so both heir and executor, that child has not only the heritage, but the whole bairn's part, and so abates the relict's part and dead's part without collation of the heritage. (e)

The obligation imposed on the heir of collating the heritage as the condition on which he can take a part in the _legitime_ is not confined to such heritage as the heir takes immediately from the father. It was expressly decided by the Court of Session, in 1809, after much consideration, and upon the authority of previous decisions, as well as with reference to the nature of entail, that a person succeeding to an entailed estate, in which he was the heir _aliaque successurus_, was not entitled to claim

(a) Montgomery—Agnew, Feb. 28th, 1775, Dict. 8210.
(b) Millie, June 7th, 1803, Dict. 8215, affirmed.
(c) Ib. Hogg, May 14th, 1800, Dict. v. Legitim, App. 2, July 16th, 1804.
(d) Murray, July 16th and 23rd, 1678, Dict. 2372, 2374.
(e) Trotter, Jan. 12th. 1681, Dict. 2375.
a share of the moveable succession of his ancestor without collating the entailed estate. (a) This decision continued to be considered the undoubted law of Scotland. In a subsequent case, the unanimous judgment of the court was pronounced to the same effect, "the court holding the question to be settled by the decision in the case of Little Gilmour, which they considered well decided." (b)

By the interlocutor pronounced by the second division of the Court of Session in November, 1833, it was declared, "That Sir Wyndham Carmichael Anstruther, the claimant, cannot claim any share of the executory of the deceased without previously collating the heritage to which, as heir to the deceased, he had succeeded." Against this judgment, the heir appealed to the House of Lords, and the appeal came on for hearing in April, 1835, when the case having been only in part heard, an order was made, declaring, "that the House, by consent of parties forbear, hoc statu, to pronounce any decision upon the matter of the said appeal, but directed that the cause should be remitted back to the second division of the Court of Session, with an instruction to the judges of that division to order the matter of law in question in this cause to be heard before the whole of the judges, including the Lords Ordinary, and to pronounce judgment according to the opinion of the majority of the whole of the Judges."

The case was accordingly so heard on the 20th Jan., 1836, when the opinion of all the judges was in favour of the interlocutor before pronounced.

The case was discussed at great length at the bar of the House, and the Lord Chancellor delivered a most elaborate judgment, in which he reviewed the preceding cases, and the principles of the law of entails in Scotland.

(a) Little Gilmour, Dec. 13th, 1809, F. C.
(b) Wyndham Anstruther, Nov. 28th, 1833, F. C.
"As the case of *Little Gilmour* decided in 1809, is identical with the present case, and as subsequent decisions have taken place upon the authority of that case, and as the law upon this subject has been considered as established by that decision, it is only necessary to consider whether that decision be so contrary to principle, and so inconsistent with former authorities, as to make it the duty of this House to overrule that decision, and to establish a rule of law diametrically opposite to that upon which that case is founded.

"It is admitted by the appellant, that the heir must collate whatever heritage he takes from the person whose estate is to be administered, but he contends, that in the case of a strict entail, the heir of entail, though he be also heir of line, takes nothing from the deceased, that he takes from the entailer and a person designated, and that he therefore ought not to be compelled to collate such heritage as the price of participating in the property of the deceased, such person so deceased never having had the power of diverting the heritage from the heir, and such heir therefore claiming nothing from him, and not even owing any thing to his forbearance.

"I will call your Lordships' attention to the question how far the rule objected to be or be not consistent with the acknowledged rule of the Scotch law as applicable to strict entails. Such entails rest upon the provisions of the act of 1685. Now it is not disputed, that an heir taking by simple destination must collate; and if that act had not been passed, and the property in question had been permitted to descend according to the entail from the last possessor to the present appellant, that the appellant must have collated such heritage before he could participate in the executry.

"If, therefore, he need not now do so, it must be by virtue of the provisions of the Act of 1685. The object of the act was to enable persons effectually to entail their estates by preventing the heirs of entail from alienating or
charging the estate entailed. It therefore secured to the heirs in succession the enjoyment of the entailed estates. Did it also entitle them to share in the executry without collating the heritage? Yet, such must be the effect of it, if the appellant be right. The argument of the appellant proceeds upon the practical effect of that act, and not upon its legal operation; and therefore, to support his argument, he is compelled to treat the possession under an entail as merely a life-renter. But this is contrary to the known principle of the Scotch law, which considers the fee as in the party in possession under the entail, and his heir makes up his title as heir to him as owner of the fee. If the Act of 1685, did not consider the heir as in possession of the fee, why restrain him from exercising rights which are conceded to the fee. The heir may sometimes suffer from this supposed fiction, but he sometimes also benefits by it, as occurred in some of the cases referred to, particularly in Spalding v. Farquharson, and Russell v. Russell, (a) in which it was held, that an heir in tail was not bound to collate the heritage with the next of kin of his father, because as such father had not made up his title, the heir was to claim as heir to the grandfather, and not as heir to his father. Not only must the heir who takes by simple destination collate, but so must an heir who takes by the bounty of his father's marriage settlement.

"In principle, therefore, there is nothing to impeach the doctrine acted upon in the Little Gilmour case. Is there then any thing of authority against it? It is admitted that there is no case of prior date precisely in point, but there are several in which it appears to me that the principle has been recognized. The first of the cases cited, and which was relied upon by the appellant, was the case of Rickard v. Rickard in 1720, in which

(a) 1 Bell's Com. 102.
there being three sisters next of kin, and the eldest being heir of entail, it was held that she was not bound to collate. In that case the question arose between sisters, so that, as to two-thirds, the eldest sister was not heir at law, but took by special destination; but in the *Scotstarvat* case in 1787, (a) the circumstances were the same, except that the sisters were not sole next of kin, and there it was held by the court of session, that the eldest sister being heir of entail, must collate with those who were next of kin, but not heirs portioners. The distinction between the two cases is obvious. The eldest sister was not in competition with heirs portioners only, but with others next of kin who were not so. This judgment was reversed in this House, but merely upon the ground that the domicile having been in England, the law of Scotland did not apply.

"In the case of *Rae Crawford*, a sister succeeded to an estate under an entail. She had a brother and a sister. It was held that she was not bound to collate, because she was not heir of line; assuming that had she been heir of line, she would have been bound to collate. Such being the state of the authorities prior to the case of *Little Gilmour* in 1809, your Lordships have to decide whether that case was so contrary to those decisions, and so inconsistent with the principles of the law of Scotland, as to induce your Lordships to overrule it.

"Had the decision of the case of *Little Gilmour* been the reverse of what it was, it might have established a rule, in some instances, more conducive to the equitable arrangement of the claims of different members of a family, and have avoided some consequences of the present rule which it is impossible to reconcile with notions of abstract justice, such as the consequence, that if a second son be heir of entail, he need not collate with his brother and sister, but that an eldest son heir

(a) Dict. 2379
of entail must. But then such a decision, to obtain such a result, would in my opinion, be a violation of the principles of the Scotch law, arbitrary and technical as they may be in the present instance. I have, therefore, come to the conclusion, that the decision of the case of Little Gilmour was right upon these grounds. And if your Lordships should concur in that opinion, you will not hesitate to act upon it, particularly as it has been considered as the rule of law for twenty-five years, and has been followed in other cases. I therefore move your Lordships to affirm the interlocutor of the Court of Sessions appealed against."

Lord Lyndhurst expressed his own concurrence, and that of the Earl of Devon in this opinion, and the interlocutor was affirmed.

It would seem, that in consequence of the remit in the preceding case, the Marquis of Breadalbane was induced to agitate the same question.

The only difference between the two cases on this point was, that the Marquis of Breadalbane was not heir of line to the settler as the heir was in the Anstruther case.

The first substitution in the entail, in the Breadalbane case, failing John third Earl, and the heirs male of his body, was stated to be to John Campbell of Carwin, the late Marquis, and the father of the present Marquis, and to the heirs male of his body. It was insisted that the claimant's father, and the heirs male of his body, took this estate under a destination expressly and directly violating the legal order of succession, and that at that moment, the heirs of line of John third Earl of Breadalbane were deprived by the deed of that inheritance which the law of the land would have given them. From the record on the part of the claimant, it appeared that Earl de Grey was in existence, the heir of line of John, the third Earl, and who was clearly the party, independent of the deed of entail, alioqui successurus in this estate.
The Court of Session rejected this assumed distinction, and pronounced an interlocutor in conformity with the judgment in the Anstruther case. From this interlocutor the Marquis of Breadalbane appealed. The case was heard after the Anstruther case, and the Lord Chancellor having pronounced the judgment of the House in that case, affirmed the interlocutor in the Breadalbane case. His Lordship, after stating the alleged distinction, says, "but it is obvious that this cannot make any difference, the obligation to collate arising as to whose personalty the collation is required, and not depending in any respect upon heirship to the entailer as to whose entail no collation arises. I therefore assume that Lord Breadalbane is bound to collate his settled estates."

As a person having neither wife nor child has absolute power over his whole estate, he may by marriage contract settle provisions on his younger children to be procreated of the marriage, in satisfaction of the legitime, which, though never accepted of by them, will effectually exclude their right to it. On this ground, a daughter was found excluded from the legitime, where the father had in his marriage contract provided the whole conquest to the children of the marriage, notwithstanding her plea, that he had, in the distribution of it among his children, given her the smallest share. (a)

Forisfamiliation excluding the child from any part of the legitime, is not inferred from the child's removal from under the parental proof or from his marriage, or even from his carrying on a trade by himself.

"It is," says professor Bell, "no sufficient bar to legitime, that a child has been married, forisfamiliation in this sense requiring a discharge of the legitime." (b)


(b) Princ. No. 1587.
"By a child forisfamiliated," says Erskine, "is to be understood one who, by having already received from his father his share of the *legitime*, and discharged it, or by his renouncing it even without real satisfaction, is no longer accounted a child in the family, and is therefore excluded from any farther share of it. As this right of *legitime* is strongly founded in nature, the renunciation of it is not to be inferred by implication. It is not presumed, either from the child's marriage, or his carrying on a trade by himself, or even his acceptance of a special provision from the father at his marriage, if he have not expressly accepted of the provision in full satisfaction of the *legitime*." (a)

The same doctrine is held by Lord Stair. (b)

Bankton says, "A child is said to be forisfamiliated when he receives payment or satisfaction of his portion natural, discharges the same, or accepts a bond of provision in satisfaction thereof; but if it bear not to be in satisfaction, he may still claim his portion of *legitime* upon collating his bond or portion to the other children." (c)

Stair states the law in direct reference to the payment and acceptance of "a tocher or portion." He says, after noticing the adverse argument, "Yet the contrary opinion is more favorable, viz. that nothing can take away the bairn's *legitime*, unless it be discharged. And that a presumption of accepting a tocher or portion in satisfaction will not be sufficient, unless it bear, in satisfaction of the portion natural, and bairn's part; because the *legitime* is so strongly founded in the law of nature and positive law, that presumption or conjecture cannot take it off." (d)

(b) B. 3, tit. 8, § 45.
(c) Bankton, b. 3, tit. 8, § 16.
(d) Stair, b. 3, tit. 8, § 45.
Erskine lays down the doctrine to the same effect in the passage already cited. (a)

Numerous decisions have confirmed this doctrine.

The decision in the House of Lords in the case of Hog v. Lashley, fully recognizes this doctrine, and has been confirmed by other decisions. (b)

In a case which was before the Second Division of the Court of Session in 1835, the Court unanimously adopted and gave effect to the opinion of the Lord Ordinary (Moncrieff) viz. "that according to the terms and legal import of the deed in favour of Mrs. Clark at her marriage, the acceptance of the provisions thereby made in her favour cannot be held to import a discharge of the legitime. The rule is fixed that legitime is not discharged by implication; and there are no words in this deed which have ever been held to import a discharge of legitime; and although there is much argument used by both parties on this point, the Lord Ordinary is not able to find authority for holding that without any words of discharge, a discharge may be inferred from collateral circumstances." (c)

This doctrine received the full sanction of the House of Lords on the appeal of the Marquis of Breadalbane from the decision of the Court of Session, that the Marchioness of Chandos the daughter of the late Marquis of Breadalbane was not barred by the portion which her ladyship's father had given her on her marriage with the Marquis of Chandos.

The late Marquis of Breadalbane on her marriage

(a) Ersk. b. 3, tit. 9, § 23.
(c) Clark v. Burns, Jan. 27th, 1835, F. C.
gave as his daughter's marriage portion thirty thousand pounds. The marriage settlement contained the following recital: "And whereas a marriage is intended to be had and solemnized between the said Richard Plantagenet Earl Temple, and the said Lady Mary Campbell: And whereas upon the treaty for the said intended marriage, the said John Earl of Breadalbane agreed that he would pay or secure the sum of thirty thousand pounds, as the portion or fortune of the said Lady Mary Campbell, in the manner hereinafter mentioned, that is to say, the sum of ten thousand pounds, part thereof, to be paid on or before the solemnization of the said intended marriage; the further sum of ten thousand pounds to be paid at the expiration of eighteen calendar months from the day of the solemnization of the said intended marriage, and to carry interest in the meantime at the rate of five per cent. per annum; and the remaining sum of ten thousand pounds to be paid within six calendar months next after the decease of him the said John Earl of Breadalbane, with interest from the day of his decease: and it was agreed that the said Richard Marquis of Buckingham should receive from the said John Earl of Breadalbane the said two sums of ten thousand pounds and ten thousand pounds first and secondly hereinafter mentioned, together with the interest of the said sum of ten thousand pounds secondly mentioned, from the day of the solemnization of the said intended marriage; and in consideration thereof, should enter into such covenant as is hereinafter contained, for the payment of the said sum of twenty thousand pounds, within two years after the solemnization of the said intended marriage, and to pay interest in the meantime, and that the said sum of twenty thousand pounds and the interest thereof should be further secured in the manner hereinafter expressed; and it was agreed that the said sum of twenty thousand pounds, so to be covenanted to be paid by the said Richard Marquis of
Buckingham, and the said sum of ten thousand pounds, the residue of the said portion of thirty thousand pounds, to be secured by the bond of the said Earl of Breadalbane, and to be payable after his decease, and the several securities for the same, should be vested in the said George Neville and John Viscount Glenorchy, their executors, administrators, and assigns, upon and for such trust, intents, and purposes, and with, and under, and subject to such powers, provisions, limitations, declarations, and agreements, as are hereinafter declared, expressed, and contained, of and concerning the same; and in further consideration of the said intended marriage, and also of the said portion or fortune of the said Lady Mary Campbell, the said Richard Marquis of Buckingham, and Richard Plantagenet Earl Temple, proposed and agreed to settle and assure the said several manors or lordships, &c.

"And whereas in part performance of the said agreement on the part of the said John Earl of Breadalbane, the said Earl hath paid to the said Richard Marquis of Buckingham, upon the day of the date of these presents, the sum of ten thousand pounds of lawful money of Great Britain, and by his bond or obligation in writing under his hand and seal, in the penal sum of twenty thousand pounds, bearing even date with these presents, the said Earl hath secured to the said Richard Marquis of Buckingham, his executors, administrators, and assigns, the payment of the sum of ten thousand pounds of like lawful money of Great Britain, at the expiration of eighteen calendar months from the day of the date of the same bond, with interest in the meantime, at the rate of five per cent. per annum, payable half-yearly, as therein mentioned: and the said John Earl of Breadalbane hath also given and executed another bond or obligation in writing, under his hand and seal, bearing even date with these presents; whereby he has become bound to the said George Neville and John Viscount Glenorchy, their
executors, administrators, and assigns, in the penal sum of twenty thousand pounds, subject to a condition thereunderwritten, for making void the same on payment of the sum of ten thousand pounds of like lawful money, to them the said George Neville and Lord Viscount Glenorchy, their executors, administrators, and assigns, within six calendar months after the decease of the said John Earl of Breadalbane, together with interest on the same sum of ten thousand pounds, at the rate aforesaid, from the day of the decease of the said John Earl of Breadalbane."

The rest of the deed related to the settlement of the estates of the Duke of Buckingham on the issue of the marriage, and charged on certain of those estates the portion given by the Marquis of Breadalbane. The late Marquis of Breadalbane, at the time of the marriage and at his death, was domiciled in Scotland. The treaty for the marriage and the marriage took place in London, where also the settlement was executed, and the Duke of Buckingham and the Marquis of Chandos were also domiciled in England. The Marchioness of Chandos claimed her *legitime* out of the moveable estate of her father. Her sister, Lady Elizabeth Campbell, had renounced her *legitime*. It was insisted on the part of the Marquis of Breadalbane, her brother, that the effect of the portion to the Marchioness of Chandos and of the settlement on her marriage was to discharge her claim to *legitime*. The Court of Session expressed a clear and unanimous opinion that it was not barred. The Lord Justice Clerk gave the following judgment:

"There is no discharge either direct or indirect of the claim of *legitime* competent to Lady Chandos discoverable from the terms of that marriage contract, which was executed entirely according to the English forms by indenture, and which, while it anxiously and technically, and I have no doubt correctly, provides for the jointure in favour of her ladyship to be secured over the estates of the Buckingham family, and guards
against all other claims on her part in name of dower or otherwise, &c., it bears only that her father, Lord Breadalbane, had covenanted and agreed that the sum of thirty thousand pounds should by him be paid and secured as the portion or fortune of the said Lady Mary Campbell.

"But to those words there is no declaration or addition whatever made that the above sum should be in full of all her legal claims whatever, or of any demand she might legally have against her father. There is nothing in short that I can discover in the instrument that has the remotest reference to the law of Scotland, or the rights of any party arising out of it. It is a mere setting forth of the tocher given with the bride, and is entirely silent as to that being accepted in full of her legal claims, as to which there is not the most distant reference made in the deed. It is utterly impossible therefore to hold that there is in this contract anything approaching to a discharge of the legitime.

"It is however quite sufficient for the validity of the claim, that it was neither directly nor indirectly discharged by any deed to which Lady Chandos was a party. And we have lately had in the case of Wright's succession the point fully decided, and where it was held as clearly fixed, that in regard to provisions at marriage, nothing short of an express declaration that they were "accepted in full satisfaction of the legitime," can avail. This is the result of a fair consideration of all the authorities on the point.

"As to the claim being cut off by her forisfamiliaition, I think that according to the definition of it by all our authorities there is just as little foundation for that plea.

"That the mere fact of her marriage can have no effect in establishing forisfamiliaition, was settled as far back as the case of Russell, referred to by Mr. Erskine, and has been exemplified in many cases, not the least remarkable being the noted one of Hog v. Lashley.
"Under these circumstances Lady Chandos must therefore be preferred to the whole *legitime*, which extends to one-third of her father's moveable succession. And as she has no competitor in that fund, she cannot be called upon to impute the amount of tocher provided in her marriage contract as part of her claim of *legitime.*" (a)

From this judgment the Marquis of Breadalbane appealed to the House of Lords.

From the following judgment delivered by the Lord Chancellor it will be seen, that on the part of the appellant it was contended that the marriage settlement ought to receive a construction different from that which might have been given to it, if it had been executed in Scotland.

"The question arises whether Lady Chandos is barred by her settlement from claiming the *legitime*, to which if not barred, and if Lord Breadalbane decline to collate his settled estates, she would be exclusively entitled. Upon this question some points are admitted. It is admitted that by the law of Scotland the claim to *legitime* cannot be barred by inference, but only by direct renunciation, and that the settlement in question, if it had been executed in Scotland, would not have barred Lady Chandos's claim to *legitime*. But it is contended that being an English deed it must be construed according to the law of the country where it is executed, and that it would bar Lady Chandos's claim to participate in her father's personalty in this country, and that therefore it must have the same effect as to his Scotch property. But it may be asked, of what would that deed be a renunciation in England? Would it be a renunciation of any thing which the law would cast upon the child? Would it be a renunciation of the child's right under

(a) Breadalbane v. Chandos, notes of the Judgment given in the Appellant and Respondent's cases, F. C.
the Statute of Distribution? I speak now of renunciation only, and not of bringing any portion into hotchpot. Cases of double portions were referred to, but they have no application. In those cases the question is, whether a father having made a will, giving his child a portion, is to be supposed to have intended by afterwards settling a portion upon such child to revoke the provisions of the will.

"It is obvious that those cases turn not upon contract between the parties, but upon the presumed intention of the testator. But certain cases upon the custom of London and York were supposed to apply; but upon examination they will be found to be in favour of Lady Chandos's claim. According to those customs, advancement is not renunciation, but the child is entitled to have his advancement made up so as to place him upon an equality with the other children; he must in short collate or bring into hotchpot the value of his advancement. The child may indeed by contract renounce his share of the orphanage part as in the case of Blunden v. Barker, (a) but those were all cases of contracts. No case is cited to show that such a deed as this would have excluded a child from the share of the orphanage part, although it would be bound to bring the portion advanced into hotchpot. But that is part of the custom, and has no reference to contract which is the present question. The only part of the settlement relied upon is the expression that Lord Breadalbane would pay the thirty thousand pounds as the portion or fortune of his daughter.

"Before the question can arise as to the effect of an English contract upon a claim of legitime in Scotland, it must be shewn that such expressions would bar a child of its claim to the intestate estate, or the orphanage part

by the custom. But if that had been done, it would have gone but a little way to prove that the claim to *legitime* was thereby barred, when it is admitted that by the law of Scotland that right cannot be barred but by such a deed as this. The settlement in question, though it professes to bar other rights, does not in any degree refer to the claim to *legitime*. Other cases were cited for that purpose, (a) but in those cases there was no ambiguity as to the intention of the parties. In none of these was it decided that the contract executed in one country, because operative in that country as to property therein situate, was to be held available in another country as to property there situated, when by the law of that other country such property could not be affected by such an instrument.

"It therefore appears to me that there is no ground for contending that the settlement upon Lady Chandos's marriage amounts to a renunciation of a claim to the *legitime*. But then it is said that she must elect? Between what interests is she to elect? Between her claim to *legitime* and the portion. But this assumes that the portion was to be in lieu of *legitime*, and therefore assumes the whole question in debate. As to her collating or bringing the portion into hotchpot, that question can only arise where there are more children than one to share the *legitime*, and as Lady Elizabeth Pringle has expressly renounced, and as Lord Breadalbane cannot claim any share without collating his entailed estate, which he does not offer to do, no question can arise as to Lady Chandos collating or bringing her portion into hotchpot with the *legitime*."

His lordship then stated his opinion that the interlocutor of the Court of Session had accurately adjudicated upon the rights of the parties. In this opinion Lords

Lyndhurst and Devon concurred, and the interlocutor was affirmed. (a)

The child’s renunciation of the *legitime* or his acceptance of a sum in satisfaction of it, has the same effect in regard to the younger children entitled to it, as the death of the renouncer, so that his share divides equally among the rest. (b) But a child renouncing the *legitime* is not cut off from his right to the father’s dead’s part, for to that he is entitled, not as a child *in familiâ*, but as next of kin to the father. (c) Where, therefore, there is but one younger child, this renunciation of the *legitime* has the effect of turning the whole of that right, to which he was entitled as the only younger child into dead’s part, and consequently all the executory falls to the renouncer himself in the character of the father’s next of kin, unless the heir is willing to collate the heritage with him. (d) But where a child renounces not only his *legitime*, but in general all interest of whatever sort in the executory, or all that he might claim by his father’s death, such renunciation plainly imports a renunciation of the dead’s part. (e)

(a) Judgment, Breadalbane v. Chandos, House of Lords, 16th Aug. 1836. Whilst this cause was pending in the House of Lords, the Marquis of Breadalbane filed a bill in the Court of Chancery in England against the Marquis and Marchionesses of Chandos. Its object was to establish the existence of some presumed intention on the part of the late Marquis of Breadalbane to give the marriage portion in bar of his daughter’s legitime, and some implied intention on the part of her Ladyship to accept it in discharge of that claim. After the judgment of the House of Lords had been pronounced, a motion was made before the Vice Chancellor to restrain the Marquis of Chandos from availing himself of the judgment of the Court of Session, thus affirmed by the House of Lords. The result of this motion, which involves some important points stated in the preceding pages, will be given in the Appendix.


(c) Goos. July 19th, 1672, Chisholm, Dict. 8180.


(e) Fount, Dec. 4th, 1694, Fowbister, Dict. 8181. Clerk Home, 101,
The renunciation both of the *legitime* and the dead's part by a younger child operates in favour, not only of the younger children who continue in family with their father, but in favour of their descendants; so that the child renouncing cannot claim the office of executry in competition with any of those descendants, though he be truly a degree nearer in blood to the deceased than they are. *(a)*

Such a renunciation excludes, not only the renouncer, but his descendants, in competition with the descendants of the children who had not renounced, for they cannot in their father's right claim any subject to which he has expressly given up his claim. But the renouncer's children are not excluded in a question with collaterals, after all the other descendants of the deceased have failed; for where the father procures a renunciation of the *legitime* or executry from any child, his purpose is barely that his other children may have the benefit of it, without any intention that any of his own descendants, even the children of the renouncer himself, should be thereby excluded from their natural right, in competition with a collateral kinsman. *(b)*

When a wife in her marriage contract renounces her *jus relictæ* by accepting a special provision in satisfaction or in full of it, such renunciation is not considered as a conveyance of her third to her husband, so as to increase the dead's part from one-third to two-thirds. It has the same effect as her death, so as to make the husband's testament divide in two, the one half *legitime*, and the other the dead's part. The wife's right is not of the nature of a debt, which may be transferred from the wife to the husband; it is a right of division, which

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*(a)* Clerk Home, 101, sup.

takes no place till the dissolution of the marriage; and this right is extinguished by the predecease of the wife, because after her death she cannot be reckoned in the division, so it must also be extinguished by the renunciation. A widow who has renounced cannot concur in the division; and in every case where the widow cannot concur the *legitime* is the half of the executry. (a)

Confirmation is not necessary by the widow and children, to vest in them, or transmit to their next of kin, that share of the moveables which falls under the *legitime* and *jus relictæ*. It does not fall to them by succession, but in their proper right. (b)

The share of a child predeceasing is transmitted without confirmation to his issue. But although the *jus relictæ*, and *legitime* fall to the widow and children by way of division of the goods in communion, and consequently descend after their death, even without confirmation from them to their next of kin; yet these next of kin cannot establish properly in themselves the right of the widow and children, but by confirming executors to them. (c) And they must also confirm to the first deceased, if no other has confirmed before them, in order to carry his testament into execution, because till his testament is confirmed, the extent of his free executry, and consequently the shares of the widow and children, cannot be known. (d)


(c) Stair, b. 3, tit. 8, § 61.

(d) Erskine, ib.
SECTION IV.

THE LAW BY WHICH LEGITIME, &C. IS GOVERNED.

The *legitime* or the analogous provision is governed as to its amount, and the persons entitled, and the property subject to it, by the *lex loci rei sitae* when the property is immovable, and by the law of the domicile when it is moveable.—Conditions or qualifications governed by the same law.—Property situated in several countries, where the laws differ from each other in the conditions and qualifications to which this provision is subject.—Whether the law of the one country affects the right in the property situated in another country, where no such law prevails.—Consequence of one part of the property being situated in a country where the person is excluded, and another part situated in a country where no exclusion prevails.—Renunciation determined by the *lex loci rei sitae* in immovables, and by the law of the domicile in moveables.

In ascertaining the nature and extent of the right of children or parents in the estate of the deceased, whether that right be *legitime* in its ordinary sense, or the reserve of a certain part of his property, recourse is had to the law of the country in which the property is situated, if it be immovable, and to the law of his domicile, if it be moveable property from which it is claimed.

When the right consists of a certain portion of that which would belong to the children or parents in the succession, if the deceased had died intestate, it is obvious that the same law by which the interest in the succession is conferred, must also determine by whom the *legitime* may be demanded, and the portion to which they are entitled.

When it consists of the reserve of a certain portion of the whole or of some part of the estate to which the deceased was entitled at the time of his marriage, or of his death, and of which he is restrained from making
any disposition, it is governed by the law to which the disposition of the property is subject.

If it can be claimed by those only who sustain the character of heir, the law which governs the succession to that property must also determine by whom, and in what proportion it is taken.

Whatever may be the distinctive character of this right, the liability to, or exemption of the property from it is a quality impressed on the property. "Jus ponitur rebus extra ullam actus à personâ peregendi interventum." (a) The law which confers that liability or exemption is a real law. It follows, therefore, from the principles which have been so frequently stated in preceding parts of this work, that the right is governed by the law of the situs of immovable property, if the right be claimed from that species of property, and by the law of the domicile, if it be claimed from moveable property: "La légitime est un droit réel; et les lois qui la différent ou qui la règlent, sont des statuts réels, dans le vrai sens de ce terme. Ainsi, ce n'est ni à la loi du domicile du défunt, ni à celle de la naissance des légitimaires, qu'on doit s'arrêter pour cet objet: mais il faut considérer chaque coutume en particulier, et, sans faire attention aux autres, distraire des biens qu'elle régît, la portion légitimaire qu'elle a fixée. Il y a, dans le recueil de Papon, un arrêt qui nous apprend que cette vérité si simple a autrefois été combattue en justice, mais sans succès.—Le 3 Février, 1541, fut décidé par arrêt (au rapport de M. de l'Hôpital), que si le testateur, demeurant en pays de droit écrit, et ayant des biens en plusieurs provinces, tant coutumières que de droit écrit, par le testament institue l'un de ses enfans héritier universel, les autres prendront leur légitime et portions, telles que la disposition de chacun pays où les biens seront situés porte, soit de droit ou de coutume; savoir, en pays de droit écrit, selon la computation de

(a) Rodenburg, tit. 2, c. 2, n. 1.
l’authentique novissima (ou Novelle 18), et ès autres pays tout ainsi que la coutume l’ordonne.

“Cette décision se justifie assez d’elle-même. Cependant si l’on était amateur de la voir appuyée de nouvelles autorités, on pourrait consulter les arrêts des 31 Mars 1618, 1 Février 1620, et 22 Juillet, 1698 ; ils sont tous trois très-précis et très-formels sur la réalité du statut de la légitime ; le premier est rapporté par Vravin ; le second par Auzanet ; le troisième est transcrit, ci-dessus, sect. 1. Le parlement de Toulouse en a rendu un semblable, qu’on trouve dans le recueil de Maynard, liv. 7, ch. 17.” (a)

The amount of the legitime, reserve or douaire is that which is fixed by the law of the situs in immovable, and by that of the domicile in moveables. “Si testator diversis locis bona habeat, quorum consuetudo diversam quantitatem legitime constituet, spectandam esse cu jusque loci consuetudinem ubi res sita est, ad constitutendum pro ratione singulorum bonorum legitimam, eti testator in patria juris scripti agat.” (b)

Voet lays down the same rule :—“Quod si circa legitime quantitatem statuta varient, uti peculiariter Ziriczez in Zelandia fortur bes liberis pro legitima assignatus ; in mobilibus quidem servandae legis loci, in quo res unaqueque immobile sita est : in mobilibus vero jus domicili testatoris ; ita uti in successionis intestatæ delatione id obtinere, alibi dictum ; eo quod legitima omnem suam relationem habet ad intestati successionem.” (c)

Dumoulin adopts the decision which had been given, “quod legitima debet diverso modo aestimari, secundum

(a) Merlin, Rep. tit. Legitme, sect. 6, § 14, p. 60.
(b) Christin. ad leg. Mech. tit. 16, art. 26, n. 4.

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diversos usus locorum et consuetudinum, ac si essent diversa patrimoniam." (a)

The condition on which the person is entitled to the provision, whether that condition is the acceptance or renunciation of the succession, or the collation or imputation of donations, or advancements made by the parent, cannot be separated from the right, nor be left to the decision of any other law than that which confers and determines the nature and extent of the right.

If the question arise, whether the person is excluded either by his own acts or by those of others, it must be decided by the same law which confers the right and prescribes the terms on which it is to be acquired, and the means by which the person may deprive himself of it.

When the property composing the succession is situated in the same country, and subject to the same law, there is little room for doubt in the application of the rule that the right of the children to any portion of the parent's property under whatever name it is given, the protection afforded them against the disposition of it by the parent, and all the modifications, qualifications, and conditions to which this right is subject, are entirely governed by the lex loci rei sitae when the property is immovable, and by the lex loci domicilii when it is moveable. But when the property of the deceased is situated in different countries in which the laws regulating the title to this provision are at variance with each other, it becomes a question how far a condition or qualification imposed by the law of the country in which one part of the ancestor's property is situated, affects the claim to another part of it, which may be situated in a country where no such qualification or condition is imposed. Jurists in proceeding to discuss this

question treat the laws which regulate this interest in the property of the deceased, whether it be given to persons merely as children, or in the character of heirs, as real laws. They bind all persons in respect of the property which is situated in the country where they prevail, but they do not extend beyond that country. (a)

They consider that if the ancestor is possessed of estates situated in different countries in which opposite laws of succession prevail, they are deemed distinct and separate successions. "Si plura ejusdem hominis prædia sint, et diversis territoriis sita, diverso etiam jure, legibus et conditionibus regantur, capiantur, transferantur, acquirantur, non aliter quæm si plura plurium essent patrimonia, quia quoties unum et idem diverso jure regitur, pro pluribus habetur. De hac controversiæ ne pueri quidem dubitant." (b)

"Successiones diversorum reputantur ob diversas consuetudines. (c)

"Ita quæ constanter docemus totidem esse hereditates, quot erunt bona diversis territoriis obnoxia." (d)

Thus a child excluded by the law of the country in which a part of the succession is situated, either on account of her sex, or in consequence of her having received a portion on her marriage, is not excluded from taking an interest in that part of the property, which is situated in a country where no such exclusion is adopted by the law. "C'est par la raison de la réalité qu'une fille non mariée sera héritière à Paris, et y aura portion entière, pendant qu'elle ne prendra qu'un mariage avenant en Normandie, sur les biens de Normandie. Voyez Evrard

(a) 1 Boull. ib. p. 297.
(b) D'Argentré, art. 218, n. 9, 10, 34. (c) Dumoulin, art. 92, Anc. Cout.
en sa Méthode pour liquider les mariages avenants des filles." (a) "Si le père avait des biens situés en différentes coutumes, la fille dotée, exclue de la succession des biens qui sont situés dans une coutume qui a cette disposition, etant habile à succéder à ceux qui sont situés en d'autres coutumes qui n'ont pas pareille disposition, serait par conséquent recevable à demander sa legitimate sur les-dits biens, si son père en avait disposé au préjudice de sa legitimate." (b)

If there had been no such express renunciation, she would be entitled to succeed to property situated in the country where the law did not exclude her, "in bonis sitis in loco ubi non est talis consuetudo, poterit succedere." (c)

Dumoulin held the same doctrine. He considers that the daughter is not excluded, unless she had expressly renounced the succession. "Quando filia maritatur à patre in patria Alverniae, et sic per consuetudinem Alverniae à successione excluditur; non solum enim excluditur à successione quoad bona sita in dictâ patria Alverniae, et dictæ consuetudinis, sed etiam quoad bona in patria juris scripti, vel alibi ubicumque sita; quod est verum, intercedente expressâ renunciatione." (d)

In the latter case, Pothier considers that the daughter ought to be deemed to have received her dotal gift in advancement, and on account of her right to succeed to all the property of her father. She would therefore impute so much of her dotal gifts as would correspond with the proportion which the estate from which she is not excluded bears to the whole estate of the deceased. Thus,

(b) Poth. Tr. des Donat. art. 5, sect. 3, § 1, p. 504.
(c) 1 Boull. p. 324. (d) Dumoulin, ib. Cons. 53, and ad Cod. lib. 1, tit. 1.
if the father had two-thirds of his property situated in a
country, where the law excluded filles dotes from the
succession, and another third in a country where there
was no such law, the daughter will be considered to
have two-thirds of the dot in lieu of her right to succeed
in that country where she is excluded, and the other
third will be deemed an advancement on account of her
succession to the rest of the estate. The legitime which
she claims is subject to the imputation of a third of such
dotal gift. (a)

M. Merlin strongly maintains the real character of
a law restraining the power of alienation, and its ex-
clusive operation on the property situated in the country
in which that law exists. If the power of disposing of
propres is admitted only when the testator has acquêts,
or failing propres, when he has moveables, and the tes-
tator being domiciled in Paris, but having in the pro-
vince of Anjou only propres, and in that of Poitou only
acquêts, it is asked whether it will be permitted him to
dispose of a third of the propres in Anjou as if his
acquêts were situated in the same province, or to dispose
of his acquêts in Poitou, by reason of the moveables
which he possessed at Paris. M. Merlin combats the
opinion of Renusson, who maintains the affirmative.
"En effet, pour l'admettre, il faut, comme on l'a vu,
aller jusqu'à dire que les dispositions coutumières que
nous discutons, forment des statuts personnels; qu'elles
ne considèrent que la personne du donateur ou du tes-
tateur, et que leur unique objet, pour décider s'il peut
ou ne peut pas donner ou léguer ses acquêts, est de
savoir s'il a des propres, en quelque lieu que ce soit.
"Mais cette supposition choque à la fois les principes,
la vraisemblance et le bon sens.
"Les principes, parce que, s'il y a une maxime
constante dans notre jurisprudence, c'est assurément celle

(a) Poth. Tr. des Don. entre-vifs. § 3, art. 5, p. 505.
qui, en adoptant et érigeant en loi générale l’art. 57 de la coutume de Vermandois, range dans la classe des statuts réels, tout ce que contiennent les coutumes sur la disponibilité des biens-fonds.

“La vraisemblance, parce que certainement les coutumes ne se sont occupées que des biens de leurs territoires respectifs, lorsqu’elles ont décidé que les propres ne seraient disponibles, qu’autant qu’on aurait des acquêts, et les acquêts qu’autant qu’on aurait des meubles.

“Le bon sens, parce que l’intention de ses coutumes n’a pu être que de réserver quelque chose aux héritiers, c’est-à-dire, de mettre une partie des biens qu’elles leur destinent à couvert des dispositions entre-vifs et à cause de morts; et que, dans le système dont il s’agit, il suffirait, pour échurer cette intention, d’avoir des propres dans un pays où ils seraient entièrement disponibles, soit entre-vifs, soit par testament.” (a)

The principle on which this rule is established equally requires that resort should be had to the lex loci rei sitae for the purpose of determining whether the acts of the party amount to a renunciation of the legitime.

In the case of Breadalbane v. Chandos, it was the clear opinion of the Court of Session and of the House of Lords, that the settlement on the marriage of the Marquis and Marchioness of Chandos would not, on account of its having been executed in England, import a renunciation of her legitime, unless it would have been a renunciation according to the law of Scotland.

If a person having biens propres in one country disposes of a larger portion than he is allowed to do by the law of the country in which they are situated, but leaves biens propres in another country of a value greatly exceeding that which he was required to reserve, yet the heir may demand from the donee so much of the donation of the biens propres situated in the former country

as will make up the *legitime* to which he was entitled by the law of that country, for that *legitime* being given to him by that law is independent of that which the law of any other country may confer on him, and there is no ground for imputing to the *legitime* to which he was entitled by the law of one country, the *biens propres* to which he had succeeded by that of another. (a)

This doctrine ought not it seems to be admitted when the question arises between the heir and devisee of such *biens propres*. The testator by devising a part of the *biens propres* of which he had not the power of disposing, is presumed to have made up the value by the devise of those of which he had the power of disposing. (b)

(a) Poth. ib. 517.  
(b) Poth. ib.
CHAPTER VII.

TESTAMENT.

The validity of the testament depends, 1st, On the capacity of the testator to make it; 2ndly, On its conformity to those restrictions which the law has imposed on the power of disposition, either in relation to the property which is the subject, or the persons who are the objects of the disposition which it contains; and 3rdly, On its being made in the manner and with the solemnities which the law requires.

The restrictions which apply to the nature and extent of the property of which its owner may dispose by testament have been stated in a preceding chapter.

The other subjects of inquiry are, 1st, The capacity or incapacity to make a testament; 2ndly, The capacity or incapacity to take under a testament; and 3rdly, The forms and solemnities with which the testament is required to be made.

Every person is capable who is not declared by law to be incapable of making a testament. The presumption therefore is in favour of the capacity to make a will, and the burden of proof rests on him who would invalidate it on the ground of incapacity. (a) "Ab eâ'

parte, quae dicit, adversarium suum ab aliquo jure prohibitum esse, specialiter lege vel constitutione, id probari oportere.” (a)

Brunneman in his commentary thus illustrates the text: “Negans jus alicui competere, si illud sit de genere permissorum, quae regulariter omnibus permissa, v. gr. procurare, agere, testimonium ferre, appellare, tenetur id probare. Secus si id negetur, quod est de genere prohibitorum, quae non omnibus, sed quibusdam tantum permissa, v. gr. jura venandi, et simul. Nam tunc affirmanti incumbit probatio. Collige excipientem teneri, suam exceptionem probare, et contra eum militare, præsumptionem. Quia negat actum rite factum, illi incumbit probatio; quia non tantum in negativâ fundamentum ponit, quo casu ipsi incumbit probatio.” (b)

The capacity to make a testament may be wanting on account of the civil status of the person, as being under the parent’s authority, or as being a bastard, or on account of his standing in that relation to the state which excludes his enjoyment of the rights of a citizen or subject, as being an alien, or convicted of certain crimes, or sentenced to certain punishments. It may be wanting because he has not attained the age of legal discretion, but is a minor. It is the policy of some states to consider that a woman under coverture is not sufficiently independent of the control of her husband as to be enabled to exercise her free will, and for this reason to refuse her the power of making a testament.

The capacity to make a testament is wanting when the person does not enjoy freedom of will. To this head may be referred those who are not of sound and disposing understanding, as idiots, lunatics, &c., or who

(a) Dig. lib. 22, tit. 3, l. 5.
(b) Brunneman, ad h. lib. tit. and l. and ad l. 11, n. 2, 3, and l. 19, and see ad Cod. lib. 4, tit. 30, l. 10, n. 3, et seq. and ad Cod. lib. 4, tit. 19, l. 1, n. 1, et seq. Mævius, p. 5, decis. 300. Mascard. de Prob. conclus. 343.
are by sentence deprived of the administration and disposition of their affairs, as persons interdicted, or upon whom such an influence has been practised that the testamentary disposition is the effect of that influence, and not their free and voluntary act.

It is proposed to treat of these several grounds of incapacity, and to consider first who are capable of making a testament, and secondly who are capable of taking under a testament.

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SECTION I.

OF THE CAPACITY TO MAKE A TESTAMENT.

I. The incapacity induced by the patria potestas of the civil law not admitted in any of these systems of jurisprudence.

II. Bastards.—Not incapacitated except by the former law of Scotland.—That incapacity removed.

III. Aliens, incapacity of, under the civil law and law of Spain.—Not recognized by the law of Holland.—Existed under the coutumes of Paris and Normandy.—Present state of the law in Lower Canada, Code Civil, England, Scotland, United States.

IV. Persons convicted of certain crimes.

V. Minors.

VI. Married women.

VII. Insanity.—Old age.—Drunkenness.—Deaf and dumb persons.—Persons whose wills have been obtained by undue influence.—Interdicted persons.

I. Children who were not emancipated from the patria potestas were incapacitated by the civil law from making any testament, except of that species of property which was peculiarly their own, their peculium castrense or quasi castrense. (a)

The patria potestas did not either in Holland or Spain prevent the person who had attained his puberty from

(a) Dig. lib. 28, tit. 1, l. 6. Cod. lib. 6, tit. 22, l. 12.
making his testament, and although he was under curatorship, it was not necessary that he should obtain the consent of the father or curator to make his testament (a).

No authority can be interposed on the part of the parent under the coutumes of Paris and Normandy, the Code Civil, or the laws of England or Scotland, to restrain the child from making his testament, if he had attained the age at which he was testable. (b)

II. Bastards were not excluded by the civil law, nor by the laws of Holland, Spain, France, Normandy, or England, from making a testament. (c)

By the law of Scotland, before the passing of the recent act, a bastard, although he might dispose of his heritable and moveable estate by any deed in liege poustie, yet he was denied the power which legitimate persons possessed of making a testament of his moveable estate, unless he obtained the king's license. (d)

By an act passed in 1836, it is enacted, that from and after the passing of the act, bastards or natural children domiciled in Scotland may dispose of their moveable estates by testament or last will in like manner as other persons belonging to that country may do, notwithstanding any law or practice to the contrary. (e)


(d) Stair, b. 3, tit. 8, § 37; b. 4, tit. 12, § 3. Erskine, b. 3, tit. 10, § 5, 6.

(e) 6 and 7 W. 4, c. 22.
III. By the civil law, aliens were incapable of making a testament. (a)

Persons taken prisoners by the enemy and hostages were not considered citizens of Rome, to whom alone the power of making a testament was granted. (b)

A similar incapacity prevailed in the law of Spain. (b)

It was not recognized by the law of Holland, but the power of making a testament might be exercised as amply by aliens as by natural-born subjects. (c)

The persons on whom the coutume of Paris confers the right of making a testament, must, from the language of the article, be in the enjoyment of the rights of citizens of France. As aliens cannot enjoy those rights, they are therefore prevented from making a will, and their property devolved on the king by the droit d’aubaine. (d)

The droit d’aubaine continued to be part of the law of Lower Canada. On its cession, and the consequent change of sovereignty, the law of England, and not the law of France, of necessity determines the question who are aliens or not; but when the fact of alienage is established according to the English law, the civil consequences of alienage are determinable by the Canadian law. (e)

The act of the Legislature of that Province 1 Will. 4, c. 53, provides, “that all persons who have at any time received grants of land in the province from the crown, and all persons who have held any public office in the province, under the great seal of the province, or under the seal-at-arms and sign manual of the governor of the province, and all persons who have taken the oath of allegiance, or being of the persons who

(a) Cod. lib. 6, tit. 24, l. 1. Dig. lib. 28, tit. 5, l. 6, § 2; lib. 35, tit. 2, l. 1.
(d) Art. 292, Ferriere, ib. 264.
by the laws of the province are allowed to affirm in civil cases, have made affirmation of allegiance to his Majesty, or his Majesty's predecessors before any person duly authorized to administer such oath or affirmation; and all persons who had their settled place of abode in the province before the year 1823, and are still resident therein, shall be and are hereby admitted and confirmed in all the privileges of British birth, and shall be deemed, adjudged, and taken to be, and so as respects their capacity at any time heretofore to take, hold, possess, and enjoy, claim, recover, convey, devise, impart or transmit any real estate in the province of Lower Canada, or any right, title, privilege, or appurtenance thereto or any interest therein, to have been natural-born subjects of his Majesty, to all intents, constructions, and purposes whatsoever, as if they and every of them had been born in his Majesty's United Kingdom of Great Britain and Ireland; and that the children or more remote descendants of any person or persons of either of the foregoing descriptions who may be dead, shall be and are hereby admitted to the same privileges which such parents or ancestors, if living, could claim under this act."

The 15th section provides, that "in all cases where any person claiming to hold, as next entitled on account of any person nearer in the line of descent having been an alien, shall, in virtue of such claim, have taken actual possession of any real estate before the first day of January, 1828, and have made improvements thereon, and also in all cases where any person claiming to hold as next entitled, on account of the person nearer in the line of descent having been an alien, shall have actually contracted to sell or part with his real estate before the said first day of January, 1828, no person being at that time in adverse possession of the same; the provisions of this act shall not extend to render invalid any right or title to such
estate, but such right or title shall be taken and adjudged to be as if this act had not passed." (a)

The 148th article of the coutume of Normandy declares, "Les héritages et biens tant meubles qu’immeubles des aubains et étrangers, appartiennent au roy après leur mort, aux chargés de droit comme dit est encore qu’ils soient tenus d’autres seigneurs, s’ils n’ont été naturalisés et qu’ils ayent des héritiers légitimes regnicoles." (b)

Under the Code Civil, (c) an alien enjoyed in France the same civil rights as then were or thereafter might be conceded by treaty to French subjects by the nation to which such alien should belong.

A foreigner could not be admitted to succeed to property which his relative, whether foreigner or native French subject, might possess in France, otherwise than in the manner that a French subject could succeed in that country, of which the foreigner so dying possessed of property was a native. (d)

It was lawful to dispose by testament or donatio inter vivos in favour of a foreigner, provided only such foreigner could by the laws of his country make a similar disposition (so as to be valid) in favour of a French subject. (e)

The provisions contained in the articles 726 and 912 are repealed by the law of the 14th of July, 1819, by which it is ordained that aliens should have the right of succeeding, disposing of, and acquiring in the same manner as native French subjects throughout the whole extent of the kingdom. "Les Art. 726 et 912 du Code Civil, sont abrogés: en conséquence, les étrangers auront le droit de succéder, de disposer et de recevoir de la même manière que les Français dans toute l’étendue du royaume." (f)

(a) Donegani v. Donegani, 3 Knapp's Rep. 73, 4.
(b) Merville, p. 168. (c) Art. 11. (d) Art. 726.
"Dans le cas de partage d'une même succession entre des cohéritiers étrangers et Français, ceux-ci prélèveront, sur les biens situés en France, une portion égale à la valeur des biens situés en pays étranger, dont ils seraient exclus, à quelque titre que ce soit, en vertu des lois et coutumes locales." (a)

By the law of England, a devise of lands by an alien is at least voidable, (b) the crown being entitled after office found to seize them in the hands of the devisee, as it might in those of the alien during his life. But until office found, the lands of an alien remain in him, having all the qualities incidental to estates of that description. (c)

By the law of England and Scotland, alien friends may make testaments of their personal estate, but alien enemies, unless they have the king's license express or implied to reside in the kingdom, are incapable of making any testamentary disposition of their property.

In the United States a similar distinction exists.

IV. By the civil law, the incapacity to make a testament was incurred by those who were guilty of certain crimes, namely, treason, the publication of an infamous libel, heresy, apostacy, and by those against whom sentence of death, or of transportation, or confiscation of property had been passed. (d)

By the laws of Spain (e) and Holland, (f) the conviction does not incapacitate the party from making a testament, unless confiscation of property be part of the sentence.

By the law of Spain, the heretic convict, and the

(a) Merlin, ib.  (b) Shep. Touchst. 404.  (c) 4 Leon. 84.
(d) Dig. lib. 28, tit. 1, l. 8, 9, 13, § 2; lib. 32, 1, 1, § 2; lib. 29, tit. 3, l. 6, § 8.  Lauterb. lib. 28, tit. 1, n. 28, et seq.
(f) Sande, Decis. Fries. lib. 4, tit. 1, def. 2. Christin. ad leg. Mech. tit. 4,
convicted traitor, are incapacitated; but no incapacity is incurred in Holland, either by heresy or apostacy. (a)

In the Coutumes of Paris and Normandy, the incapacity is the consequence of a civil death, that is, of a condemnation to a natural death, or to the galleys for life, or perpetual banishment from the kingdom, if it be pronounced by a judicial tribunal of France. (b)

By the Code Civil the sentence of contumacy suspends, but does not absolutely destroy the civil status of the party. It is superseded by his appearance, or by his being arrested, or by his death, if he die within five years after the execution of the sentence, although he had neither appeared nor been arrested. But if after the expiration of the five years he has neither appeared nor been arrested, incapacity, and all the other consequences of his civil death, are incurred. (c)

By the law of England, persons who have committed treason or murder, if sentence of death ensues, (by which they are said to be attainted), lose all power over their property from the time of their criminal act, which, if it be high treason, gives a right to the king by forfeiture; if petit treason or other murder, to the lord by escheat. Other felonies, since the statute 54 Geo. 3, c. 145, it has been said, seem to leave to the offenders the power of disposing of their estates, to be enjoyed after their deaths. (d)

By the law of Scotland, the moveable estate falls as escheat to the king, upon sentence of death pronounced in a criminal trial; and by special statute, upon conviction of certain crimes, not capital, *ex. gr.* perjury and

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bigamy, (a) deforestation, breach of arrestment (b), and usury. (c)

In New York, forfeiture of property for crimes is confined to the case of a conviction for treason: and, by a law of the colony of Massachusetts as early as 1641, escheats and forfeitures upon the death of the ancestor, “natural, unnatural, casual or judicial,” were abolished for ever.

It is said that the forfeiture of estates for crimes is scarcely known in American practice or laws. (d)

Under the coutumes of Paris and Normandy, those who had entered into religious orders were civilly dead, and incapable of making a testament. (e)

The Code Civil does not recognize the profession of religious vows, and therefore no similar incapacity exists under that law.

In Spain, persons who embrace a religious order may make a testament before, but not after they take the vow. A clergyman may dispose of any of his property by way of testament. The pilgrim may freely dispose of his property by testament. (f)

V. The law prescribes a certain age, which of itself affords a presumption that the party has adequate discretion to make a testament. The civil law required that the person should have attained the age of puberty, which it fixed in males at fourteen, and in females at twelve years: "Testamentum facere non possunt im-puberes, quia nullum eorum animi judicium est." (g)

(a) Act, 1551, c. 19.
(b) 1581, c. 118.
(c) 1597, c. 247. Erskine, b. 2, tit. 5, § 57.
(d) Dane's Abr. vol. 5, p. 4, 11. 4 Kent's Com. p. 427.
(g) Inst. lib. 2, tit. 12, § 1. Dig. lib. 28, tit. 1, l. 5.

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The civil law has, in this respect, been adopted by the laws of Holland (a) and Spain. (b)

This age was sufficient to authorize the disposal by testament, as well of immovable, as of moveable property.

According to the coutume of Paris, the party must have completed twenty years to enable him to dispose of his moveables and acquêts, and twenty-five years to dispose of the fifth of his biens propres. But if he had neither moveables nor acquêts, he might dispose of the fifth of his propres at the age of twenty years: "Pour tester des meubles acquêts et conquêts immeubles faut avoir accompli l'âge de vingt ans. Et pour tester du quint des propres, faut avoir accompli l'âge de vingt cinq ans. (c) "Toutefois si le testateur n'a meubles, acquêts ne conquêts immeubles, peut audit cas tester du quint de ses propres, après vingt ans accomplis." (d)

According to the coutume of Normandy, the party must have completed twenty years, but it is permitted a child male or female of six years of age to make a testament of a third of his or her moveables. (e)

By the Code Civil, a minor under the age of sixteen years is not capable of making a disposition, and even when he has attained that age, he cannot dispose of more than half the property of which the law permits an adult to dispose. (f)

The law of England, until the passing of the recent statute, distinguished between a devise of real or immovable estate, and a bequest of personalty.

The statute 34 Hen. 8, c. 5, s. 14, enacted, that wills

(b) Tit. 18. lib. 10. Nov. Recop.
(c) Art. 293, 1 Dupless. p. 577, 578.
(d) Art. 294.
(e) Art. 414, 415.
(f) Art. 903, 904.
or testaments made of any manors, &c., by any woman covert, or person within the age of twenty-one years, idiot, or by any person of nonsane memory, should not be taken to be good or effectual in law. This law did not create any disability that was unknown, nor does it comprise all that was known to the common law, but seems to have been dictated by an apprehension that the general terms of the act of 32 Hen. 8, might have had the effect of removing pre-existing disabilities, according to the construction given to the nearly contemporary statute of jointures, 27 Hen. 8, c. 10. But until the recent statute was passed, personal estate might have been bequeathed by males of fourteen, and females of twelve years of age; (a) and such a will was valid, notwithstanding the testator or testatrix afterwards lived to majority without confirming it. (b)

Infants may devise real estate by special custom, but the custom must prescribe some definite and reasonable age; for a custom authorizing the making of a will by persons too young to be capable of exercising a discretion, would be no less absurd than one which should empower lunatics or idiots to devise their property. Fourteen, it seems, would be considered a proper age. (c)

But the recent statute has abolished this distinction, and no will made by any person under the age of twenty-one years is valid. (d)

In the States of America, the English statute of Wills long regulated the devise of real property, and the testable age was twenty-one. The testamentary disposition of personal estate might be made by males who had

(b) Hinkelley v. Simmons, 4 Ves. 160.
(c) 2 Anders. 12.
(d) 1 Vict. c. 26, § 7.
attained fourteen years, and by females who had attained twelve years of age. In Ohio and Illinois, females are competent to make a will of real and personal estate at the age of eighteen. (a)

By the New York Revised Statutes, (b) the age for making a will of personal estate is made that of eighteen in males, and of sixteen in females.

In the revision of the laws of New Jersey, as reported in 1834, it was recommended that none but adults should make a will in any case. The early Statute Law of Connecticut required the infant of either sex to be seventeen, to render him competent to dispose of personal estate by will. This is still the law of Connecticut. (c) In Massachusetts, the age to make a will of chattels is eighteen. (d) The act of 1831, in Ohio relating to wills, does not include married women among the persons incompetent to make a will, and they are presumed to have that power. (e)

In Louisiana, the minor under sixteen cannot dispose of any property, except in the following case, (f) viz., the husband or wife, if a minor emancipated, may by marriage contract give to each other, either by simple or reciprocal donation, whatever can be given by one of the parties who has attained the age of majority. (g)

A minor not being emancipated, can give only with the consent of those relations whose consent is requisite for the validity of the marriage, and with that consent, he or she can give all that the law permits a married person of full age to give to his or her consort.

If the relation whose consent is necessary be dead, the minor not emancipated, cannot make a donation without the previous authority of a court of justice. (h)

(b) Vol. 2, 60. Revised Statutes, 1835.
(c) Statutes, 1821. (d) Revised Statutes, 1835.
(e) 4 Kent's Comm. p. 505, note (e).
(f) Louisiana Code, art. 1463. (g) Art. 1740. (h) Art. 1741.
The minor above sixteen can dispose only mortis causâ. (a)

In favour of the exercise of the testamentary power, the law deems the last day of the age of puberty complete as soon as it commences. Thus the person is considered to have attained puberty on the last day of the fourteenth year, and a testament made on that day would be valid.


The testament of the person who, at the time he made it, had not attained the prescribed age, continues void, and does not become valid, notwithstanding he may have survived that age, and until the time of his death adhered to the will. In this case, "quod ab initio non valet, tractu temporis non convalescere potest." To render it effectual, he must again execute it with all the solemnities which the law requires as essential to its validity. (c)

VI. By the civil law, a married woman was capable of making a testament without the consent of her husband. (d)

(a) Art. 1464.
(b) Dig. lib. 28, tit. 1, l. 5; lib. 4, tit. 4, l. 1. Voet, lib. 28, tit. 1, n. 31; lib. 4, tit. 4, n. 1. Herbert v. Torball, 1 Sid. 162. S. C. T. Raym. 84.
(d) Dig. lib. 28, tit. 6, l. 33.
In Holland, although she was not allowed to make a contract without the consent of her husband, yet she was permitted to make a will, because it did not take effect until the marital authority had ceased by the death of her husband. (a)

The same rule prevails in Spain. (b)

The coutume of Paris, (c) and the Code Civil, (d) permit the wife to make a testament without the consent of her husband.

But by the coutume of Normandy, she could not make it, unless with the authority of her husband, or in case of his refusal, that of the judge. (e)

In England, the Statute of Wills, 34 & 35 Hen. 8, c. 5, has expressly excluded married women from the power of devising real estate.

Neither can a married woman make a will of her chattels, because the effect of her coverture is, that the husband becomes entitled to them, and she ceases to retain any property in them.

But the husband may waive his interest, and assent to the particular testament she has made, and his assent to its probate will render it as effectual in disposing of chattels as if she were sole. (f)

His general assent that she may make a will is not sufficient. (g) It may be revoked by him during the life of his wife, and indeed, at time any before the probate of the testament. (h)

His assent may be implied from circumstances, and if he acts on the testament after her death, or once

(f) Roper, Husband and Wife, 170, 2nd ed. (g) Rex v. Bettesworth, 2 Str. 891. (h) Henley v. Phillips, 2 Atk. 49.
agrees to it, he cannot, it seems, oppose the probate. (a)

If it has been made in pursuance of a previous express consent or agreement, the consent will be inferred from slight circumstances. (b)

The husband’s assent gives validity to the instrument only in the event of his surviving the wife. If he pre-deceases his wife, the will cannot be set up against the wife’s next of kin, for the husband’s assent was merely a waiver of his right to be her administrator. (c)

But the will made by the wife during her coverture may, after the death of her husband, be recognized by her without any new publication, and by such recognition it will operate as a new will. (d)

A testament made by a woman before her marriage does not revive upon the mere death of her husband, yet she may by recognition, without the formalities of a new publication, give effect to it, and it will be as effectual so far as it relates to personal property, as if it had been made by her during her widowhood. (e)

The testament to which her husband had given his assent will not pass any property acquired by her after his death, for as he never had any interest in it she could derive no power from him, and as she had, in respect thereof, no representative power of transmission, her testament as to such subsequently acquired property, must stand on the footing of a will made by a feme covert. (f)

The disability of coverture is the creature of civil policy, and may be dispensed with at the pleasure of

(a) 1 Roper ib. 170.
(b) 1 Roper, ib. 170.
(c) Ib. Stevens v. Bagwell, 15 Ves. 156.
(e) Lewis’s case, 5 Burn’s Eccles. Law, p. 51.
(f) Scammel v. Wilkinson, 2 East, 556.
the contracting or disposing parties, so far at least as the *jus disponendi* is concerned. (a)

A woman, whose husband has been banished for life by Act of Parliament, may dispose by will of her real and personal estate, for as he is civilly defunct, she is restored to the rights and privileges of discoverte. (b) And where a felon is transported for a definite term of years, his marital rights (and therefore it would seem his wife’s conjugal disabilities) are suspended for that period. (c)

In Louisiana, the wife may make her testament without the authority of her husband. (d)

Although by the law of Scotland a married woman cannot, in the form of writing *inter vivos*, dispose of or burden such moveable subjects as may accrue to her on the death of her husband, though his interest be then at an end, because no subject can be conveyed effectually by a present deed of alienation, to which the granter has not a proper right at the date of the grant; and the wife has no more than the hope or prospect of a right to the goods in communion while the marriage subsists, (e) yet she may bequeath the share of these goods by testament, even without the husband’s consent, in the same manner that a minor can test without the consent of his curators. She may, upon the same ground, become bound for a sum of money, in the form of a deed *inter vivos*, if it be not to take effect until after her death. (f)

VII. Persons who, although they may have attained the prescribed age, are destitute of the reason which is

(a) Hearle v. Greenbank, 3 Atk. 695.
(c) See Ex parte Franks, 1 Moore and Scott, 11, cited 10 Bythewood by Jarm. p. 4.
(d) Louisiana Code, art. 132.
(e) Dec. 19th, 1626, Matthew, Dict. 959.
presumed by the law to accompany that age, are incapable of making a testament. This is an incapacity recognized by all codes. In this class are comprised persons described in the civil law as *furiosi, mente capti*, or as not possessing *integritas* or *sinceritas mentis.* (a) "In eo, qui testatur, ejus temporis, quo testamentum facit, integritas mentis, non corporis sanitas, exigenda est;" (b) and by the law of England, as *non compotes mentis.* (c)

Under one or the other of these descriptions are included idiots, who have been deprived of reason from their nativity, and never enjoy any lucid intervals, and lunatics or persons usually mad, but having intervals of reason. (d)

A testament made by the lunatic during the time of his insanity is void, whilst on the other hand if it be made during a lucid interval, that is, whilst he possesses *integritatem mentis*, it is valid. (e) “Furiosi autem, si per id tempus fecerint testamentum, quo furator eorum intermissus est, jure testati esse videntur; certè eo, quod ante furorem fecerint, testamento valente. Nam neque testamentum rectè factum, neque ullam aliquud negotium rectè gestum, postea furator interveniens perimit.” (f)

Here it may be observed that the burden of proving the mental incapacity rests on him who would on that ground invalidate the testament. (g) The sanity is presumed until the contrary is proved by clear and satisfactory evidence, nor is this presumption rebutted

(b) Dig. lib. 28, tit. 1, l. 2. (c) Co. Litt. 246, b.
(e) Grotius, Manud. ad Jursip. Holl. lib. 2, c. 15, n. 2. Voet, ib.
(f) Inst. lib. 2, tit. 12, § 1.
by evidence of insanity even three days after the will was made, if there be no evidence of insanity at the time the instructions for it were given. (a)

But if insanity previous to the execution of the testament has been clearly established, and it is alleged that the testament was made during a lucid interval, the onus probandi is transferred to the person who alleges the capacity. If it can be established that the party afflicted habitually by a malady of the mind has intermissions, and if there was an intermission of the disorder at the time of the act, that being proved is sufficient, and the general habitual insanity will not effect it. But the effect of it is this, it inverts the order of proof and of presumption; for until proof of habitual insanity is made, the presumption is that the party, like other human creatures, was rational; but where an habitual insanity in the mind of the person who does the act is established, there the party who would take advantage of the fact of an interval of reason must prove it. (b)

The Chancellor D'Auguesseau has, in his celebrated pleading in the case of the Prince de Conté and the Duchess de Nemours, given a definition of the nature of that lucid interval which would give validity to the act done during its continuance: "Un intervalle lucide n'est point une tranquillité superficielle, ni une ombre de repos, inumbra quies, comme le remarque la loi 18, § 1, D. de acquisitions. Ce n'est point une simple diminution, une rémission de mal, mais une espèce de guérison passagère, une intermission si clairement marquée, qu'elle est entièrement semblable au retour de la santé; et comme il est impossible de juger en un moment de la qualité de l'intervalle, il faut qu'il dure assez long-temps pour pouvoir donner une entière certitude du rétablissement passager de la raison."

(b) Cartwright v. Cartwright, 1 Phill. R. 100.
Intervalla perfectissima ut in quibusdam etiam pene pene furor esse remotus dit la loi 6, D. de curatoribus furiosorum. Il faut, comme dit la loi 9, C. qui testamenta facere possunt, une entière suspension, une véritable trêve inducīs. De-là il suit qu’il ne faut pas confondre une action sage avec un intervalle lucide, parce qu’une action peut être sage en apparence, sans que celui qui en est l’auteur, soit sage en effet. L’action n’est qu’un effet rapide et momentané de l’âme; l’intervalle dure et se soutient. L’action de sagesse est un acte, l’intervalle lucide est un état. Il y a des exemples de fous qui ne sont fous que sur un seul point, et qui sont sages sur tout le reste. Cependant il est bien certain que de tels insensés sont hors d’état de faire un testament. D’ailleurs, s’il ne fallait que quelques actions sages pour prémunir des intervalles lucides, on ne pourrait jamais articuler la démence avec succès, parce qu’il serait toujours aisé de trouver quelques témoins qui parleraient d’actions de sagesse.”

Lord Thurlow adopts this doctrine: “General rules are easily framed; but the application of them creates considerable difficulty in all cases in which the rule is not sufficiently comprehensive to meet each circumstance which may enter into and materially affect the particular case. There can be no difficulty in saying, that if a mind be possessed of itself, and that at the period of time such mind acted, that it ought to act efficiently. But this rule goes very little way towards that point which is necessary to the present subject, for though it be true that a mind in such possession of itself ought when acting to act efficiently, yet it is extremely difficult to lay down with tolerable precision the rules by which such state of mind can be tried. The course of procedure for the purpose of trying the state of any person’s mind allows of rules. If derangement be alleged, it is clearly incumbent on the party alleging it
to prove such derangement; if such derangement be proved, or be admitted to have existed at any particular period, but a lucid interval be alleged to have prevailed at the period particularly referred to, then the burden of proof attaches on the party alleging such lucid interval, who must show sanity and competence at the period when the act was done, and to which the lucid interval refers. (a) The evidence in such a case applying to stated intervals ought to go to the state and habit of the person, and not to the accidental interview of any individual, or to the degree of self-possession in any particular act; for from an act with reference to certain circumstances, and which does not of itself mark the restriction of that mind which is deemed necessary in general to the disposition and management of affairs, it were certainly extremely dangerous to draw a conclusion so general, as that the party who had confessedly before laboured under a mental derangement was capable of doing acts binding on himself and others. (b)

There is an infinite variety of shape and degree in which madness may subsist from the maniac chained down to the floor, to the person apparently rational on all subjects and in all transactions except on one subject, and cases occur in which a will is founded on and the offspring of a delusion or partial insanity on that subject. There may be perhaps greater difficulty in establishing partial insanity where the general sanity or capacity is admitted, than in proving a lucid interval when general insanity has been established. But if this difficulty be surmounted, the contest would only be on the sufficiency of the proof, because it cannot be seriously doubted that it would invalidate a testament founded on and the offspring of it.

"The true criterion—the true test—of the absence or

(b) 11 Ves. 10. Attorney General v. Parnther, 3 Bro. C. C. 443.
presence of insanity, has been stated to be the absence or presence of what, used in a certain sense of it, is comprisable in a single term, namely, delusion. Wherever the patient once conceives something extravagant to exist which has still no existence whatever but in his own heated imagination; and wherever, at the same time, having once so conceived, he is incapable of being, or, at least, of being permanently reasoned out of that conception; such a patient is said to be under a delusion, in a peculiar, half-technical, sense of the term; and the absence or presence of delusion so understood forms the true and only test or criterion of absent or present insanity. Delusion, in this sense of it, and insanity, are almost, if not altogether, convertible terms; so that a patient, under a delusion, so understood, on any subject or subjects in any degree, is, for that reason, essentially mad or insane on such subject or subjects in that degree. On the contrary, in the absence of any such delusion, whatever extravagances a supposed lunatic may be justly chargeable with, and how like soever to a real madman he may either speak or act on some or on all subjects; still, in the absence of any thing in the nature of delusion, so understood, the supposed lunatic is, in my judgment, not properly or essentially insane.” (a)

The case of Dew v. Clark was that of a father who was fully proved, generally speaking, to have been in a state of delusion throughout, as to his child’s conduct and character, almost from her earliest infancy. The attempt on the part of the residuary legatees to account for the extraordinary treatment which the child was proved to have uniformly experienced at the hands of the father, namely, by imputing this to gross misconduct in the child, operating upon a peculiar state of feelings and opinions (short of insanity) in the father, had, in the opinion of the Court, wholly failed. (b)

(b) 3 Add. Ecc. Rep. 179.
“Subject to these considerations, the question,” says
the learned judge, “in the end to be determined, the
point at final issue is, not whether the deceased's in-
sanity in certain other particulars, as proved by the
daughter, should have the effect of defeating a will gene-
really of the deceased, or even this identical will; but it
is, whether his insanity on the subject of his daughter,
as also proved by the daughter, should have the effect of
defeating, not so much any will (a will generally) of the
deceased, as this identical will, and to the decision of that
question I am to be understood as solely addressing my-
self in the following observations:” And he concluded by
expressing his clear opinion that “the will propounded
in this cause, a will virtually disinheriting the daughter,
being (plainly so to be inferred) the direct, unqualified
offspring of that morbid delusion proved, I may now say
without any qualification or restriction, to have been ever
present to the mind of the deceased, as to the character
and conduct of his daughter, being, if I may so term it,
the very creature of that morbid delusion put into act and
energy, I, at least, can arrive at no other conclusion
than that the deceased was insane at the time of his
making the will propounded in this cause; and consequently
that the will itself is null and void in law.”

This decision was brought under the consideration of a
commission of Delegates and affirmed. (a)

The infirmities of old age and diseases do not, unless
they deprive the person of reason, induce incapacity to
make a testament: “Senium quidem ætatis vel ægri-
tudinem corporis sinceritatem mentis tenentium testa-
menti factionem certum est non auferre.” (b)

This rule is universally adopted. (a)

In the enumeration of those whom Lord Coke describes
as non compotes, are persons who were of good and sound

(b) Cod. lib. 6, tit. 22, l. 3. Voet, lib. 28, tit. 1. n. 36.
memory, but by the visitation of God have lost it; and those who have lost it by their own act as drunkards. In the former of these two classes he includes those who from sickness, grief, old age, or accident, have lost their reason. (a)

The old age of the testator can have no other effect than that of exciting increased vigilance in those to whose judicial examination the acts of the party may be submitted. It has been well said, that to arrive at the true meaning of imbecility or weakness of understanding, whether it proceeds from old age or any other cause, we may resort to what the law prescribes as perfect capacity, which is most correctly found in the form of pleadings. The averment to be contained in a common conditit is, that the testator was "of sound mind, memory, and understanding; talked and discoursed rationally and sensibly, and was fully capable of any rational act requiring thought, judgment, and reflection." Here is the legal standard. When all this can be truly predicated of the person, bare execution is sufficient; but if it cannot be truly predicated, a deficiency of capacity exists; a deficiency not necessarily rendering the person intestable, but in proportion to the degree of deficiency, requiring clearer and more direct proof of the unbiased testamen
tary intention. Imbecility and weakness of mind may exist in different degrees between the limits of abso-
olute idiocy on the one hand, and of perfect capacity on
the other. When the law uses the terms "mind, mem-
ory, understanding, thought, judgment, reflection," it
must not be supposed that they are quite synonymous,
that each means precisely the same thing. (b)

"He that is overcome by drink," says Swinburne, "during his drunkenness is compared to a madman, and therefore if he make his testament at that time, it is void in law; which is to be understood, when he is so exces-

(a) Co. Litt. 247, a. 4 Rep. 124. 4 Bl. Com. 25.
(b) Ingram v. Wyatt, 1 Hagg. Ecc. Rep. 401.
sively drunk, that he is utterly deprived of the use of his reason and understanding; otherwise albeit his understanding is obscured, and his memory troubled, yet he may make his testament being in that case." (a)

There is scarcely an act of which an insane person can be guilty which may not arise from intoxication. Intoxication is in truth temporary insanity; the brain is incapable of discharging its proper functions; there is temporary mania, but that species of derangement when the existing cause is removed, ceases. Sobriety brings with it a return of reason. Unless then it could be shewn that at the particular time when the will was made, the deceased was so excited by liquor, or so conducted himself in doing the particular act as to be legally disqualified at the moment from giving effect to such act, the evidence fails to establish satisfactorily that the deceased was at all times or generally of unsound mind. (b)

The effects of drunkenness or ebriety only subsist whilst the cause, the excitement, visibly lasts; there can scarcely be such a thing as latent ebriety, so that the case of a person in a state of incapacity from mere drunkenness or ebriety, and yet capable to all outward appearance, can hardly be supposed. Consequently, in this description of case, all which is required to be shewn is the absence of the excitement at the time of the act done, at least the absence of the excitement in any such degree as would vitiate the act done, for it must be conceded, that under a mere slight degree of that excitement, the memory and understanding may be in substance as correct as in the total absence of any exciting cause. Whether where the excitement in some degree is proved to have actually subsisted at the time of the act done, it did or did not subsist in the requisite degree to vitiate the act done, must depend in each case upon a due con-


(b) Ayrey v. Hill, 2 Add. 209.
sideration of all the circumstances of that case itself in particular. (a)

Persons deaf and dumb ab ipsâ naturâ were not considered competent to make a will, because they were presumed to be idiots. (b) “Discretis surdo et muto, quia non semper hujusmodi vitia sibi concurrunt: sancimus, si quis utroque morbo simul laboret, id est, ut neque audire, neque loqui possit, et hoc ex ipsâ naturâ habeat: neque testamentum facere, neque codicillos, neque fideicommissum relinquare, neque mortis causâ donationem celebrare concedatur.” (c)

But this presumption may be rebutted by sufficient proof that the person understands what a testament means, and is desirous of making one. It does not exist if he was not born deaf and dumb, but the infirmity was induced by disease: “Ubi autem et hujusmodi vitii non naturalis, sive masculo, sive feminâ accidit calamitas, sed morbus postea superveniens et vocem abstulit, et aures conclusit: si ponamus hujusmodi personam literas scientem: omnia quæ priori interdiximus, hæc ei suâ manu scribenti permittimus.” (d)

“Sin autem infortunium discreetum est, quod ita rarò contingit: et surdis, licet naturaliter hujusmodi sensus variatus est, tamen omnia facere et in testamentis, et in codicillis, et in mortis causâ donationibus, et in libertatibus et in omnibus aliis permittimus.” (e)

Such as are only deaf, and not dumb, may make their testaments. (f)

Such as can speak and cannot hear, may make their testaments, as if they could both speak and hear, whether that defect came by nature or otherwise. (g)

(b) Perez. Cod. lib. 6, tit. 22, n. 5.
(c) Cod. lib. 6, tit. 22, l. 10.
(d) Cod. ib. (e) Ib.
(g) Cod. ib. Godolph. ib. Swinh. ib. pl. 3.
Such as are speechless only and not void of hearing, if they can write, may very well make their testaments themselves by writing; if they cannot write, they may also make their testaments by signs, so that the same signs be sufficiently known to such as then be present. (a)

The question when the person labours under these infirmities is, whether he has competent understanding of the act in which he is engaged. (b)

The Code Civil allows a testator who cannot speak, but is able to write, to make a mystic will, provided such will is written throughout, dated, and signed with his own hand, that he present it to the notary and to the witnesses, and that at the head of the act of superscription he writes in their presence that the paper which he presents is his will, after which the notary must write the act of superscription, in which mention is to be made of the testator having written these words in the presence of the notary and of the witnesses, and moreover every thing is to be observed which is prescribed in the article respecting mystic wills. (c)

A blind person was competent to make a will, but to protect him against imposition the civil law prescribed a particular form in which it should be made. It was to be declared by him before a notary and seven witnesses assembled for this purpose, and reduced to writing uno contextu by the notary, or if a notary could not be obtained, an eighth witness was to be present, and being reduced to writing, it was to be signed and subscribed by the notary and witnesses. (d)

In Spain this requisition of the civil law was retained. (e)

(a) Cod. lib. 6, tit. 22, l. 10. Godolph. ib. Swinb. ib. pl. 4. 4 Burn’s Eccles. Law, 60.
(c) Art. 979. See infra.
(d) Cod. lib. 6, tit. 22, l. 8.
(e) Carps. Def. For. part 3, const. 6, def. 1. L. 3, tit. 1, p. 6.
In Holland two witnesses with the notary are deemed sufficient, although it is considered by other jurists as a measure of precaution that there should be a third witness to the will of a blind person. (a)

In France, although the ordinance of 1735 has required that in those provinces which adopted the civil law there should be an additional witness where the testator was blind, yet it has enforced no additional formalities in the pays coutumier. (b)

Those who know not how, or who are unable to read, are not allowed to make dispositions in the form of a mystic will. (c)

In England it is not necessary to the validity of the execution of a will of lands by a blind man, that it should be read over to him in the presence of the attesting witnesses. It was held sufficient that it was established by an unimpeached witness, who took instructions from the mouth of the blind man himself and wrote them down. (d)

The testator may be endowed with adequate capacity to make his testament, but at the same time he may have made it under circumstances which deprived him of the freedom of will.

Those circumstances may of themselves be sufficient to deprive him of free agency, whatever be the degree of his capacity, or their effect might not be sufficient for that purpose, unless he had laboured under a mental weakness, although without the intervention of those circumstances, his mind would not have been inadequate to the perfection of the will. (e)


A will obtained by actual force or by fear, that is by a just fear, "satis gravis qui meritò et in hominém constantem cadit," or by fraud, is void. In deciding whether either of these causes has deprived the testator of the freedom of will, the degree of mental capacity, the state of bodily health, and various other circumstances, will form important considerations. (a)

There are other means by which the testator might be deprived of his freedom of will, and which might be practised with great facility, and these may not admit of being proved to have produced that effect. Of this description are wills obtained by importunities and influence.

There prevailed amongst the Romans, a numerous class of persons who practised every species of artifice and address to ingratiate themselves with testators, and procure bequests from them. (b) They were called Captatores and Hæredipææ. Pothier has thus defined such institutions as were deemed captoríæ, and on that account condemned: "Similiter propter inhonestum finem, captoriae institutiones reprobatae sunt senatusconsulto quodam; quum scilicet quis aliquem hæredem instituit, ut sibi ejus hæreditatem captet." (c) "Cæterum captoriais institutiones non eas senatus improbavit, quæ mutuis affectionibus judicia provocaverunt; sed quarum conditio confertur ad secretum alienæ voluntatis," (d) "Illæ autem institutiones captoriae non sunt: veluti si ita hæredem quis instituat, quæ ex parte Titus me hæredem instituit, ex eà parte Mævius hæres esto: quia in præteritum, non in futurum institutio collata est. Sed illud quæri potest, an idem servandum sit, quod senatus censuit, etiam si in aliam personam captionem direxerit? Veluti

(b) Martial. l. 9, Epigr. 36. Juvenal, Satyr. 5, 7. Cicero, Off. l. 3.
(c) Pothier, ad Pand. lib. 28, tit. 5, § 43.
(d) Pothier, ib. Dig. lib. 28, tit. 5.1. 70. Voet, lib. 28, tit. 5, n. 28.
si ita scripsisset: Titius si Maxium tabulis testamenti sui heredem à se scriptum ostenderit, probaveritque, hæres esto. Quod in sententiam S. C. incidere non est dubium.” (a)

If the testator is deprived of the exercise of his free agency by importunity and influence, his will is invalid.

The texts of the civil law are directed against those solicitations and persuasions which are accompanied by falsehood or fraud. Thus when it avoids a testament which the party has made, not sponte suâ, but by compulsion, it gives its sanction to mere persuasion.

“Civili disceptationi crimen adjungitur, si testator non suâ sponte testamentum fecit, sed compulsus ab eo, qui hæres est institutus, vel a quolibet alio, quos noluerit scripsit hæredes.” (b)

“Quod si non coactus sed persuasus est testator, cessat pæna.” (c)

“Judicium uxoris postremum in se provocare maritali sermone non est criminosum.” (d)

“Vrum, qui non per vim, nec dolum, quo minus uxor contra eum, mutatâ voluntate, codicillos faceret, interesseat sed (ut fieri adsolet) offensam sêgræ mulieris maritali sermone placaverat, in crimen non incidisse respondi; nec ei, quod testamento fuerat datum, auferendum.” (e)

The commentators admit that the laws do not affect to reach mere importunity or influence, unless it is accompanied by those other circumstances which deprive

(a) Dig. lib. 28, tit. 5, l. 71. (b) Cod. lib. 6, tit. 34, l. 1.
(c) Poth. ad Pand. lib. 29, tit. 6, § 5. (d) Cod. lib. 6, tit. 34, l. 3.
the testator of freedom in exercising this power of disposition. (a)

A will made upon the interrogation of another person may, from the relation in which the interrogant stands to the testator, be subject to the suspicion of having been obtained by suggestion or importunity, rather than from the free will of the testator. Carpzovius says, "non semper testamentum ad alterius interrogationem conditum validum habetur. Non certè, tunc quando interrogatio est facta à personâ suspectâ, ei, qui est in ultimo mortis articulo constitutus. (b) Nam eo casu attentâ qualitate interrogantis, et statu interrogati resultat vehemens suspicio, quod testator potius ad suggestionem et importunitatem illius ita responderit, quàm quod talis esset eius voluntas. Hinc nec testamentum à marito vel muliere àegrà ad interrogationem conjugis subsistere potest." (c)

If the testament should not have been made on such interrogation, but is impugned as having been obtained by importunity, the same jurist, in stating the nature of the constitution against wills thus obtained, also lays down the general doctrine of the civil law. "An ergò testatorem blandis verbis ad condendum testamentum inducere non licebit? Hoc inde non sequitur, quam durae ac importunae sollicitationes et flagitationes tantùm hâc constitut. prohibeantur. Unde ad blanditas amicabiles nihil inferendum: Blando siquidem sermone omninò licet invitatre testatorem, ut aliquem hæredem instituat, neque ex eo institutio vitiosa redditur." (d) "Sed hoc ita, si dolus blandientis non intervenerit: Non enim subsistit testamentum, quod testator dolosis ac falsis persuasionibus inducens

(a) Brunneman, ad lib. 29, tit. 6, l. 3. Leyser, spec. 375. Lauterbach, ad Pund. lib. 29, tit. 6. Carps. Def. For. p. 3, const. 5, def. 6, et seq.
(b) Jul. Clarus, lib. 3, § Testamentum, quest. 37, n. 6.
(d) Carps. ib. def. 7.
fecerit (a) Ergò multùm differunt blanditiæ à falsis et dolosis persuasionibus." (b)

"Vicinae sunt violentæ coactioni importunæ solicitationes, umgestumæ unhalten, uti ab Electore Saxone in constitutione, 5. P. 3. vocantur, quando quis continuis precibus, flagitationibus, clamoribus et persuasionibus testatorem ita fatigat, ut ille tandem pertæsus atque se à molestiis liberaturus hæredem vel legatarium faciat eum, quem importunus iste solici{t}or jubet." (c)

Leyser has given a definition of that species of importunity or suggestion which would avoid the act: "Sexto inter captatorias artes loco ponimus suggestionem, quà tunc intervenire dicitur, quum apparet, testatorem non, quà ipse senserit, sed magis alieni animi sententiam expressisse. Veteres hoc, dictare testamentum alienum, vocabant. Memorabilis est Plinii locus in lib. 2, epist 20. Aurelia, inquietis, ornata femina, signatura testamentum, sumperat pulceperrimas tunicas, Regulus, quum venisset ad signandum: voco, inquit, has mihi leges. Aurelia ludere hominem putdabat, ille serio instabat. Nec multa. Coegit mulierem aperire tabulas, a sibi tunicas, quas erat induta, legare; observavit scribentem, inspexit, an scripsisset. Tandem in fine adjicit: Improbissimum est genus falsi, aliena testamenta ipsis, quorum sunt illa, dictare." (d)

"Ad suggestionem refero intempestivas interrogationes, quæ in testamento nuncupativo interveniunt, et toties illud vitiæ, quoties testator ipse voluntatem suam et præcipue nomina hæredum non pronunciat, sed simplici voce aut nutu id, de quo alius eum interrogat, affirmat." (e)

The law of France has adopted the term suggestion to express that importunity or influence to which a

(a) Petr. Peck. lib. 4. de Test. Conjug. c. 3, n. 1, et seq.
(b) Carpsi. ib. def. 8.
(c) Leyser, spec. 375, n. 8.
(d) Ib. n. 13.
(e) Ib. n. 14.
testator may be subject, and of which alone, and not of his free will, the testament has been the offspring. The 47th article of the ordinance of 1735 is particularly directed against it. This term is used by commentators on the civil law, but the law of England, although it does not adopt the term, yet is equally strict in denying effect to a testament which has been obtained from a testator under such circumstances of importunity or influence, as precluded the freedom of agency. "La suggestion est aussi un vice dans les legs, qui les rend nuls. Un legs est fait par suggestion, lorsque, le testateur a été vivement sollicité à le faire, soit par le légataire, soit par d'autres, dans le temps, ou peu avant la confection de son testament; ce qui fait présumer que le testateur l'a fait plutôt pour se délivrer de l'importunité de ceux qui le portaient à le faire, que par un motif d'une juste affection." (a)

"Il résulte des notions que nous avons données de la suggestion, que ce n'est pas un fait de suggestion suffisant, que de mettre en fait que, lors de la confection du testament, celui, au profit duquel il a été fait, était présent; car suggérer, c'est importuner et solliciter vivement: la seule présence de cette personne lors de la confection du testament, n'est donc pas une suggestion, lorsqu'on ne met pas en fait qu'elle a sollicité le testateur à faire ces dispositions. C'est ce qui a été jugé par un arrêt rendu en la grand' chambre le 1st Aout 1650, que rapporte Ricarde, Tr. des donat. par. 3, c. 1, n. 52, qui a confirmé un testament fait par une femme au profit de son mari, dans la coutume de Chartres, quoiqu'on soutint que son mari était présent lors de la confection.

"Ricard, dans le même chapitre qu'on vient de citer No. 52, apporte pour exemple d'un fait pertinent de

(a) Poth. Intr. au Titre. 16, Sect. 2, § 4, Art. 2, n. 29.
suggestion, lorsqu'on met en fait que, lors de la confection d’un testament, il y avait une personne qui dictait les dispositions du testateur, que le testateur ne faisait que répéter et approuver. Cela me parait dépendre des circonstances ; car si le testateur, à cause de son peu d’intelligence ou de l’accablement de son mal, ayant peine à faire entendre par lui-même au notaire ses intentions, avait appelé une personne de ses amis, non suspecte et non intéressée, pour les faire mieux entendre, je ne penserais pas qu’on pût regarder cela comme une suggestion. Hors ces circonstances, ce serait un fait pertinent de suggestion.

“Observez que la suggestion, qui annule les dispositions testamentaires, doit être lors de la confection du testament ; c’est pourquoi Ricard décide fort bien que ce ne sont pas des faits pertinens de suggestion, que de mettre en fait que le testateur a été vivement sollicité à faire les dispositions qu’il a faites dans des temps fort antérieurs à celui de la confection de son testament ; car ces sollicitations, auxquelles il a résisté, ne concluent pas qu’il a fait son testament par suggestion ; il a pu, depuis qu’elles ont cessé le faire de sa pure volonté ; il faut prouver qu’elles ont duré jusqu’au temps de la confection.” (a)

“La suggestion,” says Furgole, “n’est un moyen de cassation des dispositions, qu’autant qu’elle rend la disposition involontaire, et qu’elle est fondée sur le dol, et que la preuve des faits de suggestion n’est recevable que quand ils tendent à la preuve du dol, c’est à dire, que les dispositions ont été surprises par des inspirations et des suggestions artificieuses et frauduleuses ; et c’est avec fondement que Menochius (de arbitr. casu, 395. n. 45), et les autres interprètes du droit romain, exigent quod falsæ et dolœæ suggestiones adhibite sint.” Merlin adopts this definition : “On

(a) Poth. Tr. des Test. c. 2, § 2, art. 7, p. 304.
pressent bien par-là de quelle nature doivent être des faits de suggestion, pour opérer la nullité d'un testament. Il faut qu'il en résulte que la volonté écrite du testateur est contraire à sa propre raison; qui n'a fait telle ou telle disposition, que parce qu'il y a été force par l'obsession d'autrui, par une faiblesse marquée, et dont les preuves ont éclaté au dehors; que cette obsession a été l'unique cause de ses dispositions; et que si elle n'avait pas eu lieu, il en aurait fait de toutes contraires; en un mot, il faut que le testament contienne une volonté entièrement opposée à celle qu'il avait dans le cœur, et que le dol, la fraude et l'artifice dont on s'est servi pour le séduire, soit l'unique mobile qui ait pu le déterminer." (a)

The importunity which would have the effect of invalidating a bequest must, according to the definition given by a learned judge, be in such a degree as to take away from the testator free agency; it must be such importunity as he is too weak to resist; such as will render the act no longer the act of the deceased; not the free act of a capable testator in order to invalidate an instrument. (b)

"If a dominion was acquired by any person over a mind of sufficient sanity for general purposes, and of sufficient soundness and discretion to regulate his affairs in general, yet if such a dominion or influence were acquired over him as to prevent the exercise of such discretion, it would be equally inconsistent with the idea of a disposing mind, and perhaps the most probable instance of such a dominion being acquired is that of an artful woman like the present, having taken possession of a man and subdued him to her purpose." (c)

The influence to vitiate an act must amount to force and coercion, destroying free agency; it must not be

(b) 2 Phill. 551, see Cochin, vol. 6, 294. Ib. vol. 7, 496.
(c) Mountain v. Bennet, 1 Cox's cases, p. 355.
the influence of affection and attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act; further there must be proof that the act was obtained by this coercion, by importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear. (a)

Dispositions made in favour of persons standing in particular relations to the testator were presumed to be the effect of suggestion. Thus the disposition by a minor in favour of his guardian or curator; by a novice in favour of her convent; by a penitent in favour of her confessor; by a man in favour of his mistress, were without any other proof regarded "comme la part de la suggestion."

A will made by a prodigal whilst he was under interdict was void by the civil law. But by the 39th Novell of Leo, his disposition would be sustained if made in favour of his necessary heirs, or of the poor, or for pious uses, or for any other purpose which did not evince prodigality. (b) On this authority, the will of a prodigal having no children, and who bequeathed by it the usufruct of his estate to his wife, was sustained. But as the interdict deprives the person of the power of making any disposition of his property, it is considered more safe that he should obtain permission to make his testament. (c)

It has been seen that when the capacity to make a testament depends on the competence of the mind or body for that act, it is sufficient that it exists at the time


(c) Ib.
the testament was made. But if it depends on the status of the person, it must exist not only at the time of making the will, but at the time of the testator’s death, because if that incapacity be wanting at the latter period, the succession cannot be transmitted. (a)

CHAPTER VIII.

TESTAMENT—OF THE CAPACITY TO TAKE.

Persons incapable of making may not be incapable of taking under a testament.—Persons capable.—Child in utero as mere.—Posthumous child.—Corporations and religious communities.—Amortisatio.—Policy of Holland, Spain, and France, to restrain these institutions from taking by bequest.—Statutes of Mortmain in England.—Colonies.—United States.—Persons condemned to death, or who have entered into monasteries.—Aliens.—Incapacities from the relation of the devisee to the devisor.—Guardians, masters, and others.—Law of Holland, Spain.—Coutumes of Paris and Normandy.—Code Civil.—Periods when the devisee must be capable.—Effect of a change in the law between the time of the testament and the death of the testator.

Persons may be incapable of taking under a testament in consequence of the devise to them being in violation of some of the restrictions imposed on the power of testamentary disposition. Thus the testator may have omitted to institute the heir, or he may have passed over those whom he ought to have instituted, or he may have devised property to persons when the property itself was not the subject of testamentary disposition, or could be bequeathed only to certain persons, and the devisee is not one of those persons.

The incapacities which proceed from the testator not having conformed to, but exceeded the powers of testamentary disposition which the law has granted him, have been already considered in treating of the power
of testamentary disposition, and the restrictions imposed on it.

The incapacity to make does not infer an incapacity to take under a testament; on the contrary, many of those who are incapable of making a testament are capable of taking under it. Minors, fames covert, lunatics, idiots, may be instituted heirs, and take by devise. "Testamenti autem factionem non solum is habere videtur, qui testamentum facere potest: sed etiam qui ex alieno testamento vel ipse capere potest, vel alii adquirere, licet non possit facere testamentum. Et ideo furiosus, et mutuds, et posthumus, et infans, et filius familias, et servus alienus testamenti factionem habere dicuntur. Licet enim testamentum facere non possint, attamen ex testamento vel sibi vel alii acquirere possunt." (a)

"Mutus et surdus recte hæres institui potest." (b)

An infant in ventre sa mère, and a posthumous child, not only of the testator himself, but of another person, may be instituted by and take under a devise. In the civil law and those systems founded on it, if the testator had devised to the children of brothers and sisters, who at the time of his death had remained unmarried, none could be admitted to the succession until it was ascertained who were to take under this institution, but the estate was in the mean time committed to the administration of those appointed by the testator's will, or by the judge. (b)

In England, a distinction seems to have been formerly taken between a present devise to natural persons not in esse, and a devise to them by way of remainder; for if there were a tenant for life in rerum naturâ at the time of the devise, but no person in remainder in rerum

(a) Inst. lib. 2, tit. 19, § 4.
(b) Dig. lib. 28, tit. 5, l. 1, § 2; lib. 29, tit. 2, l. 5, § 1; lib. 37, tit. 3, l. 1, 2. Voet, lib. 28, tit. 5, n. 1. L. 2, tit. 3, P. 6. Ferriere, sur l'art. 292. Code Civil, art. 902. 2 Grenier, Tr. des Test.
naturd, yet the devise was good, if he in remainder were in esse at the time when the remainder fell in. (a) A devise was made by a devisor of his hereditaments to his wife for life, and after her death to remain to J. son of the devisor, and to his heirs male of his body engendered, and for default of such issue to the next heir male of the devisor and the heirs male of his body. In this case it was held that the devise to the next heir male of the devisor would have been good on the demise of the wife and J. without issue, if an heir male had been born previous to those events. (b)

But it was never doubted that a devise to an infant en ventre sa mère was valid where the testator appeared to be aware that the devise could not take place immediately; (c) as a devise to an infant en ventre sa mère when he shall be born, (d) or a devise that, if the child with which his wife is enceinte shall be born, it shall have a share with the rest of his children. (e)

Persons unknown to the testator might take, if they were sufficiently designated by him with reference either to their relationship, or to any other qualities, or by such a description as would distinguish them from others. (f)

If the institute or devisee is ascertained by description, that description may be made good by reputation, although it be not strictly true. As if A. devise that B. shall stand seised of land to the use of Jane his daughter; this would be a good devise to her if she were reputed so to be, although she were a bastard, and not so called by

(c) Andrews v. Fulham, Strange, 1093.
(d) 1 Lev. 135, per all the Justices. 1 Eq. Ca. Abr. 173, pl. 12.
the will. (a) But this does not extend to a bastard born after a will made. (b)

A bastard in esse, whether born or unborn, is competent to be a devisee or legatee of real or personal estate; and the only question is, whether he is sufficiently designated as the object of the bequest. (c)

Whether a gift can be made to bastards not procreated is vexata questio. The early authorities certainly lean to the negative; the reason assigned is, that "the law does not favour such a generation, nor expect that such shall be." (d)

In the case of Wilkinson v. Adams, Lord Eldon, in allusion to this point, said he would leave it where he found it, without any determination. (e)

A devise to the son, or eldest son of such a one, would be a good description of a devisee. (f)

So a devisee may be described as first and eldest son. (g)

It is not necessary that the devisee should be certain at the time of the testament, if by a subsequent event to which the testator refers the devise is rendered certain. A person devised all his lands to one of his cousins, Nicholas Amherst's daughter, that should marry with a Norton within fifteen years. Nicholas Amherst had three daughters, Elizabeth, Ann, and Mary. Stephen Norton married Elizabeth; and on a question between the heirs


(e) 1 Ves. and Bea. 422.


(g) 1 Powell on Devises, 269.
at law and the devisee who should have the land, one objection taken by the heir at law was, that the devise was void for uncertainty as to the person, for two might marry with a Norton. But the Court agreed that the devise was good, notwithstanding the uncertainty; for that although the words were not, who should first marry with a Norton, yet it was all one, because the law supplied these words: and therefore it should not be presumed that more than one would marry a Norton, especially as the words of the will fixed on a single person, and they said there was a difference, when there was uncertainty in the event and uncertainty in the person. (a)

It was doubted whether cities, corporations, colleges, and communities were competent to take by bequest or by institution as heirs. (b) They were supposed to be persona incertæ. Their competence however to take either as legatees or heirs is clearly recognized by the civil law, provided the society or corporation has been sanctioned by the authority of the prince or state: "Collegium, si nullo speciali privilegio subnixum sit, hæreditatem capere non posse, dubium non est." (c) But no bequest to or institution of private societies or communities was valid. (d)

Combinations or associations of private individuals were regarded with great jealousy, and from an early period the law reprobated those which had been founded otherwise than with the authority of the state: (e) "Mandatis principalibus praecipitur præsidibus provinciarum, ne patiantur esse collegia sodalitium, neve milites collegia in castris habeant." (f)

"Sed religionis causâ coire non prohibentur; dum

(a) Bate v. Norton, T. Raym. 82.
(b) Dig. lib. 36, tit. 1, l. 36.
(c) Cod. lib. 6, tit. 24, l. 8.
(d) Brunneman, ad Cod. lib. 6, tit. 24, l. 8, 12. Wissenbach, ad Cod. h. lib. and tit.
(f) Dig. lib. 47, tit. 22, l. 1.
tamen per hoc non fiat contra senatusconsultum, quo illicita collegia arcentur.” (a)

“Collegia si qua fuerint illicita, mandatis, et constitutionibus, et senatusconsultis, dissolvuntur. Sed permitter eis, cum dissolvuntur, pecunias communes, si quas habent, dividere, pecuniamque inter se partiri. In summa autem, nisi ex senatusconsulti auctoritate, vel Caesaris, collegium, vel quodcumque tale corpus coerit; contra senatusconsultum, et mandata, et constitutiones collegium celebrat.” (b)

But although certain colleges might be deemed lawful, that is, recognized by the public authority of the state, yet they were not permitted to take by will. Thus a bequest to a society of Jews was void: “Quod Cornelia Salvia Universitati Judæorum, qui in Antiochium civitate constitutis sunt, legavit, peti non potest.” (c) “Et sic nec Judæorum universitati quid legari potest, cum toleretur potius, quam approbetur illorum universitas.” (d)

Public bodies, states, cities, hospitals, and colleges, established by public authority, and professing the Christian religion, might be instituted as heirs, and the inheritance would be acquired by them for their respective societies. (e)

If the testator instituted a particular saint as his heir, the institution would enure to the benefit of the church of the place of the testator’s domicile. (f)

It has been found requisite that the public interest, no

(a) Dig. ib. § 1.  
(b) Dig. ib. l. 3, § 1.  
(c) Cod. lib. 1, tit. 9, l. 1. Wissenbach, ad Cod. h. lib. and tit. Brunneman, ad h. lib. and tit. and ad Cod. lib. 6, tit. 24, l. 8.  
(d) Brunneman, ib. Carpf. p. 3, const. 13, def. 36.  
(e) Dig. lib. 36, tit. 1, l. 26; lib. 34, tit. 5, l. 20; lib. 35, tit. 2, l. 1, § 5; lib. 33, tit. 1, l. 20, § 1. Cod. lib. 1, tit. 2, l. 1, 13, 16, 26; tit. 3, l. 24, 28, 49. Menoch. de Pres. lib. 4, Pres. 112. Alciat. ad Cod. lib. 1, tit. 2, l. 1; and de Pres. reg. 1, Pres. 18, n. 1. Wissenb. ad Pand. lib. 28, disp. 56. Brunneman, ad Pand. lib. 33, tit. 1, l. 20. Voet, lib. 28, tit. 5, n. 2, et seq.  
(f) Cod. lib. 1, tit. 3, l. 49. Voet, ib.
less than the well-being of families, should be protected against the excesses too frequently committed under the influence of superstition or of ill-judged or ill-directed enthusiasm, and the importance of spiritual advisers. In Holland no institution or bequest to ecclesiastical bodies of real property was sustained unless the license of the supreme authority of the state was granted.

"Planè hodiernis moribus immobilia ecclesiis aut monasteriis relinqui nequeunt nisi à principe impetrata sit amortizatio, sic ut aliquin nec estimatio debeatur et ne per occasionem hæreditatum, monachis aut monialiibus delatarum, bona ad monasteria devoverentur, post frequentes Belgii Principum querelas de captationibus hæreditatum per ecclesiasticos institutis." (a)

In Spain it was also necessary that ecclesiastical bodies should obtain authority from the sovereign, to enable them to receive bequests. (b)

It was also required in other states of Europe, in England, (c) France, (d) Venice, Genoa, (e) and Hungary. (f)

The authority by which they were enabled to receive devises of immovable property was called *Amortizatio*, "licentia bona immobilia per manum mortuam reti-


(c) Bodin, ib.


(e) Bodin, ib. Thuan, ib.

(f) Thuan, lib. 136.
nendi, et in perpetuum possidendi, sive renunciatio juris cogendi eam, ad transferendum in idoneum manum." (a)

The property was said to be dead, because it could no longer be transferred from one hand to another: "Rem mortuam non absurdè dici existimo, quæ amplius de una manu in alteram manum viventium non transit, sed communi hominum commercio eximitur: cujusmodi sunt hæc bona, quæ dicimus, amortizata." (b)

The effect of this act is to relieve the ecclesiastical bodies from those laws of the state which prevented them from acquiring real property: "Ecclesiis, Collegiis, cæterisque corporibus quæ manus mortuæ appellantur, per amortizationem adversus leges principis, bonorum immobilium acquisitione illis interdicientibus succurritur, earumque est veluti solutio, et laxamentum." (c)

In France, the edict of Dec. 1749, rendered null and void any donation or bequest of immoveable or real property to communities and hospitals, and generally to those institutions called gens de main morte, unless they had first obtained the king's letters patent. (d)

A bequest of that species of property which is prohibited, although made on the condition that the devisees should obtain the letters patent, is equally void. (e)

The bequest of a sum of money to institutions in main morte is payable only out of that species of property in the succession which is permitted to be bequeathed to them, and is valid only to the extent to which there exists in the succession property of that description. (f)

If a bequest were made to them as universal legatees, it would embrace only that description of property which the edict permitted them to take, and not any part of the real or immoveable property of the testator. (g)

(a) Peckius, de Amortis. ch. 1. (b) Ib.
(c) Peckius, ib. c. 1, 3, 4, p. 440, 441. (d) Poth. Tr. des Test. c. 3, § 2, art. 2.
(e) Ib. (f) Ib. (g) Ib.
The Code Civil adopts the spirit of the edict of 1749, and recognizes the incapacity of these establishments to receive bequests unless the government dispenses with it. \((a)\)

Dispositions by gift or by will in favour of hospitals, poor of townships, or establishments of public utility, shall have effect only as far as they shall be authorized by an imperial decree. \((b)\)

The acceptance of gifts made in favour of hospitals, of poor of a township, or of establishments of public utility, cannot take place until that authority has been obtained.

In England, the disability of corporations to acquire real property has been created by various statutes, \((c)\) and they are founded on the principle that by such grants the lords were deprived of escheats and other feudal profits. Hence the necessity of obtaining the King's license, he being the ultimate lord of every fee in the kingdom. Doubts were however entertained at the Revolution whether such license was valid, \((d)\) and the statute 7 & 8 Wm. 3, c. 37, was passed, which provides that the crown for the future, at its own discretion, may grant licenses to aliene, or take in mortmain of whomsoever the tenements shall be holden. Lands therefore cannot be devised to corporations sole or aggregate, lay or spiritual, unless by license from the crown.

Lands or goods cannot be devised to superstitious uses within statute 23 Hen. 8, c.10, by any means whatsoever.

The uses which are superstitious are declared by statutes 16 Rich. 2, c. 5; 23 Hen. 8, c. 10; 37 Hen. 8, c. 4; 1 Edw. 6, c. 14; 1 Geo. 1, c. 55, \((e)\) to be where lands, tenements, or goods are given for the maintenance

\((a)\) Grenier, Tr. des Don. p. 1, c. 2, § 1, n. 70. \hspace{1cm} \((b)\) Art. 910.
\((c)\) Magna Charta, c. 36. 9 Hen. 3, c. 36. 7 Edw. 1, c. 1. 34 Edw. 1, st. 3. 13 Edw. 3, c. 3. 15 Rich. 2, c. 5. 23 Hen. 8, c. 10.
\((d)\) 2 Hawk. P. C. 293.
\((e)\) See Cary v. Abbott, 7 Ves. 495.
of persons to pray for the souls of dead men in pur-
gatory, or to maintain perpetual obits, lamps, &c. These, and many others are declared to be superstitious, and as such void; and the king is entitled to appoint the lands or goods so given to other purposes.

It was held (a) by Lord Hardwicke, that a bequest for maintenance of a Jesuba, or assembly for daily reading the Jewish law, and for advancing and propa-
gating their religion, was void. Sir William Grant held a bequest of personal estate "for the purpose of educating and bringing up poor children in the Roman Catholic faith," to be void, as such a disposition clearly was void before the statute 31 Geo. 3, c. 32, (which granted certain immunities and privileges to Roman Catholics,) and that act provided that all dispositions before considered unlawful, should continue to be so. His Honor therefore held that the king might appoint to a lawful charity by sign manual. (b)

Where lands are devised to a corporation (not licensed to take lands in mortmain) in trust for other persons, the devise is void at law; and the lands will de-
send to the heir, charged with the trusts, as it would have done, if no trustee had been named, or the de-
vice had lapsed by the death of the trustee in the testator's lifetime. (c)

The power of devising which the statute 32 Hen. 8, as explained by the 35 Hen. 8, gave, was restrained to any person or persons, except bodies politic or corporate. Devises in mortmain were thus excluded. The statute 43 Eliz. c. 4, was construed to authorize a devise to a corporation for a charitable use, as operating in the nature of an appointment rather than as a devise; but the statute 9 Geo. 2, c. 36, was passed to counteract the

(a) Da Costa v. De Pas, Amb. 238. 1 Dick. 258. 2 Ves. sen. 274, 6.
3 Swanst. 487.
(b) Cary v. Abbot, 7 Ves. 490. The Bedford Charity, 2 Swanst. 470.
(c) Sonley v. Clockmakers' Company, 1 Bro. C. C. 81.
effect of this construction and prohibit such dispositions as might defeat the political ends of the Statutes of Mortmain.

That statute enacts that no hereditaments or personal estate to be laid out in the purchase of hereditaments shall be conveyed or settled to or upon any persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered in trust or for the benefit of any charitable uses whatsoever, unless such settlement of hereditaments or personal estate (other than stocks in the public funds) be made by deed indented, sealed, and delivered, in the presence of two or more credible witnesses, twelve calendar months before the death of the donor, and be enrolled in Chancery within six calendar months after the execution, and unless such stocks be transferred six calendar months before the death of the donor; and unless the same be made to take effect in possession for the charitable use intended, and be without any power of revocation, reservation, trust, &c. for the benefit of the donor, or of any persons claiming under him. (a)

The act is declared not to extend to purchases for a valuable consideration, or dispositions in trust for the two English universities, or any of the colleges within them, or the colleges of Eton, Winchester, or Westminster, for the maintenance of scholars upon the foundations, or to the disposition of any estate real or personal, lying or being in Scotland. (b)

The statute extends to property of every description which savours of the realty, as, a grant from the crown of the right to lay chains in the river Thames, for mooring ships, (c) canal shares, (d) money secured on turnpike tolls, (e) or by an assignment of the poor's rate and county rates, (f) leaseholds or mortgages, whether

(a) 9 Geo. 2, c. 36, § 1.  
(b) Sect. 2, 3, 4, 5. Stat. 9 Geo. 4, c. 85.  
(c) Negus v. Colter, Amb. 367.  
(d) Hume v. Chapman, 4 Ves. 542.  
(e) Knapp v. Williams, 4 Ves. 430 n.  
(f) Finch v. Squire, 10 Ves. 41.
in fee or for years. (a) And where a testator had bequeathed his personal estate upon trusts for a charity, and afterwards contracted to sell real estate, it was held that his lien on the property for the purchase money was "an interest in land" within the meaning of the statute, and accordingly could not pass by his will to a charity. (b)

If the pecuniary gift is partly charged upon land and partly personal, it will be void pro tanto. And therefore where a testator devised a freehold estate to be sold, and the produce applied together with so much of the personal estate as should be necessary to secure an annuity of thirty pounds for the life of A., and after his death the principal to go a charity, the freehold estate not being sufficient to raise the money, it was held that the bequest was good as to the residue, which was to be raised out of the personal estate (c)

Although the statute contains no express words prohibiting a bequest of money to be produced by the sale of land, yet it is settled, by construction, that such a bequest is within the spirit and meaning of the enactment. (d) The statute however, expressly extends to the converse case of money being directed to be laid out in lands, (e) and applies not only where the trust expressly directs the investment in land, but where such an application of it is consequential on the nature and purposes of the charity. (f)

But the bequest of a sum of money to be applied in the erection of buildings on land which is already de-

(b) Harrison v. Harrison, 1 Russ. and Myln. 71.
(c) Waite v. Webb, 6 Madd. 71.
voted to charitable purposes, (a) or in repair and improvement of buildings devoted to charity, (b) is good, as by such gifts no additional land is thrown into mortmain. (c)

There are some devises to corporations which are authorized by particular acts of parliament. For instance, the statute of 43 Eliz. c. 4, was held to render valid appointments to corporations for charitable uses; (d) and though devises to such uses are now prevented by the act of 9 Geo. 2, c. 36, yet the section of the latter statute, excepting out of its operation gifts to the colleges in the two English universities, and the colleges of Eton, Winchester and Westminster, seems to have had, so far as it goes, the same effect of conferring validity on devises to those corporations. So the statute 43 Geo. 3, c. 107, enables persons to devise lands to the governors of Queen Anne's bounty; and the statute 43 Geo. 3, c. 108, authorizes under certain limitations, the devise of lands for the erection or repair of churches or chapels, the enlargement of churchyards, or of the residence or glebe for any minister of the church of England.

The exception made by the act in favour of property in Scotland has been held to point at the locality of lands only. It precludes, therefore, the devise of lands in England to a Scotch charity, but admits of English personality being bequeathed to be laid out in lands in Scotland, so far as is consistent with the Scotch law, which permits the destination of real estate to some kinds of charity. (e) It has been held, that the circum-


(c) Ingleby v. Dobson, 4 Russ. 342.

(d) Flood's case, Hobart, 136.

stance that the charity is Scotch, and that the trustees to be chosen for administering it are to be Scotchmen, does not conclusively shew that the purchase is to be of lands in Scotland, so as to take the bequest out of the statute. (a)

A bequest of money to be laid out in lands in Ireland, for charitable purposes, will be good, (b) no act corresponding with the English Mortmain Act having been passed by the Irish Legislature before the union, or by the Parliament of the United Kingdom since. (c)

It has been decided that the statute 9 Geo. 2, c. 36, does not extend to the colonies. (d) But the early statutes of mortmain are in force in those colonies which adopt the English law.

By one of the earliest acts of the Jamaica legislature, in order to encourage pious, charitable, and public gifts and grants, "so necessary in new colonies to be encouraged and made good, and that they may not be defeated, but may take effect," it was enacted, that,"for and during the term and time of twenty years next ensuing, all gifts, grants, conveyances, and devises of any houses, lands, tenements, rents, goods, or chattels, to any good, pious, charitable, or public use or uses, as for the maintenance of lawful ministers, erecting or maintaining of churches, chapels, schools, universities, colleges, or other places for education of youth, or maintenance of men of learning, or any alms-houses or hospitals, or any other uses whatsoever, theretofore made, and thereafter to be made, within the time aforesaid, were thereby for ever confirmed and made good, according to the true intent and meaning of the donor or donors, grantor or grantors, deviser or devisors; the Statute of Mortmain, or any other statute, law, custom, or usage, to the contrary notwithstanding." (e)

(b) See Campbell v. Earl of Radnor, 1 Bro. C. C. 272.
(c) Att. General v. Power, 1 Ball and Beatt. 154.
(e) Jamaica Act, 33 Car. 2, c. 15, § 1.
But the act expressly declares, that "no gifts, grants, or devises to any person or persons whatsoever, for any superstitious use or for maintenance of any minister or teacher whatsoever, other than such as are lawfully ordained and allowed of by the church of England, are thereby confirmed or made good." (a)

In Lower Canada there existed a declaration of the King of France, Nov. 26th, 1743, by which religious orders and *gens de main morte* were expressly excluded from taking unless by the king's license. Its effect, however, is controlled in its operation by an act of the provincial legislature for the encouragement of schools. (b)

The first section of this act empowered the governor of the province to appoint persons trustees of the schools of royal foundation, and of all other institutions of royal foundation, to be thereafter established in the province for the advancement of learning, as also for the management of all estates and property, to be thereafter appropriated to the said schools and institutions, and to remove the said trustees, and to appoint others their successors, to such as should die or resign their trust.

By the second section the trustees and their successors are declared to be a body corporate and politic by the name of "The Royal Institution for the Advancement of Learning," and are authorized to receive, hold, and purchase without license in mortmain, or *lettres d'amortissement*, all messuages, lands, money, &c., to be given, granted, purchased, appropriated, devised, or bequeathed in any manner or way whatsoever for the said schools, &c.

By the third section, the property of the said schools and institutions of royal foundation is vested in the said trustees and their successors.

The operation of this act became the subject of judicial

(a) Jamaica Act, 33 Car. 3, c. 15, § 2.  
(b) 41 Geo. 3, c. 17.
decision in the provincial courts, and on appeal by the privy council.

Mr. M'Gill, a gentleman of Montreal, had by his will, made there on the 8th day of January 1811, after leaving a large part of his fortune to the defendant who was in no degree related to him by blood, bequeathed to certain trustees a tract of land called Burnside, in trust that they should convey and assure the same to "The Royal Institution for the Advancement of Learning," constituted or to be constituted under this act.

It appeared that the testator died on the 19th Dec. 1813, from which period his widow possessed and enjoyed the estate of Burnside until her decease on the 16th April, 1818, and from that time the defendant possessed and enjoyed the same. On the 8th of October, 1818, nearly five years after the death of the testator, the then governor-in-chief, in conformity with the provincial statute, by an instrument under the great seal of the province, appointed certain persons therein named, "trustees of the schools of royal foundation in this province to be thereafter established for the advancement of learning therein," and declared the said trustees and their successors, a body corporate and politic, by the name of "The Royal Institution for the Advancement of Learning." On the 13th of December, 1819, by two other instruments under the great seal, an additional number of trustees was appointed: The Lord Bishop of Quebec was named principal of the institution, and times and places fixed for the meetings of the members. On the 3rd August, 1820, by a notarial deed, made and executed at Montreal, the then surviving devisees, in pursuance of the trust reposed in them, conveyed to the Royal Institution the estate of Burnside, subject to the conditions prescribed in the will.

On the 31st of March, 1821, letters patent were issued and granted upon the petition of the Royal Insti-
tution, wherein the devise in question was recited, and thereby his Majesty did will and grant, that upon the land of Burnside, and in the buildings thereon erected, or to be erected, there should be established from that time one college at the least for the education of youth, to continue for ever; that the first college should be called "McGill College, &c."

The devisees in trust, after having obtained his Majesty's letters patent creating and establishing a college thereupon by the appellation of "McGill College," brought a petitionary action in the Court of King's Bench at Montreal, to obtain from the appellant the estate of Burnside.

The defendant demurred to the declaration, and assigned special causes of exception or demurrer, which having been overruled, the defendant answered upon the merits.

It was contended on his part, that by the declaration of the King of France, in 1743, (a) enrolled in Lower Canada, the bequest of McGill was a nullity, being contrary to the provisions of the declaration.

The Court, after intimating that perhaps the bequest would be void under the declaration, if the provincial statute 41 Geo. 3, c. 17, had not preceded the bequest, and the bequest had been made in conformity, and with a view to that statute, expressed a decided opinion that this declaration of 1743 could not be brought to bear upon a case which stood upon its own peculiar law.

This judgment was rendered in the Court of King's Bench at Montreal on the 19th of October, 1822, and was affirmed in the Provincial Court of Appeal on the 20th of November, 1823. The Court declared, that whatever might have been the effect of the Ordinance of the French King, of the year 1743, the provincial statute of the 41st Geo. 3, c. 17, granted

(a) 1 Edits. et Ordon. p. 537.
full power to the governor, by an instrument under the
great seal of the province, to establish free schools for the
advancement of learning, and declared that the trustees
and their successors, to be named as therein directed,
should be a body corporate and politic, by the name of
"The Royal Institution for the Advancement of Learning."

This provision of the statute, by giving such licence
to the governor, completely does away with the ancient
law in this respect, and renders the ground of objection
unavailable. The latter judgment was afterwards
affirmed before His Majesty in his Privy Council, on
the 7th of May, 1828. (a)

The Statutes of Mortmain have not been re-enacted in
New York; and the only legal check to the acquisition
of lands by corporations consists in those special restric-
tions contained in the acts by which they are incor-
porated, and which usually confine the capacity of pur-
chasing real estate to specified and necessary objects; and
to the force given to the exception of corporations from
the Statute of Wills. (b)

The Statutes of Mortmain are in force in the State of
Pennsylvania. In the other States it is understood,
that the Statutes of Mortmain have not been re-enacted
or practised upon; and the inference from the statutes
creating corporations, and authorizing them to hold real
estate to a certain limited extent, is, that corporations
cannot take and hold real estate for purposes foreign to
their institution. (c)

Persons condemned to death were, by the civil law,
incapable of taking by testament. "Edicto prætoris
bonorum possessio his denegatur qui rei capitalis damnati
sunt, neque in integrum restituti sunt." (d)

This incapacity is adopted by the jurisprudence of

(a) Desrivieres v. Richardson, 1 Stuart's L. C. Rep. 241.
(b) 32 Hen. 8, c. 1. N. Y. Revis. Stat. vol. 2, 57, sec. 3.
(d) Dig. lib. 37, tit. 1, l.13.
Holland, Spain, (a) and France. (b) In Holland, it existed where the sentence of death involved the confiscation of the convict's property. (c)

In England, the incapacity induced by attainder is not that of taking, but of holding. (d)

Under the Civil Law, aliens were incapable of taking "Peregrini capere non possunt hæreditatem." (e)

This incapacity existed in the jurisprudence of Spain, (f) and in that of France, (g) before the law of the 14th July, 1819. That law has abrogated the previous articles as to the incapacity of an alien to take under the testament.

The law of Holland did not exclude aliens. (h)

By the law of England, an alien friend may not only take but hold a bequest of moveable property. Lands devised to him remain in him till office found, and then they belong to the crown. (i) On this principle, where lands are devised to an alien and a British subject as joint tenants, the whole does not vest in the latter, (which would be the effect if the devise to the alien were absolutely void,) but in both jointly; and if the crown does not seize the alien's moiety, as it might do after office found, (h) on the decease of the alien, leaving his co-deviseree surviving, the survivorship which is incidental to every joint tenancy takes place, subject nevertheless to be overreached by the crown's right of seizure after office found, which would, by rela-

(a) L. 4, tit. 3, p. 6.  (b) Poth. Tr. des Test. s. 2, art. 1. Code Civil, art. 25.
(c) Voet, lib. 28, tit. 5, n. 5. Groiüus, Manud. ad Jur. Holl. lib. 2, c. 16, n. 1. Groeneweg, ad Cod. lib. 6, tit. 24, l. 2; and ad Dig. lib. 48, tit. 19, l. 17. Van Lennep, Cens. For. p. 1, lib. 3, c. 4, n. 36.
(e) Cod. lib. 6, ctit. 24, l. 1. Dig. lib. 28, tit. 5, l. 6, § 2.
(f) L. 4, tit. 3, p. 6.
(h) Voet, ib.
(h) The King v. Boys, Dyer, 283, b.
tion, defeat the title of the surviving joint tenant to the alien's moiety. (a) If, however, the alien survives his co-devises, the entirety does not devolve to him, as he is disabled from taking by operation of law, even for the benefit of the crown, since the law, by its own act, never gives an estate to one whom it does not permit to retain it. (b)

By the fifth Novell of Justinian, chap. 5, the property belonging to those who entered into a convent, accrued to the convent into which they entered; and they could not afterwards dispose of it, and their children could retain no more of their parents' estate than their legitime. (c)

In Holland it seems that a bequest to a monk would be valid during his life, and on his death it returned to those who were next in succession, being seculars. (d)

In the law of France, prior to the promulgation of the Code Civil, those who had become members of religious orders, les religieux, were incapable of taking, because they had lost their civil status. (e)

Under the civil law and the law of Spain, heretics and apostates were incapable of taking. (f)

No such incapacity is recognized in the other systems of jurisprudence which are here considered. (g)

In England, since the statute 18 Geo. 3, c. 60, which repeals so much of the statute of the 11th and 12th Wm. 3, c. 4, (h) as disables persons educated in the Popish religion, or professing the same, under the circumstances

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(a) Forset's case, cit. 1 Leon, 47; 4 Leon. 82.
(b) Collingwood v. Pace, 1 Ventr. 417. See ante, vol. 1, p. 694.
(c) Cod. lib. 1 tit. 5, l. 22, and tit. 7, l. 3.
(e) Poth. ib.
(f) Cod. lib. 1, tit. 7; lib. 1, tit. 5. L. 4, tit. 3, p. 6.
(g) Voet, lib. 28, tit. 5, n. 5. Van Leeuwen, ib. n. 38. Groeneweg. ad Cod. lib. 1, tit. 5.
(h) Co. Lit. 391 a, Butl. n.
therein mentioned to inherit or take by descent, devise, or limitation in possession, reversion, or remainder, within the kingdom of England, &c., provided such persons, within the time limited by the act 18 Geo. 3, take the oath prescribed thereby. Papists complying with that oath are likewise capable of being devisees of real property.

The incapacities which have been hitherto considered are absolute and applicable to every person, without any consideration of the relation in which he stands to the testator.

There are other incapacities which are relative, and exist only in respect of a relation which is presumed to have enabled the devisee to exercise such an influence over the testator, that his testamentary disposition proceeds from that influence and not from his free will.

It does not appear that the civil law expressly incapacitated persons placed in that relation from being instituted heirs, or from taking a bequest. (a)

In Holland, by an edict of the Emperor Charles V., donations and bequests made by minors to their guardians, curators, or other persons who had the management of their affairs were null and void. The bequest was equally invalid when made to the children and concubines of such guardians, &c. (b)

This prohibition has been held to extend to the wives of the persons thus incapacitated. (c)

But the bequest would be sustained if the guardian, &c. were also one of the heirs of the minor, and if the amount of the bequest did not exceed that which he

(a) Dig. lib. 34, tit. 3, l. 28, § 10.

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would have taken as one of the heirs ab intestato, and if he were the parent of the minor, the bequest would be sustained, although the law did not call such parent to the succession. (a)

The edict applies only to devises of immoveable or real property, and therefore the minor might bequeath to any one of these persons his moveable property. (b)

It is not material in what manner, or under what authority the relation of tutor, &c. exists, or that it has been undertaken gratuitously. The incapacity to take arises from the relation, and the influence which it enables the one to exercise over the other. Those whose situation gives them similar authority and influence, as preceptors, schoolmasters, &c. are included in the prohibition. (c)

If the relation has ceased, the prohibition also ceases, and therefore when the authority of the guardian has wholly terminated, he is no longer incapable of being instituted by or taking under the testament of the person who had previously been his ward, even although he may not have passed his accounts as such guardian. (d)

The coutume of Paris, which is in conformity with the Ordinance of 1539, and the Declaration of 1549, prohibits, in terms still more explicit and comprehensive, bequests to persons, who, from their relation to minors, exercise any power or authority over them. (e) "Les mineurs et autres personnes étans en puissance d'autrui, ne peuvent donner ou tester directement ni indirectement au profit de leurs tuteurs, ou curateurs, pedagogues, ou


(c) Wesel, ad Novell, Cons. Ultraject. art. 15, n. 4, 5, 6, 31, 32. Voet, ib.

(d) Voet, ib. n. 8, but see A. Wesel, ib.

(e) Ord. Francis I. Declaration of Francis II., 1549.
autres administrateurs, ou aux enfans desdits administra-
tateurs, pendant le temps de leur administration, et
jusqu’à ce qu’ils aient rendu compte: peuvent toutefois
disposer au profit de leurs père, mère, ayeul ou ayeule, ou
autres ascendants, encore qu’ils soient de la qualité sus-
dite; pourvu que lors du testament et décès du testateur,
lesdits père, mère, ou autres ascendants ne soient rema-
rize.” (a)

It will be observed, that this incapacity is not confined,
like the edict of Charles V., to bequests made by minors,
but it extends to those who are en puissance d’autrui.

It has been considered that the expression “ou autres
administrateurs,” includes all those who have any author-
ity or power over others, as masters, confessors, direc-
tors, &c. (b) Hence all bequests by noviciates and others
to the religious societies of which they are members, are
void. (c)

The prohibition extends to the children of those who
are themselves incapable of taking. (d)

The incapacity does not cease until the guardian has
fully accounted. (d)

The coutume excepts from this prohibition the father,
brother, grandfather or grandmother, who may have the
guardianship or administration of the minor’s estate, pro-
vided they have not remarried. (e)

A similar incapacity is admitted by the coutume of
Normandy. (f)

Under the Code Civil, the person who had been in
tutelle, does not, by attaining his majority, become
enabled to make a valid bequest to his former guardian,
unless the final accounts of the latter had been rendered.
“Le mineur, quoique parvenu à l’âge de seize ans, ne
pourra, même par testament, disposer au profit de son
tuteur. Le mineur, devenu majeur, ne pourra disposer,

(a) 1 Dupless. art, 276. (b) Ferriere, sur l’art. 276, p. 201.
(c) Ib. (d) Ib. (e) Ib. (f) Merville, sur la Coutume de Normandy, p. 416.

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soit par donation entre-vifs, soit par testament, au profit de celui qui aura été son tuteur, si le compte définitif de la tutelle n'a été préalablement rendu et apuré.

"Sont exceptés, dans les deux cas ci-dessus, les ascendants des mineurs, qui sont ou ont été leurs tuteurs." (a)

The Code Civil is less extensive in its prohibition than the preceding article of the coutume of Paris, for it does not, by any such expression as "ou autres administrateurs," affect those who are tutors, subrogés or curators, schoolmasters, or preceptors. (b)

It excepts the ascendants of him who is or has been in guardianship from the prohibition, without retaining the qualification contained in the coutume, namely, that they had not remarried. (c)

The civil law did not permit medical persons to receive any bequest from their patient, made during the illness of which such patient died. (d)

A similar incapacity was recognized by the jurisprudence of France. It seems to have been an extension of the coutume of Paris and the Ordinance of 1539, article 131. It is the subject of an article in the Code Civil:

"Les docteurs en médecine ou en chirurgie, les officiers de santé et les pharmaciens qui auront traité une personne pendant la maladie dont elle meurt, ne pourront profiter des dispositions entre-vifs ou testamentaires qu'elle aurait faite en leur faveur pendant le cours de cette maladie.

"Sont exceptées, 1°. les dispositions rémunératoires faites à titre particulier, en égard aux facultés du disposant et au services rendus; 2°. les dispositions universelles, dans le cas de parenté jusqu'au quatrième degré inclusivement, pourvu toutefois que le décédé n'ait pas d'héritiers en ligne directe; à moins que celui au

(a) Art. 907.
(b) Toullier, liv. 3, tit. 2, c. 2, n. 65. Grenier, Tr. des Don. c. 1, p. 3, § 3, n. 123.
(c) Ib.
(d) Cod. lib. 10, tit. 53, l. 9. Dig. lib. 50, tit. 13, l. 3.
profit de qui la disposition a été faite ne soit lui-même du nombre de ces héritiers.

"Les mêmes règles seront observées à l'égard du ministre du culte." (a)

It will be observed, that in order to invalidate the bequest, it must have been made during the sickness of which the patient died; if it were made at any period antecedent to that sickness, it would be valid.

It is not to be understood that the medical person is precluded from taking a bequest by way of remuneration for his medical services, provided it does not exceed the ability of the patient, and is not disproportioned to those services.

The Code Civil permits a disposition universel, or made à titre universel, to the medical person when he is a relation to the deceased, even to the fourth degree inclusive, provided the testator has no heir in the direct line; unless, indeed, he should be himself one of those heirs, in which case the disposition will take effect so far as it does not prejudice the rights of his co-heirs. (b)

This incapacity has never been extended to gardes-malades (sick nurses). (c)

The article also renders the minister of religion incapable of taking a bequest made to him by the person whom he has been attending in that character during the illness of which the latter died. It has, however been decided by the Court of Cassation, (d) that a minister of religion was not incapable of receiving a bequest made in his favour, although he was in constant attendance on the person during the sickness of which he died, if he were not in fact his confessor, and did not administer to him absolution. (e)

The jurisprudence of England and of the United States

(a) Art. 909. (b) Toullier, ib. n. 66. Grenier, ib. n. 127.
(c) Furgole, Quest. 34, sur l'Ordon. de 1791, n. 23, et suiv. Grenier, ib. n. 128. Toullier, ib. n. 167.
(d) Arrêt, May 18th, 1807. Sirey, an 1807, p. 287.
(e) Toullier, ib. Grenier, ib.
does not treat any of the persons comprised in the articles of the coutume and Code Civil as incapable of taking any bequest which may be made to them. The only effect which their relation to the testator, and of the probable power it gives them is, that it may add weight to other circumstances adduced for the purpose of establishing imposition or undue influence; but alone it would have no weight. (a)

By the civil law a person could not take under an institution written by himself, although dictated by the testator. This incapacity is adopted in the jurisprudence founded on the civil law. (b)

By the law of Holland, a minor under twenty-five could not institute as his heir, nor make a bequest to his concubine. (c)

A person who married a minor, without the consent of the parents of the latter, could not be instituted the heir of the minor. (d)

The capacity to be instituted heir ought, by the civil law, to exist at the time of making the testament, at that of the testator's death, and, if instituted on a condition, at the time when that condition takes effect. (e)

If the incapacity exist at the time of the making of the will, its subsequent removal before the death of the testator will not render the will valid. A will made by a minor in favour of his tutor, and therefore void, will not become valid by the minor living to attain his majority. (f)

The Code Civil considers that it is sufficient if the devisee be capable at the death of the testator.

(c) Voet, lib. 28, tit. 5, n. 6, 7.
(d) Voet, lib. 23, tit. 2, n. 11, 16. Voet, lib. 28, tit. 5, n. 7.
"Pour être capable de recevoir par testament, il suffit d’être conçu à l’époque du décès du testateur."

"Néanmoins la donation ou le testament n’auront leur effet qu’autant que l’enfant sera né viable." (a)

But if between the time of making the will and of the death of the testator, or of the condition happening, the law becomes changed, and that change causes an incapacity, the previous institution would not be thereby prejudiced. Thus if the husband, being domiciled in Holland, had made the bequest in favour of his wife, and had afterwards changed his domicile to Utrecht, but had subsequently resumed that in Holland, where he died, the will would remain valid. (b)

Where the will of a bastard was valid at the time it was made according to the law which then prevailed in the place in which it was made, an ordinance was afterwards established taking away the power of testing by bastards. Everard holds that the will was valid. "Sufficit quod condens testamentum, sit tempore quo condidit ad testandum habilis, et idoneus, et non requiritur quod apud eum sit, tempore decessus, ejusdem testamenti factio.” (c)

In England, it has been held that a will devising lands to charitable uses having been made before, but the testator not having died till after the Statute of Mortmain had been passed, such devise of lands was not affected by that statute. (d)

(a) Art. 206.
(c) 2 Boullen. 170.
But a bequest of personality by will dated prior to the 9 Geo. 2, c. 36, to be laid out in lands for a charity, but which was afterwards confirmed by a codicil dated after the statute, was held to be void, because the codicil operates as a new will. (a)

A testator by will made before the Statute of Mortmain, devised a real estate to three trustees, for charitable uses; and by a codicil made after the statute he altered the disposition which he made by his will of part of his real estates, by postponing one of his nephews and his issue. He then devised the estate which he had given him by his will, and devised it over again, and also a piece of pasture, to the same trustees, and to two others as additional trustees, upon the same charitable trusts he had given it by his will. The question arose, whether the codicil revoked the will, and operated as a new devise? If it did, then the devise to the charity would be void by the Statute of Mortmain. Lord Hardwicke held, that as to the additional land given by the codicil, the devise was void by the Statute of Mortmain, it being devised only by the codicil which was subsequent to the statute. But as to the other land, he held, that neither the beneficial nor trust estate was revoked, as well from the nature of the instrument as the words of it. The beneficial interest is the same in the will and in the codicil. The codicil is part of the will, and not a revocation of the instrument itself, but only a few particular bequests in it. This is the nature of a codicil, according to Swinburne, and here the testator says, the codicil was by him intended to confirm his will, and is therefore to be made part of it. (a)

The statute of 6 Geo. 4, c. 79, which came into operation on the 27th of June, 1823, enacted that the currency of Great Britain should be and become the currency of

the whole united kingdom of Great Britain and Ireland, and that receipts, payments, gifts, grants, &c., matters and things whatsoever relating to money, or involving or implying the payment of money made, &c., in any part of the united kingdom, should be made, &c., according to such currency of Great Britain, so becoming the currency of the united kingdom, and not according to any currency, or as money hath been or may be valued in any particular part of the united kingdom, and that gifts, &c., shall be taken to be made according to such currency of Great Britain, and in reference to money of the value and description circulating in Great Britain, unless the contrary be proved to have been the intention of the parties concerned. A testator domiciled in Ireland made his will, charging his lands in Ireland with an annuity. The will was made prior to the commencement of the act, and the question arose whether this annuity was to be computed in Irish or in English currency. It was held that the bequest of the annuity, though not perfected till the death of the testator, was a gift made at the time of making the will, and the gift being prior to the 6 Geo. 4, c. 79, that the annuity was to be computed in Irish currency. (a)

It was held by the House of Lords, that the Irish statutes declaring the lands of Papists descendible as in gavelkind, notwithstanding a devise, avoided a will, although it was made before those statutes were passed. This decision, however, was founded on the peculiar language of the statutes which expressly declared that all the lands of which any Papist then, or at any time thereafter, was seised, and which were not sold, &c., in his lifetime, for a valuable consideration, should descend in gavelkind, notwithstanding any grant, settlement, or disposition by will or otherwise. (b)

(b) Burke v. Morgan, 5 Bro. P. C. 365.
An alteration in the status or condition of the person between the time of making the will and the death of the testator, will not prejudice the devisee: "Solemus dicere, media tempora non nocere, ut puta civis Romanus hæres scriptus, vivo testatore factus peregrinus, mox civitatem Romanam pervenit: media tempora non nocent." (a)

(a) Dig. lib. 28, tit. 5, l. 6, § 2.
CHAPTER IX.

TESTAMENTS—FORMS OF.

Testaments.—Comitia Calata.—Per as et libram.—Forms under the pretors edicta.—The Constitutions of emperors.—Division of Testaments.

One of the definitions of a testament given in the civil law, although it has not obtained the approbation of all commentators, may be so understood as to describe its distinguishing properties, and that which was essential to its validity, "Voluntatis nostræ justa sententia, de eo, quod quis post mortem suam fieri velit." (a) It imports such a declared disposition of the testator's property to take effect after his death as is authorized by law, and made with the forms and solemnities which the law prescribed. (b)

Vinnius gives a definition which he considers more appropriate to this mode of disposition. "Testamentum est suprema contestatio in id solemniter facta, ut, quem volumus, post mortem nostram habeamus haereditem." (c)

The forms and solemnities on which the validity of the testament depends, the different species of testaments, and the nature of the codicil, will be the subject of the following chapter.

(a) Dig. lib. 28, tit. 1, l. 1.
(b) Vinnius, ad Inst. lib. 2, tit 10, Lauterbach, ad Dig. lib. 28, tit. 1. Heppius, ad Inst. h. lib. and tit. Vasq. tom. 1, p. 5.
(c) Vinn. ib. p. 271.
In the earlier period of the history of Roman jurisprudence, the testament in times of peace was made in a full assembly of the people convened, *calatis comitiis.* "Ibi quicumque testamentum facere volebat, illud in concione populi condебat per modum legis, rogando ut quis sibi heres esset; quæ rogatio populi suffragio confirmabatur." (a)

The testator presented himself before the assembled people; he made his testament in the form of a law; he named his heir, and called on them to confirm the nomination. (b)

In this form may be discovered the extreme importance which a Roman citizen attached to the power of disposing of his property by testament, and the obligatory effect of its exercise. His testament was the law made by each father for his family.

It has been observed that the word *legavit* in its original meaning imported a law by the testator, *legem dixit,* and hence the maxim *dicat testator et erit lex.*

When the people were going to battle, another form of testament was used, called *Testamentum Procinctum.* "Illud in rebus trepidis cives Romani cincti et ad bellum profiscientes et quasi devoti diis manibus faciebant. Hæc enim devotorum voluntas ultima, pro lege erat, tacito populi suffragio rata. Hujus testamenti memorit Plutarchus in vitæ Coriolani, ubi moris suisse refert apud Romanos, ut milites in acie jamjam prefecturi ad pugnam, testamentum facerent nuncupando vivâ voce, coram tribus aut quatuor testibus, quem sibi heredem vellent. Extra tale periculum milites testabantur jure ordinario." (c)

A third species was afterwards introduced called *per æs et libram,* because it was effected by mancipation, or

(a) Poth. Pand. liv. 28, tit. 1, prem. art. 20.
(c) Poth. ad Pand. lib. 28, tit. 1, art. 1, § 2, p. 312.
an alienation made by an imaginary sale in the presence of five witnesses, and the libripens or balance-holder, all citizens of Rome above the age of fourteen; and also in the presence of him who was called the emptor familiae, or purchaser. " Alors le testament fut fait sous la forme d'une vente imaginaire, per as et libram. Montesquieu la rappelle en ces termes: 'On jugea qu'il convenait de permettre à tous les citoyens de faire leur testament devant quelques citoyens Romains pubères, qui représentaient le corps du peuple. On prit cinq citoyens devant lesquels l'héritier achetait du testateur sa famille, c'est-à-dire, son hérité; un autre citoyen portait une balance pour en peser le prix; car les Romains n'avaient point encore de monnaie. Il y a apparence, que ces cinq témoins représentaient les cinq classes du peuple, et qu'on ne comptait pas le sixième, composée de gens qui n'avaient rien.' " (a)

"Celui qui portait la balance était appelé libripens et l'héritier, familia emptor. Le testateur disait, en s'adressant aux témoins, et en tenant le testament, tabulas: 'Hæc uti in his tabulis cerisse scripta sunt ita do, ita lego, ita testor. Itaque vos, quirites, testimonium perhibetote.' " (b)

The expressions familiae et pecunia imported every description of property, or the whole succession of the testator.

This sale affords another illustration of the absolute power which, at this period in the history of Roman jurisprudence, might be exercised by the testator in making his testamentary disposition. (c)

Another species of testaments was introduced by the edict of the Prætor. By the prætorian edict, the signature of seven witnesses was decreed sufficient to establish a testament without any mancipation or imaginary sale.

(a) Montesquieu, Esprit des Lois, liv. 27. 1 Grenier, Tr. des Don. p. 44.
(c) Grenier, ib. Montesquieu, ib.
“Sed predicta quidem nomina testamentorum ad jus civile referebantur: postea vero ex edicto prætoris forma alia faciendorum testamentorum introducta est. Jure enim honorario nulla mancipatio desiderabatur, sed septem testium signa sufficiabant: cum jure civili signa testium non essent necessaria.” (a)

These two forms are designated in the institutes and by commentators as part of the *jus civile*, as distinguished from the *prætors* edicts.

The subsequent law was composed partly of that, thus called the *jus civile*, partly of that which had been introduced by the *prætorian* edicts, and partly of the constitutions of the emperors.

In conformity with the *jus civile*, it was required that all testaments should be made in the presence of witnesses at one and the same time without interruption. According to the *prætorian* law, it was necessary that they should be sealed by seven witnesses, and in obedience to the constitution, that they should also be subscribed by the witnesses: “Sed cum paulatim tam ex usu hominum, quam ex constitutionum emendationibus òeptit in unam consonantiam jus civile et prætorium jungi, constitutum est, ut uno eodemque tempore, (quod jus civile quodammodo exigebat), septem testibus adhibitis, et subscriptione testium (quod ex constitutionibus inventum est, et ex edicto prætoris) signacula testamentis imponerentur. Ita, ut hoc jus tripartitum esse videatur: et testes quidem et eorum præsencia, uno contextu testamenti celebrandi gratiâ, à jure civile descendant: subscriptiones autem testatoris et testium, ex sacrarum constitutionum observatione adhibeantur: signacula autem, et testium numerus ex edicto prætoris.” (b)

It was further required by the Emperor Justinian that the name of the heir should be expressed in the hand-

(a) Inst. lib. 2, tit. 10, § 2. 
(b) Ib. § 3.
writing either of the testator or of the witnesses, but this law was afterwards repealed. (a)

The testament is distinguished as *solemn* and *minus solemn*, or privileged, and each of these species is again distinguished as written or nuncupative. Again the written testament might be secret, mystic, or closed.

It is proposed in the section which follows to treat of each of these species of testament, and of the codicil and codicillary clause under the civil law, and the law of Holland, Spain, and Trinidad; and in the subsequent sections under the other systems of jurisprudence, which are the subjects of this work.

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SECTION I.

TESTAMENTS—FORMS OF UNDER THE CIVIL LAW, LAW OF HOLLAND, SPAIN, AND TRINIDAD.

I. Civil law.—1. Solemn will in writing.—The number and qualification of the witnesses.—Manner of attesting.—2. Secret, mystic, or closed will.—Proof and opening of.—3. Will made by blind persons.—4. Nuncupative testament.—5. Privileged testament, in favour of soldiars.—*Tempore postea*.—By persons in the country.—By a parent in favour of children.—6. Codicil and codicillary clause.

II. Law of Holland.

III. Law of Spain.

I. The civil law in the forms and solemnities it required made no distinction between the devise of moveable and that of immovable property.

1. It was required in order to render a solemn will in writing valid, that it should be written either by the

(a) Novell, 119, c. 9.
testator himself, or by some other person, in words at length; (a) that it should be subscribed and signed by the testator, or by some other person in his name and stead, (b) but in the testator's presence, and before seven witnesses, who were all to be citizens of Rome, solemnly requested thereunto. The witnesses were either to subscribe the same in their own persons, (c) or if so many could not be found as could write, one person might subscribe for another; (d) and if they had not seals of their own, they might seal it with the seals of other men. (e) If another wrote the will, the testator must subscribe it himself. (f) But if the testator could not write, then an eighth witness was to subscribe the will in his name: "Septem testibus adhibitis et subscriptione testium." (g)

"Rogatis testibus septem numero, civibus Romanis, puberibus omnibus." (h)

There were certain persons whom the law did not admit as competent witnesses to a testament: "Mulier testimonium dicere in testamento quidem non poterit." (i)

It has been seen that the witness must have attained the age of puberty. (j) A bondman, who is a dependant person; (k) a madman, prodigal, and the like; a person deaf and dumb; (l) a person that is in the power of the testator, were incompetent to be witnesses.

Mad men, deaf and dumb persons, and prodigals who are interdicted, were not competent witnesses to a testament: "Neque furiosus, neque mutus, neque surdus, neque is cui bonis interdictionem est, possunt in numerum testium adhiberi." (m) "Meritor (qui bonis

(a) Cod. līb. 6, tit. 23, l. 21.
(b) Ib. l. 29.
(c) Ib. l. 21.
(d) Ib. l. 31.
(e) Dig. līb. 28, tit. 1, l. 22, § 2.
(f) Cod. ib. l. 12.
(g) Inst. līb. 2, tit. 10, § 3.
(h) Cod. ib. l. 21.
(i) Dig. līb. 28, tit. 1, l. 20, § 6.
(j) Inst. ib. § 6.
(k) Dig. ib. § 7.
(l) Inst. ib.
(m) Ib.
interdictus est) nec testis ad testamentum adhiberi potest, cum neque testamenti factionem habeat.” (a)

“Neque ii quos leges jubent improbos intestabilesque esse, possunt in numerum testium adhiberi.” (b) “Cum lege quis intestabilis jubetur esse; eo pertinet ne ejus testimonium recipiatur.” (c)

“Testes adhiberi possunt ii cum quibus testamenti factio est.” (d)

The witnesses must be competent at the time the testament is made. If they subsequently become incompetent, the testament is not invalidated: “Conditionem testium tunc inspicere debemus, cum signarent, non mortis tempore. Si igitur tunc cum signarent, tales fuerint, ut adhiberi possent, nihil nocet, si quid postea eis contigerit.” (e)

The heir named in a testament cannot be a witness to it, on account of his direct interest in supporting its validity: “Qui testamento haeres instituitur, in eodem testamento testis esse non potest: quod in legatario contra habetur.” (f)

His children, father, and brothers, are also excluded: “Sed neque haeres scriptus, neque is qui in potestate ejus est, neque pater ejus qui eum habet in potestate, neque fratres qui in ejusdem patris potestate sunt, testes adhiberi possunt. Quia hoc totum negotium quod agitur testamenti ordinandi gratiâ, creditur hodie inter testatorem et hæredem agi.” (g)

This prohibition extends also to the testator’s domestics: “In testibus autem non debet esse qui in potestate testatoris est. Sed si filius familias de castrensi peculio, post missionem faciat testamentum, nec pater

(a) Dig. lib. 28, tit. 1, l. 18. (b) Inst. ib. § 6.
(c) Dig. ib. l. 26. (d) Inst. ib. § 6.
(e) Dig. ib. l. 22, § 1.
(f) Dig. lib. 28, tit. 1, l. 20, and lib. 34, tit. 5, l. 14. Cod. lib. 6, tit. 23, l. 22. Inst. lib. 2, tit. 10, § 11.
(g) Inst. lib. 2, tit. 10, § 10.

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ejus rectè adhibetur testis, nec is qui in potestate ejusdem patris est: reprobatum est enim in eà re domesticum testimonium." (a)

Several persons of one and the same family may be witnesses to a testament, for if they are all equally capable of this function, their relation among themselves is no obstacle to it: "Pater, nec non si is qui in potestate ejus est, item duo fratres, qui in ejusdem patris potestate sunt, utique testes in uno testamento fieri possunt: Quia nihil nocet ex unà domo plures testes alieno negotio adhiberi." (b) "Ad testium numerum simul adhiberi possumus ut ego et pater, et plures qui fuimus in ejusdem potestate." (c)

But although the heir is an incompetent witness, yet a legatee may be a witness to the testament: "Si quis ita scripsisset, Illis, qui testamentum meum signaverint hæres mes Decem dato: Trebatius utile legatum esse putat: quod Pomponius verius esse existimat, quia ipsum testamentum confirmatur testibus adhibitis; quod verum esse existimo." (d)

All the witnesses ought to be present at the same time and at the same place where the testament is made, in order that they may hear the whole tenor of it. But although the testament had been previously written, and in their absence, yet it is sufficient that they are all present to hear it read in the presence of the testator; and that he declared to them that the said testament contained his will, of which the said writing, together with their uniform testimony, is to make the proof; and that at the same time without being interrupted by other business, the witnesses see the testator sign the testament, and they also sign it with him. (e) It is by the signing that the testament is to be completed and to acquire its

(a) Inst. ib. § 9.  
(b) Inst. ib. § 8.  
(c) Dig. lib. 28, tit. 1, l. 22.  
(d) Dig. lib. 34, tit. 5, l. 14  
(e) Cod. ib.
form: "Septem testium præsentia in testamentis requiritur, et subscriptio à testatore fiat." (a)

"Si unus de septem testibus defuerit, vel coram testatore omnes eodem loco testes suo, vel alieno annulo non signaverint, jure deficit testamentum." (b)

"In omnibus auem testamentis, quæ præsentibus, vel absentibus testibus dictantur, superfluum est uno eodemque tempore exigere testatorem et testes adhibere, et dictare suum arbitrium, et finire testamentum. Sed licet alio tempore dictatum, scriptumve proferatur testamentum, sufficit uno tempore, eodemque die, nullo actu extraneo interveniente, testes omnes videlicet simul, nec diversis temporibus scribere signareque testamentum. Finem autem testamenti subscriptionem, et signacula testium esse decernimus." (c)

It is required that the testament should be made uno contextu, without the intervention of any extraneous act. This rule does not apply to the composition or writing of the testament which may be written at different times, but to the adhibition of the solemnities required by the law. It is intended to preclude during the progress of those solemnities the introduction of any extraneous business, but not an absence or interruption occasioned by necessity. (d) "Vi morbi, aut necessitate naturæ in testatore vel testibus." But if the witness were long absent, or could not return, and the testator were in danger, then another witness ought to be substituted. But all the witnesses, however the will be begun, ought to sign it at the same time and in the same place, and in the sight of each other; and thus a will ought to be finished at one act, uno contextu. "Cum antiquitas testamenta fieri voluerit nullo actu interveniente, et hujusmodi verborum compositio non rîtè interpretata penè in permiciem, et

(a) Cod. ib. l. 28, § 1.
(b) Ib. l. 12.
(c) Cod. lib. 6, tit. 23, l. 21.

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testantium, et testamentorum processerit: sancimus in tempore quo testamentum conditur, vel codicillus nascitur, vel ultima quaeam dispositio secundum pristinam observationem celebratur, (nihil enim ex ea penitus immutandum esse censemus) ea quaedem, quae minimè necessaria sunt, nullo procedere modo: quippe causè subtilissimè proposita, ea quae superflua sunt, minimè debent intercedere. Si quid autem necessarium evenerit; et ipsum corpus laborantis respiciens contigerit; id est, vel victus necessarii, vel potionis oblatio vel medicaminis datio, vel impositio, quibus relictis ipsa sanitas testatoris periclitetur, vel si quis necessarius naturæ usus ad depositionem superflui ponderis immineat, vel testatori, vel testibus; non esse ex hac causâ testamentum subvertendum, licet morbus comitialis (quod et factum esse comperimus) uni ex testibus contigerit, sed eo quod urget, et imminet, repleto, vel deposito, iterum solita per testamenti factio nem adimpleri.” (a)

The testament may be made at all hours, either of the day or night:” “Posse et nocte signari testamentum nulla dubitatio est.” (b)

2. If the testator be desirous that the contents of his testament should remain unknown, he can make a private or secret testament. If he knows how to read and write, or only to read, and writes his testament himself, or procures it to be written by another, and reads it over, and finding its contents to be conformable to his intentions, he presents this writing, folded up and sealed, to a public notary, and to seven witnesses assembled together at the same time, declaring to them that that is his testament, but without suffering them to read it, or telling them what are its contents; and having signed it in their presence, upon the back or upon the cover, if he knows how, or is able to sign, he procures the wit-

(a) Cod. lib. 6, tit. 23, l. 28. (b) Dig. lib. 28, tit. 1, l. 32, § 6.
nesses, or the notary, to sign it; and if the testator or either of the witnesses cannot, or is not able to sign it, the same addition is to be made as in the solemn testament in writing, and which has been already mentioned. "Hâc consultissimâ lege sancimus, licere per scripturam conscientibus testamentum, si nullum scire volunt ea quae in eo scripta sunt, consignatam, vel ligatam, vel tantum clausam involutamque proferre scripturam, vel ipsius testatoris, vel cujuslibet alterius manu conscriptam, eamque rogatis testibus septem numero, civibus Romanis, puberibus omnibus, simul offerre signandam et subscribendam: dum tamen testibus presentibus testator suum esse testamentum dixerit, quod offertur, eique ipse coram testibus suâ manu in reliquâ parte testamenti subscripterit; quo facto, et testibus uno codemque die ac tempore subscribentibus et consignantibus, testamentum valere; nec ideo infirmari, quod testes nesciant quae in eo scripta sunt testamento. Quod si literas testator ignoret, vel subscribere nequeat, octavo subscriptore pro eo adhibito, eadem servari decernimus." (a)

The proof of the secret or mystic testament is founded on the declaration made by the testator to the witnesses that his testament is contained in the writing which he produces to them. It is necessary, that after the death of the testator the secret writing, in which the testament is contained, should be put into the hands of the judge, that he may open it, after the witnesses and notary have been summoned before him to acknowledge their handwriting, and bear testimony that it is the same writing which the testator declared to them to be his testament. After it has been thus verified, it is opened: "Cùm ab initio aperiendae sint tabulæ prætoris ad officium est, cogat signatores convenire, et sigilla sua recognoscere, vel negare se signasse." (b)

If any of the witnesses had not signed, or if any of

(a) Cod. lib. 6, tit. 23, l. 21.  
(b) Dig. lib. 29, tit. 3, l. 4, 5.
those who did sign, should be either dead or absent, the
testament ought to be verified and opened in the pre-
sence of such of the witnesses as are to be found, and
who have signed it, and of the notary, if he be not dead
or absent. If either the notary or any of the witnesses
should be prevented by some lawful impediment from
appearing before the judge, the verification with respect
to them would be made in the place where they are
resident. But if all of them were either dead or ab-
sent, and it were necessary to open the testament with-
out delay, the judge might call before him some per-
sons of probity who were well acquainted with the
handwriting of the notary and witnesses; and upon
proof made of their handwriting open the testament.
This verification might afterwards be confirmed, by proc-
curing the notary and witnesses, who had been absent
when the testament was opened, to acknowledge their
own hands. “Sed si major pars signatorum fuerit
inventa, poterit ipsis intervenientibus resignari testa-
mentum, et recitari.” (a) “Si fortè, omnibus absentibus,
causa aliqua aperire tabulas urget, debet proconsul
curare ut intervenientibus optimæ opinionis viris aperi-
antur. Tunc deinde eò mittantur, ubi ipsi signatores
sint, ad inspicienda sigilla sua.” (b)

3. Blind persons may make a testament as well as
other persons who can neither write nor read. They
may signify their meaning, and cause it to be committed
to writing, and declare in the presence of seven witnesses
and a notary, that what they have so committed to
writing, and which is to be read in the presence of the
witnesses and notary, is their testament; and such test-
ament will be sufficient, if it be signed by the wit-
nesses who are able to sign, and by the notary. And if
there are witnesses who cannot, or are not able to sign,
the notary must make mention of it: “Hâc consultis-

(a) Dig. lib. 29, tit. 3, l. 6.  
(b) lb. l. 7.
simâ lege sancimus, ut carentes oculis, seu morbo vitiove, seu ita nati, per nuncupationem sue condant moderamina voluntatis; scilicet presentibus testibus septem, quos alii quoque testamentis interesse juris est; tabulario etiam, ut cunctis ibidem collectis, primum ad se convocatos omnes, ut sine scriptis testentur, edoceant. At cum humana fragilitas, mortis præcipue cogitatione perturbata, minus memoria possit res plures consequi; patebit eis licentia, voluntatem suam, sive in testamenti, sive in codicilli tenore compositam, cui velit scribendum credere in eodem loco postea convocatis testibus et tabulario." (a)

A person who is capable of making a testament may make it by writing it himself, or causing it to be written by another, and declaring in the presence of a notary and seven competent witnesses, that the writing which is to be read in their presence, and in the presence of the testator, is his testament, and signing it himself, and procuring it to be signed. This species of testament was the most frequent, and might be adopted by the blind, the deaf, and the dumb, and those who knew neither how to write nor read.

The testament might be written upon a tablet of wax, upon paper, parchment, or any other substance. "Nihil interest, testamentum in tabulis, an in chartis, membranisve, vel in aliâ materiâ fiat." (b)

4. A nuncupative testament is that which is made without the solemnity of writing, namely, when the testator, in the presence of seven witnesses, names his heir, and declares his last will. (c) This species of testament may be reduced into writing. It is called a nuncupative will, because there is no necessity for any writing therein, but the whole disposition may be made by the nuncupation and living voice of the testator. (d)

(a) Cod. lib. 6, tit. 23, l. 8.
(b) Inst. lib. 2, tit. 10, § 12.
(c) Cod. lib. 6, tit, 23, l. 21.
(d) Iib. § 2.
The strict formalities enjoined by the civil law in exercising the power of testamentary disposition have, it is supposed, originated in that liberty which the Romans always enjoyed of making testaments without writing. Justinian, in prescribing the solemnities with which written testaments were made, expressly reserves the right of making the nuncupative testament: "Sed hæc quidem de testamentis, quæ scriptis conficiuntur, sufficiunt. Si quis autem sine scriptis voluerit ordinare jure civili testamentum, septem testibus adhibitis, et suâ voluntate eoram eis nuncupatâ, sciat hoc perfectissimum testamentum jure civili, firmumque constitutum." (a)

The Emperor Theodosius ordained that there should be seven witnesses, citizens of Rome, called on purpose, and that they should be present during the whole time of making a nuncupative testament: "Per nuncupationem, hoc est, sine scripturâ, testamenta non alias valere sancimus, quam si septem testes, simul uno eodemque tempore collecti testatoris voluntatem, ut testamentum sine scripturâ facientes, audierint." (b)

The term nuncupare denotes the declaration of a man’s will, and the express nomination by him of his heir before witnesses: and it is not sufficient that the heir is named before witnesses by another person, and then simply approved of by the testator himself. (c)

A nuncupative differs from a written testament in this, that in the latter the testator may conceal his purpose, but in the former he is obliged to reveal it. In a nuncupative testament, it was customary to make use of seven witnesses especially requested thereunto, and then upon the testator’s death, these witnesses were by the heir presented to the judge, before whom they declared and gave an account of the last will of the person deceased. (d) But a nuncupative will is almost

(a) Inst. lib. 2, tit. 10, § 14. (b) Cod. lib. 6, tit. 23, l. 21, § 2.
(c) Vinn. ad Inst. lib. 2, tit. 10, § 14.
(d) Dig. lib. 28, tit. 1, l. 21.
always reduced into writing by notaries after the testator's death; and this being done, although the witnesses afterwards die, or be rendered incapable of giving their evidence, the testament remains valid. (a)

The preceding rules as to the qualification of witnesses and the completion of the solemnities uno contextu are equally applicable to nuncupative testaments.

Every testament, in which any of the formalities prescribed by the law is wanting, is null: "Testamentum non jure factum dicitur, ubi solemnia juris defuerunt." (b) Thus, a testament would be null, if it had only six witnesses, in places where seven are required, or if it were not signed by the testator, or by the witnesses.

5. The civil law has exempted certain testaments from the greater number of the solemnities, which it required to be observed in other testaments. The privilege of such an exemption was granted, either in respect of the person of the testator, or of the time when the testament was made, or of the persons in whose favour it was made. They were called privileged testaments. This privilege was granted to soldiers on actual service. They were allowed to make their testaments "quomodo velint et poterint." With respect to property of which they might dispose, the persons who might be the objects of their bounty, the form of the instrument, and the manner of making it, they were not bound by any of the rules to which other persons were subject. "Quoquomodo testati fuissent, rata esset eorum voluntas. Faciant igitur testamenta, quomodo volent; faciant quomodo poterint: sufficiatque ad bonorum divisionem faciendam nuda voluntas testatoris." (c)

(a) Inst. lib. 2, tit. 10, § 2. Dig. lib. 28, tit. 1, l. 4; lib. 29, tit. 3. Cod. lib. 8, tit 54, l. 31.
(b) Dig. lib. 28, tit. 3, l. 1.
(c) Dig. lib. 29, tit. 1, l. 1, and lib. 37, tit. 3.
"Lucius Titius miles notario (suo) testamentum scribendum notis dictavit, et antequam literis perscriberetur, vitæ defunctus est. Quæro, an hæc dictatio valere possit? Respondi, militibus quoquo modo velint, et quomodo possint testamentum facere concessum esse: ita tamen ut hoc ita subsecutum esse legitimis probationibus ostendatur." (a)

Although this indulgence is confined to soldiers who are in actual service, qui in expeditionibus sunt, and whose duties do not afford them the opportunities of observing the solemnities which the law enjoins on others, (b) yet the expression in expeditionibus is not to be so strictly understood that they must be in the field of battle, or in an enemy’s territory. If they are in the camp this privilege is enjoyed by them. (c) But at any other time, or when they are not engaged in, or subject to the urgent duties of their service, and are not living in the camp, they must make their testaments in the same manner as other persons: “Sancimus his solis qui in expeditionibus occupati sunt memoratum indulgeri circa ultimas voluntates conficiendas beneficium.” (d) “Illis autem temporibus, per quæ citra expeditionum necessitas in aliis locis vel suis sēdibus degunt, minimè ad vindicandum tale privilegium adjuvantur.” (e)

The testament which the soldier is thus permitted to make whilst in actual service will not be valid after the expiration of a year from the time of his quitting the army. If he dies before the termination of that period it will remain valid: “Et quod in castris secerint testamentum non communi jure, sed quomodo voluerint, post missionem intra annum tantum valebit. Quid ergo,

(a) Dig. lib. 29, tit. 1, l. 40. Inst. lib. 2, tit. 11.
(b) Vinnius, ad Inst. lib. 2, tit. 11. Hoppius, ad Inst. h. lib. and tit. n. 1.
(c) Lib. Bachov. ad Treutl. vol. 2, disp. 10, th. 6, lib. Carps. p. 3, const. 4, def. 28.
(d) Cod. lib. 6, tit. 21, l. 17. (e) Inst. lib. 2, tit. 11.
si intra annum quis decesserit, conditio autem hæredi adscripta, post annum extiterit? An quasi militis testamentum valeat? Et placet valere quasi militis.” (a)

This privilege will be forfeited by him if he has not honorably quitted the service. (b)

All those who form part of and are attached to an army, although their functions may be of a civil character, are entitled to this privilege. (c)

Persons employed in the public navy were also included in the number of those entitled to this privilege: “Non solis autem militibus legionariis jus testandi jure militari concessum est; sed item navarchos et trierarchos classium jure militari testari posse nulla dubitatio est. (d) Sed et in classibus omnes remiges et nautae milites sunt. Item vigiles milites sunt, et jure militari eos testari posse nulla dubitatio est.” (e)

If a soldier intending to execute a perfect and formal testament had nevertheless left it in an informal and imperfect state, or beginning to reduce it to writing had died before he had completed it, or having revoked a will previously made, expressed his desire that it should be revived, in either of these cases his testament would take effect. It was only necessary that there should be clear and undoubted proof of his intention. This proof might be furnished by writing; and of the manner in which it might be written, as well as the extent of this privilege, the Emperor Justinian has given a forcible illustration, when he says: “Si quid in vaginâ aut clypeo literis sanguine suo rutilantibus adnotaverint, aut in pulvere inscripserint gladio suo, ipso tempore quo in prælio vité sortem derelinquunt, hujusmodi voluntatem stabilem esse oportet.” (f)

(a) Inst. lib. 2, tit. 11, § 3.  
(b) Ib.  
(c) Perex. Cod. lib. 6, tit. 21, n. 3, et seq.  
(d) Dig. lib. 37, tit. 13, l. 1.  
(e) Ib. § 1.  
(f) Poth. Pand. lib. 29, tit. 1, § 1, 2.
This proof might also be afforded by two witnesses declaring that the testator had seriously made such a disposition, or named such a person as his heir, nor was it necessary that they should be specially called to witness it: (a) "Id privilegium, quod militantibus datum est, ut quouquammodo facta ab his testamenta rata sint, sic intelligi debet, ut utique prius constare debeat testamentum factum esse. Si ergo miles, de cujus bonis apud te quæritur, convocatis ad hoc hominibus, ut voluntatem suam testaretur, ita locutus est, ut declararet quem vellet sibi esse hæredem, et cui libertatem tribuere, potest videri, sine scripto hoc modo esse testatus: et voluntas ejus rata habenda est. Ĉæterum si, ut plerumque sermonibus fieri solet, dixit alicui, Ego te hæredem facio, aut tibi bona mea relinquo, non oportet hoc pro testamento observari." (b)

Amongst the more important privileges connected with the dispositions of the testament by a soldier may be enumerated those of passing over the heir without subjecting the testament to be set aside as inofficious, and of instituting the heir by a codicil, and of property left by him as a legacy or fidei-commissum not being subject to the deduction of the Falcidian or Trebellian portion. (c)

An indulgence also was granted to persons in the country, illiterate themselves, and who were not able to procure the full number of witnesses who could read or write. They were permitted to make a testament attested in the presence of five witnesses only: (d) "In illis vero locis, in quibus rarè inveniuntur homines literati, per presentem legem rusticanis concedimus antiquam eorum consuetudinem legis vicem obtinere: ita tamen, ut ubi scientes litteras inventi fuerint, septem testes (quos ad testimonium convocari necesse est) adhibeantur ut unusquisque pro suâ personâ subscribat. Ubi autem

(a) Perez. ad Cod. lib. 6, tit. 21, n. 8, 9.  
(b) Dig. lib. 29, tit. 1, l. 24.  
(c) Ib.  
(d) Perez. ad Cod. h. lib. and tit. n. 29.
non inveniuntur literati, septem testes etiam sine scripturâ testimonium adhibentes admitti. Sin autem in illo loco minimè inventi fuerint septem testes: usque ad quinque modis omnibus testes adhiberi jubemus: minus autem nullo modo concedimus. Si vero unus, aut duo, vel plures fuerint literati, liceat eis pro ignorantibus literas, presentibus tamen, subscriptionem suam interponere: sic tamen, ut ipsi testes cognoscant testatoris voluntatem: et maximè quem, vel quos hæredes sibi relinquere voluerit: et hoc post mortem testatoris jurati deponant.” (a)

Some of the solemnities were dispensed with if the testament were made during the time a plague or contagious disease prevailed. A less number of witnesses would then be sufficient if the requisite number could not be assembled, and they might sign and subscribe the testament separately, if they had cause to apprehend infection from a nearer communication with the testator: “Casus majoris ac novi contingentis ratione, adversus timorem contagionis, quæ testes deterret, licet aliquid de jure laxatum est: non tamen prorsus reliqua testamentorum solennitas perempta est. Testes enim hujusmodi morbo oppressos eo tempore jungi atque sociari remissum est: non etiam conveniendi numeri eorum observatio sublata est.” (b)

The observance of the ordinary solemnities was dispensed with in favour of the testament by which a parent disposed of his property amongst his legitimate children, if he confined it to that object: “Si quis literas sciens, inter suos filios voluerit facere dispositionem, primum quidem ejus subscriptione tempus declaret: deinde

(a) Cod. lib. 6, tit. 23, l. 31.
quoque filiorum nomina propriâ manu: ad hoc uncias in quibus scripsit eos hérèdes, non signis numerorum significandas, sed per totas litteras declarandas: ut undique clare et indubitatae consistant.” (a)

If he wrote it in his own hand expressing in letters the day, and also the names of the children, it was not necessary that he should have any witnesses to it, but if he employed another person to write it, two witnesses were required. (b)

Those witnesses might be females as well as males. (c)

This permission was granted to the grandfather and grandmother, or other ascendants, as well as to the immediate parents of the children. (d)

The testament might be nuncupative as well as written, if it were attested by two witnesses. (e)

The children might by this testament be instituted in unequal as well as equal shares. (f)

This species of testament must be confined to the children, for if it attempted to dispose of property to any other persons, it was void as to the latter. (g)

Natural children cannot be objects of this testament. (h)

This permission is not granted to children. (i)

The omission of the date, or any internal evidence which the instrument afforded that it was not the final


(c) Grassus, de Success. § Testam. quest. 11, n. 5. Groeneweg. ad § 6, Inst. lib. 2, tit. 10. Voet, ib.


(e) J. Ciarus, § Testam. quest. 11. Vinnius, Select. Quest. lib. 2, c. 18.

(f) Tulden, ad Cod. lib. 6, tit. 21, n. 3. Zoesius, ad Pand. lib. 29, n. 64.

(g) Ib.


and ultimate declaration of the testator's intentions, but merely preparatory, or that he intended to make any addition to it, would render it inoperative. (a)

6. Codicils were not of frequent use before the reign of Augustus; for Lucius Lentulus, by whose means trusts became efficacious, was the first who caused authority to be given to them. When he was dying in Africa he wrote several codicils, which were confirmed by his testament; and in these he requested Augustus to perform some particular act in consequence of a trust; the Emperor complied with the request; and many other persons, influenced by the authority of the emperor's example, afterwards punctually performed trusts committed to their charge; and the daughter of Lentulus paid debts, which in strictness of law were not due. But it is reported, that Augustus having convened upon this occasion the sages of the law, and also Trebatius, whose opinion was of the greatest weight, demanded whether codicils could be admitted to be of force, and whether they were not repugnant to the very reason of the law? To which Trebatius answered, that codicils were not only most convenient, but most necessary, on account of the long voyages which the Romans were frequently obliged to take, to the intent, that where a man could not make a testament, he might bequeath his effects by codicil. And afterwards, when Labeo, a lawyer of great eminence, disposed of his own property by codicil, it was no longer a doubt but that codicils might be legally allowed. (b)


(b) Inst. lib. 2, tit. 25. Dig. lib. 29, tit. 7. Cod. lib. 6, tit. 36. Vinius, ad Inst. lib. 2, tit. 25. Hoppius, ad Inst. h. 1 and tit. Lauterbach, ad lib. 29, tit. 7.
Not only the person who has already made his testament is permitted to make a codicil, but even an intestate may commit a trust to others by codicil. But when a codicil precedes a testament, it cannot according to Papinián take effect otherwise than by being confirmed by the subsequent testament.

But the Emperors Severus and Antoninus have by rescript declared, that property left in trust by a codicil preceding a testament may be demanded by the fideicommissary, if it appear that the testator has not receded from the intention first expressed by him in his codicil: "Non tantum autem testamento facto potest quis codicillos facere, sed et intestatus quis decedens fidei-committere codicillis potest. Sed cum ante testamentum factum codicilli facti erant, Papinianus ait, non aliter vires habere, quam si speciali voluntate postea confirmetur. Sed Divi Severus et Antoninus rescripsierunt, ex iis codicillis, qui testamentum præcedunt, posse fidei-commissum peti, si appareat eum, qui testamentum fecit, à voluntate quam in codicillis expresserat, non recessisse." (a).

"Codicilli et ab intestato confici possunt, et facto testamento. Ab intestato facti suis iribus nituntur et vicem testamenti exhibent: proinde quicunque intestati successor erit, sive legitimus, sive honorarius, etiam postea natus, codicillis relicka præstabit. Testamento autem condito, codicilli, quocunque tempore facti fuerint, ad testamentum pertinent, viresque ex eo capiunt, etiamsi in eo confirmati non sint; et confirmato testamento codicilli concidunt. Illud vero interest inter codicillos testamento nominatim confirmatos et non confirmatos, quod illis relicka etiam directò jure valent, veluti legata et libertates directò datae; perindeque omnia habeantur, ac si in testamento scripta essent, exceptâ causâ hæreditatis. At, quæ codicillis non confirmatis relicka sunt, sive

(a) Inst. lib. 2, tit. 25, § 1.
verbis directis sive precariis, debentur jure fide-commissi. Sed non est, quod de his amplius laboremus; cum enim confusa nunc sit legatorum et fidei-commissorum natura, dubitandum non est, quin legata codicillis etiam non confirmatis data directò nunc valeant.” (a)

But an inheritance can neither be given nor taken away by a codicil, and therefore an heir cannot be disinherited by it. Yet although an inheritance can neither be given nor taken away by codicil in direct terms, yet it may be legally left from the heir in a codicil, by means of a trust, or _fidei-commissum_. No man is allowed to impose a condition upon his heir by codicil, nor to substitute directly. “Codicillis autem hæreditas neque dari, neque adimi, potest; ne confundatur jus testamentorum et codicillorum: et ideo nec exhaeredatio scribi. Directò autem hæreditas codicillis neque dari neque adimi potest: nam per fidei-commissum hæreditas codicillis jure relinquitur. Nec conditionem hæredi instituto codicillis adjicere, neque substituere directò, quis potest.” (b)

“Codicillos autem etiam plures quis facere potest: et nulam solemnitatem ordinationis desiderant.” No extraordinary solemnity, namely, that of bringing seven witnesses to subscribe it, is required, as in the case of a testament; but a codicil should be supported by five witnesses. (c) “In omni autem ultimá voluntate, excepto testamento, quinque testes, vel rogati, vel qui fortuitu venerint, in uno eodemque tempore debent adhiberi: sive in scriptis, sive sine scriptis voluntas conficiatur: testibus videlicet, quando in scriptis voluntas componitur, subnotationem suam accommodantibus.” (d)

As a measure of precaution, testators added to their testaments a clause, which they called codicillary, whereby they declared that if their will could not be valid as a

(a) Vinn. ad Inst. h. lib. and tit. and §. (b) Inst. lib. 2, tit. 25, § 2.
(c) Inst. lib. 2, tit. 25, § 3.
(d) Cod. lib. 6, tit. 36, l. 8, § 3.
testament, it might be valid as a codicil, or otherwise in the best form that it could be valid. The effect of this clause is, that if it were wanting, and there should happen to be in the testament some nullity, the will would not be valid as a codicil; yet this clause being added to the testament, renders it valid and effectual, provided it has all the formalities necessary in codicils, as for example, if there were some witnesses, whose testimony ought to be rejected, there should remain five at least, whose testimony was competent. "Plerique pagani solent cum testamenta faciunt per scripturam, adjicere; velle hoc etiam vice codicillorum valere." (a) "Si non valuit, ea scriptura, quam testamentum esse voluit, codicillos non faciet, nisi hoc expressum est." (b)

"Sæpissimè rescriptum et constitutum est, eum qui testamentum facere opinatus est, nec voluit quasi codicillos id valere, videri nec codicillos fecisse. Ideoque quod in illo testamento scriptum est, licet quasi in codicillis poterit valere, tamen non debetur." (c)

The effect of the codicillary clause is also given even when it is not inserted, as when the testator declared in his testament, that he had written it without the help of any lawyer to assist him in observing the formalities, choosing rather to follow what his reason dictated to him, than to subject himself to the trouble of a nice observation of all those formalities, and judging if he erred in any one of them, yet the will of a person in his right senses ought to be held for just and lawful; it was decided that these expressions should have the same effect as a codicillary clause: "Lucius Titius hoc meum testamentum scripsi sine ullo jurispronto, rationem animi mei potius secutus, quam nimiam et miseram diligentiam, et si minus aliquid legitime minusve peritè fecero, pro jure legitimo haberi

(a) Dig. lib. 29, tit. 1, l. 3.
(b) Dig. lib. 28, tit. 6, l. 41, § 3. Cod. lib. 6, tit. 36, l. 8, § 1.
(c) Dig. lib. 29, tit. 7, l. 1. Cod. ib. l. 8, § 1.
debet hominis sani voluntas; deinde hæredes instituit. Quæstitum est, intestati ejus bonorum possessione petitâ, an portiones adscriptæ ex causâ fidei-commissi peti possunt? respondi, secundum ea quæ proponerentur posse.” (a)

Expressions indicating the testator’s desire that his will should be executed, have obtained the effect of this clause. As, when the testator desired in his testament that it might subsist in whatever manner it could have its effect: “Ex his verbis, quæ scripturæ pater-familias addidit, hoc testamentum volo esse ratum, quæcunque ratione poterit; videri cum voluisse omnimodo valere ea quæ reliquit, etiamsi intestatus deceisses.” (b)

So, if he had said, that in case his disposition could not be valid as a testament, he entreated those who should succeed to him as dying intestate to execute his intention: “Ex testamento quod jure non valet, nec fidei-commissum quidem, si non ab intestato quoque succedentes rogati probentur, peti potest.” (c)

II. A testator, by the law of Holland was at liberty, and in British Guiana it is competent for him to make his testament, written or nuncupative, in the presence of seven witnesses, according to the Civil law. But this practice has nearly fallen into disuse. (d)

But it is also competent for him to make it in the presence of a notary and two witnesses, or before two members of the court, and the secretary. (e)

The latter species of testament was either open or close.

(a) Dig. lib. 30, tit. 2, l. 88, § 17.
(b) Dig. lib. 28, tit. 1, l. 29, § 1.
(c) Cod. lib. 6, tit. 42, l. 29.

(e) Ib.
The open testament is that, which being written by the testator, or by some person at his request and by his direction is read to him, in the presence of the two witnesses and notary, and declared by him to be his testament. The subscription of the testator and witnesses to it, although usual, is not essential to its validity. (a) The day and place of making the will ought to be inserted, but the omission, even of the day, can never be fatal to it, when there is only one testament, and therefore no uncertainty exists respecting that which is the last testament. (b)

The written closed will is made by the testator committing it to writing himself, or causing it to be written by another. It is subscribed and closed by him, and he then delivers it to the notary, in the presence of two witnesses, declaring, that whatever is contained in the paper thus closed is his full last will. The notary superscribes on it this declaration, and the same is subscribed by the testator and witnesses. (c)

The party who makes his will in this way must be cautious to keep the seal and envelope unbroken and unopened, otherwise it loses its force. (d)

When such a will is confirmed by the death of the testator, it is opened by the notary in the presence of witnesses, and on the seal and envelope appearing perfect and untouched, an act of opening is made and given out, the original will remaining in the protocol of the notary. (e)

A husband and wife may both make their testaments in one and the same paper writing; (f) but the paper is


(d) Voet, lib. 28, tit. 4, n. 1.


(f) Grotius, Inleyd. lib. 2, c. 17. Van Leeuwen, b. 3, c. 2, par. 4.
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considered to contain two separate testaments, which each of them may always alter separately, and without the knowledge of the other, as well as after the death of either of them; (b) but if they have benefited each other reciprocally, and directed how their goods of the common estate are to go after the death of the survivor, if the latter has enjoyed or wishes to enjoy the benefit of it, such survivor can make no other last will or testamentary disposition of his or her share, unless he or she had rejected the benefit made, and had ceded the same. (c)

A closed will of two wedded persons, in which one benefits the other, ought to be written by a third person; because no one can write any last will in which he himself is benefited. (d)

The law of Holland adopted the preceding rules of the Civil Law respecting the qualification and competence of the witnesses to the testament; and it excluded as a witness, not merely the heir, but any other person who took a beneficial interest under the testament. (e)

The witnesses must be present together in a situation that they may see the testator, and they should be fully aware that the instrument, the execution of which they are about to attest, is his will. (f)

The testator must be known to the notary, or to both the witnesses. (g)

(b) Peck. de Testam. Conjug. lib. 1, c. 43. Everhard. cons. 79. Faber, Cod. lib. 6, tit. 5, def. 18. Gaill, lib. 2, obs. 117, n. 1, 2.
(c) Ib. Van Leeuwen, lib. 3, c. 2.
(f) Voet, lib. 26, tit. 1, n. 7.
The privilege granted to soldiers in making their testament has been retained in the jurisprudence of Holland, and the rules of the Civil Law are adopted to their full extent. (a)

It also permitted the testaments of persons sailing to the Indies, or returning from thence, made on board the ship, to be valid, when attested by two witnesses, if they were reduced to writing in a book appointed for that purpose, and confirmed by the subscription of him who wrote it, and two witnesses. (b)

The privilege in respect of a testament made before two witnesses during the time of a plague would seem also to be retained. (c)

The privilege in favour of testaments made by husbandmen in the country is not admitted. (d)

The testament of a father or mother, by which they made a division of their property amongst their children, retains the privilege which the civil law gave to a testament in favour of those objects. If they make it verbally in the presence of two witnesses, so that there may be proof of its having been made, or by their own writing, or if they had procured another person to write it, but had themselves signed it, such will would have full effect, so far as it relates to the children. It would also have the effect of revoking a previous will made without the solemnities of the law.

This privilege extends to a testament made by a


(c) Voet, ib.

grandfather in favour of his grandchildren, and further descendants. (a) It has been decreed by the High Court of Holland, that this testament may be revoked by a general insertion of the revocation customary among notaries, and that no special revocation is required, much less any insertion respecting the nature of the will. (b) In the jurisprudence of Holland, the distinction between testaments and codicils have long ceased to be observed, "Eandem enim ordinationis solemnitatem requirunt, atque ita suprema Hollandiæ curia censuit; et confusis eorum nominibus haeredis institutionem ad substantiam testamenti necessariam esse negant pragmatici. Hinc quoque codicillis hereditatem directo dari et adimi, ideoque et exhaerotionem scribi moribus nostris nil vetat." (c) III. The law of Spain enabled a testator to authorize another to make a will for him. The person thus authorized was called delegate or substitute (comisario). (d) His powers, however, were strictly construed, and he required an express special authority for whatever he inserted in the testament. He could neither institute, nor disinherit, nor substitute an heir, nor meliorate (mejorar), nor appoint a trustee or guardian, nor revoke a testament previously made, nor make any disposition without a special power for each of these purposes. (e) If the testator has not himself instituted an heir, and the comisario has not a special power for any of these purposes, but only a general power, it is only competent

for him to discharge the obligations of conscience owing by the testator, viz., to pay his debts and the like, and direct the disposal of the fifth for the benefit of his soul, and divide the remainder between the heirs *ab intestato*, or, if there be none, to dispose of it for pious uses. *(a)*

If the heir has been appointed by the testator, the *comisario* can only dispose of the fifth, and if he does not, the heirs are to distribute it for the benefit of the testator's soul. He has four months for making the necessary dispositions; if he be absent from the place, six months, and one year, if he be absent from the kingdom. *(b)*

The testament is of two sorts, open *(abierto)* or closed *(cerrado)*. The open or nuncupative will ought to be executed before an *escribano* and three witnesses, inhabitants of the place; and if the testator is blind, five are required; and if there be no *escribano*, five witnesses of the place are requisite, unless they cannot be met with, or seven strangers or non-residents *(forasteros)* will be sufficient. *(c)* The closed or written will, *(d)* which is made in secret *(en poridad)* is delivered to the *escribano*, signed on the outside by the testator and seven witnesses, with the attestation of the *escribano*. *(e)*

The law of Spain adopted the rules of the civil law in respect to the number and qualification of the witnesses. It was found inconvenient in the Island of Trinidad to retain that law, and an order in council was passed on


*(c)* L. 1, tit. 4, lib. 5, Rec.

*(d)* L. 1, tit. 1, p. 6.

the 8th of June, 1816, and proclaimed there on the 9th of August, by which a material alteration was made.

It recites the expediency of removing all doubts concerning the validity of wills and testaments made and to be made within the Island of Trinidad, as far as regards the number of persons required by law to attest the same; and of remedying the inconvenience that may arise from the difficulty of procuring, on a sudden emergency, the same number and description of witnesses as are required by the first and second laws of the 18th title and 10th book of the Novisima Recopilacion of Castille. It then orders and declares that all wills, testaments, and codicils thereto, attested by three male witnesses domiciled and inhabitants of the place and quarter wherein the same shall have been made, or of two such witnesses as aforesaid, and the commandant of the quarter, shall be, as they are thereby declared to be, good and valid, in respect to the attestation of the same.

It further orders and declares, that all wills and testaments made and executed previous to the promulgation of the order, that shall have been signed and attested by three male witnesses as aforesaid, shall be considered good and valid in respect to such signature and attestation, provided they shall not have been administered to, nor declared null and void for that defect alone, by a competent tribunal previous to the promulgation of the order. And it further orders and declares, that any will, testament, or codicil thereto, that shall not be attested and signed by the number and description of witnesses thereinbefore mentioned and required, shall be deemed and taken, as they are thereby declared to be, void and of no effect. (a)

It will be observed that this order in council relates to testaments made in Trinidad.

(a) Trinidad, Order in Council, June 8th, 1816.
The order in council of the 6th of April, 1818, which relates to the registry of deeds and wills, requires that three separate books or protocols shall be kept by the secretary and registrar, or his lawful deputy, viz., one for receiving and keeping all original wills, made and executed within the said Island of Trinidad, and original wills or attested copies of original wills executed out of the said island, and by and under which any estate or interest within the said island is devised and bequeathed, and duly proved according to the law and custom of the place where the will was executed.

And it orders and declares, as to all deeds, acts, or instruments, executed and acknowledged in any other part of the world, in cases where it is required by the laws and customs of the country wherein such deed, act, or instrument is acknowledged and executed, that the original should be kept and deposited in any protocol, archive, or office in the said country, that in such case an authentic copy of the original, certified to be so by a public notary, or other public officer, whose character shall also be certified by a judge or magistrate nearest to the residence or domicile of such notary or public officer, shall be deemed and taken as of equal validity as the original, and shall be admitted to be registered and protocoted in the office of the said secretary and registrar, of the illustrious board of Cabildo, or his lawful deputy. (a)

The testaments of soldiers who are on actual service (en guerra actual) do not require the solemnity which is enjoined for other testaments. It is sufficient that the will is proved by two witnesses, or by a simple writing under the hand (de puno) of the soldier. (b)

Codicils are made with the same solemnity as the open or nuncupative testament, (c) and are made use of to

(a) Trinidad, Order in Council, April 6th, 1818.
(b) L. 7, t. 18, lib. 10, Nov. Rec. Orden. Milit. tr. 8, tit. 11, art. 1, 2, 3, 4.
(c) L. 2, tit. 4, lib. 5, Rec.
bequeath, or substitute an heir, or correct the testament. (a)

An heir cannot be substituted directly, nor can any condition be imposed upon him by a codicil; neither can an inheritance be given or taken away directly by it, although it may be indirectly by means of a fideicommissum. (b)

(a) L. 1, tit. 12, p. 6. L. 2, tit. 18, lib. 10, Nov. Rec.
(b) L. 2, tit. 12, p. 6. L. 7, tit. 3, p. 6.
SECTION II.

FORMS AND SOLEMNITIES OF TESTAMENTS UNDER THE COUTUMES OF PARIS AND NORMANDY, THE CODE CIVIL, LAW OF LOWER CANADA AND ST. LUCIA.

I. Under the coutumes of Paris and Normandy two species of testament—
   1. Le testament olographe—and 2. Le testament solennel.—The Code Civil retains le testament olographe, and admits le testament par acte public, and le testament mystique ou secret.—1. Le testament olographe under the coutumes of Paris and Normandy and Code Civil, must be entirely in the testator’s handwriting.—Consequence of any part of the testamentary disposition being in the handwriting of another.—Signature.—It ought to be at the end of the testament.—It was not necessary that there should be a date to the testament under the coutumes of Paris and Normandy.—Required by the Ordinance of 1735, and it is now required by the Code Civil.—A false or erroneous date, where it may be corrected.

II. Le testament solennel under the coutumes of Paris and Normandy, and par acte public under the Code Civil.—The functionaries before whom it is made, or by whom it is received.—Notaries.—Curé or Vicar.—Witnesses.—The formalities required in the making of this testament.—Dictation.—Writing by notary.—Reading to the testator. Expression of its having been read.—Signature by the testator, &c.

III. Le testament mystique under the Code Civil.

IV. Testaments privileged.—Soldiers.—Persons at sea.—Made in time of plague.—No privilege in respect of the testament made by a parent in favour of his children.

V. Testaments in Lower Canada.—Construction of the Quebec act.

VI. St. Lucia.

I. The only two forms of testament recognized by the coutumes of Paris and Normandy are—le testament olographe, and le testament solennel.

In the language of the coutume of Paris, “Pour reputer un testament solennel il est necessaire qu’il soit écrit et signé du testateur.” (a)

(a) Art. 289.
In the coutume of Normandy, "Testament écrit et signé de la main du testateur, est bon et valable, ores que les solemnitez prescrites au precedent article n’ayent été observées et gardées." (a)

The Code Civil retains the olograph testament. It also adopts two other forms of testament, that made par acte public, and le testament mystique, or secret: "Un testament pourra être olographe, ou fait par acte publique, ou dans la forme mystique." (b)

The olograph testament is that which is wholly written by the testator’s hand, and signed by him: "Olographum testamentum est manu autoris totum conscriptum atque subscriptum." (c)

If thus written and signed, no other form is necessary. "Le testament olographe" in the language of the Code Civil "ne sera point valable, s’il n’est écrit en entier, daté et signé de la main du testateur; il n’est assujetti à aucune autre forme." (d)

If a word in the testament, even although it be a superfluous word, be written in any other hand than his own, the whole testament is absolutely null. A single word written in any other hand than that of the testator, even with his sanction, will vitiate the testament.

Thus where a testatrix had by a testament in her handwriting appointed son beau frere her universal legatee, but the term beau had been interlined in the handwriting of another person, the testament was held to be null. (e)

The language of the article of the Code Civil is ex-

(a) Cout. Normand. art. 413, 412, Merville, 415. 2 Basnage, 171.
(b) Code Civil, art. 969.
(d) Art. 970.
press; the olographe testament is, that "qui est écrit en entier, daté et signé de la main du testateur." (a)

If the testament contain several distinct dispositions, each having its signature and date, but one of them is not written entirely by the testator, the latter only, and not the other dispositions, will be void; but if there had been only one signature subscribed to them all, they would have been all void. (b)

The paper ought to be conceived in the form of, and purport to be, a testament; for otherwise it will be deemed a mere memoir and null. (c)

It may be written on any piece of paper. By an Arrêt of the Court of Nimes, January 20th, 1810, a testament written in the testator’s account book was held valid. (d)

The signature of the testator is also of the very essence of the olographe testament. (e)

The name by which he signs it ought to be that of his family, although he may add the surname by which he is distinguished from its other members. The testament of the celebrated Massillon was disputed by his brother because the signature was Evêque de Clermont, and it did not comprise the name of his family. It was proved that Massillon after his elevation to the bishoprick had never signed in any other manner. The brother’s suit was dismissed by the decision of the court, yet having prosecuted an appeal, the administrators of the Hotel de Dieu de Clermont, whom he had instituted universal legatees, compromised the suit by giving him an annuity. (f)

(a) Toull. ib. n. 357.
(f) Toull. ib. n. 374.
The signature must be *at the end* of the last disposition contained in the testament. "Quant au lieu où les signatures doivent être placées, il n'y a pas de doute qu'il y a obligation de les apposer à la fin de l'acte, et après qu'il est achevé, attendu que faisant foi par elles mêmes et servant de sceau à l'acte, elles ne peuvent point valablement être faites, que lors que l'acte est accompli." (a)

"C'est la signature," says Bourjon, "à la fin du testament olographe qui en est le sceau," and in the note he adds, "En effet, c'est cette signature finale qui en est le sceau et sans laquelle il y a tout lieu de presumer que l'ecrit n'est que le simple projet d'un testament." (b)

Ferrière also says, "Signature est la souscription, ou opposition de son nom au bas d'un acte, mise de son propre main." (c)

Pothier, in speaking of the testament *olographe* says, "La signature doit être à la fin de l'acte, parcequ'elle en est le complément et la perfection." (d)

M. Toullier, in commenting on the Art. 970 of the Code Civil, says, "C'est la signature qui rend parfait le testament olographe, elle seule atteste qu'il est l'acte propre du testateur, sans elle il ne seroit qu'un projet." (e)

And he adds, "La place de la signature n'est pas variable et indifferente, comme celle de la date. Cette place est marquée par la nature des choses, elle est la marque de l'accomplissement de la volonté du testateur, et de la dernière approbation qu'il donne à l'acte. Il est donc necessaire que toutes les dispositions du testament soient terminees par la signature." (f)

It was not considered essential to this form of testa-

(a) Ricard, Tr. de Donat. entre-vifs, vol. 1, n. 1531, p. 347.
(c) Ferrière, Dict. de Droit, v. Signature.
(d) Pothier, Tr. des Test. ch. 1, art. 2, § 2.
(e) Toullier, des Dispos. Test. liv. 3, tit. c. 5, n. 372; and n. 375.
(f) Ib. n. 375.
ment under the *coutumes* of Paris and Normandy, that the testator should date it either as to the time or place of his making it. (a) Denisart reports an arrêt of 10th April, 1764 establishing that an *olographe* testament without date made at St. Domingo before the ordinance had been registered there was held valid. There had, however, been some decisions of a different nature. The 38th Article of the Ordinance of 1735, removes all doubt by expressly requiring that the *olographe* testament should contain the date of the day, month, and year.

"Tous testaments, codicilles, actes de partage entre enfans et descendans, ou autres dispositions à cause de mort, en quelques pays et en quelque forme qu'ils soient faits, contiendront la date des jour, mois et an, et ce encore qu'ils fussent olographes. Ce qui sera pareillement observé dans le cas du testament mystique, tant pour la date de la disposition, que pour celle de la suscription."

This ordinance was not registered in Quebec, and in the case subsequently referred to, the decision of the provincial courts and of the privy council was founded on the want of the signature at *the end* of the testament. (b)

It was not necessary under the ordinance that the date should be written on the last page of the will. The widow Volain, made an *olographe* testament on the first side of a sheet of letter paper, *without any* date. She had left blank the second and third sides of the sheet, but on the fourth had written, in the ordinary form in which a letter would be addressed, as follows: *Ceci contient mes dernières volontés, adressées à M. Battu,*


(b) Attorney General and Meiklejohn, 2 Knapp's App. Cas. 328.
que je prie de faire exécuter. Fait à Gien, ce 25 Mars, 1761. Signé de la Croissette, veuve Voilain. And on the other side there was written as follows: C'est moi qui la cachette en cire rouge et en chiffres. Signé de la Croissette, veuve Voilain.

Her testament was disputed on the ground that the date was not to be found on the page which contained the whole of the disposition, but the testament was held to have been duly made in this respect. (a)

Under the ordinance the testament was null, not only if the date had been wholly omitted or left in blank, but if there had been an omission to name the day, the month, and the year. It was not sufficient to have named the day and the month, if the year were not also mentioned, nor to have named the year and the month, if the day were not also mentioned. (b)

The expression in the Code Civil (c) is thus limited, "le testament olographe ne sera point valable, s'il n'est daté de la main du testateur," and does not require any precise indication of the day, month, and year. (d)

A date may have been given to the testament evidently and palpably not correct, for it may be impossible that the day assigned as the date could have been that on which the testament was made.

If the date be evidently anterior to the period when the testament was made, and if the testament itself contains the means by which this error may be corrected, and the period when it was made be demonstrated, the error will not avoid the testament. Madame Letellier died in 1816, leaving an olographe testament, by which she had instituted the Compte Duparc and his wife her universal legatees. The testament bore date the 16th June, mil cent seize. It was quite clear

(b) Furgole, Tr. des Test. c. 51, sect. 4, n. 18. (c) Art. 970.
(d) Toullier, liv. 3, tit. 2, c. 5, des Dispos. Test. n. 362.
that this was an incorrect date, as the testatrix could not
have been then born. The testament also furnished the
proofs by which its real date might be ascertained. Thus
the testatrix had described the legatee as a member of
the Chamber of Deputies, but he was not elected a
member until 1816. She had given a legacy to a per-
son named Etienne, described as her servant, but he did
not enter her service until 1815. Another person was
described in her testament as her agent; he did not be-
come so until 1815. The paper on which the testament
was written bore the stamp mark of the 13th May, 1816.
From all these circumstances, it was quite evident that
there had been an omission of the word huit in the date,
and that the real date was the 16th June, 1816. The
Cour Royale of Caen adjudged the testament to be valid,
and this decision was affirmed on the 19th February, 1818,
by the Court of Cassation. The grounds of the affir-
mance express the principles on which such an error is
corrected: "Attendu, en droit, qu'une erreur de date
ne vicie pas l'acte qui la renferme, quand on trouve dans
l'acte même des éléments matériels et physiques qui la
corrigent, la verifient et la fixent nécessairement.

"En fait, que des éléments matériels de la main de
la testatrice, et faisant partie intégrante de l'acte, sup-
pléent nécessairement le mot huit, seule omission qu'on
puisse reprocher à la date en question, et qu'aussi il est
manifestement et nécessairement établi que le testament
litigieux a été écrit le 15 Juin, 1816; d'où résulte que
le vœu de la loi a été rempli." (a)

But when the date on the testament is posterior to the
period when it could be made, as if the date should be
in the month of October, and the testator had died in the
August preceding, it seems that such a testament would
be held to have no date, and therefore to be void, unless
it were possible to imagine a case in which the testament

(a) Toullier, ib. n. 362.
contained statements from whence the actual date might be discovered. Dumoulin refers to a case in which he had been consulted on a testament found in the library of M. de Gilbert, bearing date in October 1546, the testator having died in the preceding month. This great jurist was of opinion that the testament was null, on the ground that as it bore a date subsequent to his decease, the presumption was "non intendebat ante testari." (a)

M. Merlin reports an Arrêt rendered by the Superior Court of Justice of Brussels, of the 20th Nov. 1822, (b) and subsequently affirmed, by which it was established, that a date, which the stamp on the paper shewed to be of a day subsequent to the period of the testator's death, was null. The motives of the affirmance develop the principles to be applied to cases of this description: "Attendu, que l'article 970 du Code Civil exige que le testament olographe soit écrit et signé de la main du testateur, et qu'il contienne la date ou mention du jour de la signature du testament, le tout à peine de nullité, en vertu de l'article 1001 du même Code; Que si, selon l'opinion des auteurs et la jurisprudence des arrêts, l'erreur de la date d'un testament olographe ne le rend pas toujours nul, cette exception néanmoins ne doit avoir lieu que lorsqu'on peut apercevoir cette erreur, par le contenu et par les circonstances du testament même, et lorsqu'on peut en même temps, par ce contenu et par ces circonstances, fixer le véritable jour auquel le testateur a signé son testament; Attendu que, dans l'espèce, le testament olographe sur lequel la demanderesse fonde son action, est écrit sur un timbre Belgique, et que ce timbre n'a été introduit que le 1er. Avril, 1814; Attendu que le même testament porte néanmoins une date antérieure à cette époque d'environ vingt mois, c'est-à-dire, celle du 10 Août, 1812; que conséquemment

cette date n’est pas véritable ; Attendu que le testament en litige ne présente pas le moindre circonstance qui soit de nature à pouvoir fixer, entre le 1er. Avril, 1814, jour de l’émission des timbres Belgiques, et le 4 Nov. 1819, jour du décès du testateur, le jour certain, le mois et même l’année où le testateur aurait signé le dit testament ; Qu’aussi, et puisque la date du 10 Août, 1812, doit être considérée comme non existante, le même testament n’est point daté, dans le sens de l’article 970 du Code Civil ; Que, par une conséquence ultérieure, l’arrêt attaqué, loin d’avoir violé ou faussement appliqué le dit article 970, en a fait au contraire une juste application ; par ces motifs, la cour rejette le pourvoi.” (a)

A statement of the place where the testament is made is not essential to its validity. (b)

An erasure in an olographe testament has the effect of annulling only that particular disposition in which the erasure is found. (c)

II. If the testament be not olographe, the coutume of Paris required “qu’il soit passé par devant deux notaires, ou par devant le curé de la paroisse du testateur, ou son vicaire général, et un notaire ; ou dudit curé ou vicaire, et trois témoins ; ou d’un notaire et deux témoins : icex témoins idoines, suffisans, mâles et âgéz de vingt ans accomplis, et non legataires : et qu’il ait été dicté et nommé par le testateur ausdits notaires, curé ou vicaire général, et depuis à lui relû en la presence d’icex notaires, curé ou vicaire général et témoins, et qu’il soit fait mention audit testament, qu’il a été ainsi dicté, nommé et relÚ, et qu’il soit signé par ledit testateur, et par les témoins, ou que mention soit faite de la cause pour laquelle ils n’ont pu signer.” (d)

The testament solemn according to the coutume of Normandy, “doit être passé par devant le curé ou vicaire,

(a) Toullier, ib.  (b) Pothier, Tr. des Test. c. 1, art. 1, § 2, Toullier, ib. n. 368.  (c) Pothier, ib.
notaire ou tabellion, en présence de deux témoins idoines, âgez de vingt ans accomplis, et non legataires; presence desquels le testateur doit déclarer sa volonté, et s'il est possible le dicter; et après lui doit être lú le testament, presence de tous les dessusdits, signé du testateur, s'il le peut faire, et si faire ne le peut, sera fait mention de l'occasion pourquoi il ne l'a pû signer; même il sera signé desdits curé ou vicaire, notaire ou tabellion, et témoins." (a)

The testament par acte public by the Code Civil, "est celui qui est reçu par deux notaires, en présence de deux témoins, ou par un notaire en présence de quatre témoins." (b)

"Si le testament est reçu par deux notaires, il leur est dicté par le testateur, et il doit être écrit par l’un de ces notaires, tel qu’il est dicté. S’il n’y a qu’un notaire, il doit également être dicté par le testateur, et écrit par le notaire. Dans l’un et l’autre cas, il doit en être donné lecture au testateur, en présence des témoins. Il est fait du tout mention expresse." (c)

The coutume of Paris appoints certain public functionaries before whom the testament is to be passed, namely, notaries or the curé of the parish of the testator, or son vicaire-général. If it be passed before two notaries, no witnesses are required; if before one notary, there must be two witnesses; if before the curé or his vicar, there must be one notary or three witnesses.

The coutume of Normandy requires that it should be passed before the curé or his vicar, or a notary or tabellion, in the presence of two witnesses.

The Code Civil requires that it should be taken by two notaries in the presence of two witnesses, or by one notary in the presence of four witnesses.

The functionaries must be competent to receive the testament.

(a) Cout. of Normandy, art. 412.
(b) Art. 971.
(c) Ib. 972.
They must have authority to act as notaries in the jurisdiction or district in which they respectively receive the testament. (a)

Under the Code Civil and the law regulating notaries, a notary cannot perform any notarial act out of the precinct or jurisdiction for which he is appointed.

He is not only subject to a penalty if he performs any notarial act out of the precinct or jurisdiction for which he is appointed, but his act is null. (b)

Under the coutumes of Paris and Normandy, the notary does not appear to have been disqualified from receiving the testament of his relation, even that of his father. (c)

Under the present law of France, two notaries cannot join in the same act when they are relations, or allied in any degree in the direct line, or in the collateral line as far as uncle or nephew.

They cannot receive any testament in which their relations in the same degree are testators or legatees, and à fortiori, no testament can be received by them in which there is any disposition made in their favour.

Under the coutumes they were disqualified from receiving a testament in which any disposition was made in favour of themselves or of any relation.

The notary must not be disqualified from acting. (d) If therefore he was interdicted, he became incapable of receiving the testament, because the interdict might be known in the place. It was otherwise if he were a minor, for in that case he would either have obtained, on his appointment, a dispensation by the king from the effect of his minority, in which case he is competent, or


(b) Loi, 25 Ventôse, An XI. art. 6; art. 68; art. 5. Toullier, ib. n. 384.

(c) Pothier, Tr. des Test. c. 1, art. 3, § 2.

(d) Pothier, ib. Grenier, Tr. des Test. p. 2, c. 1, § 2, n. 249.
he must have obtained his admission as notary by a false insertion in the registry of baptisms. The bona fides of the party who receives them in the actual exercise of his office renders his acts valid. (a)

The curé or vicar must be of the parish in which the testator is residing. It is not necessary that he should be of the parish which was the proper domicile of the testator. (b)

He is incompetent to receive the testament if it contain any bequest in favor of himself or of his relations. (c)

The testament must be expressed to be passed before him in his public capacity. Therefore, where the testament had been taken by the clerk of the notary with the vicar of the parish as a witness, although it was admitted the clerk was incompetent, yet it was insisted that it might be deemed to have been taken by the vicar, and that the clerk should be considered the witness. This was not admitted, and the nullity of the testament was pronounced. (d)

The witnesses must be competent: "Témoins idoines, suffisants, mâles et âgé de vingt-ans accomplis et non legataires." Persons who are not of twenty years of age; those who do not enjoy a civil status, either from having become professed members of religious societies, or upon whom sentence has been passed inferring civil death; persons who are insane, deaf, or blind; persons taking themselves or their relations any bequest under the testament, are excluded. (e) The clerks, domestics, or servants of the public functionary who receives the testament are also incompetent. (f)

The Code Civil requires that the witnesses should be

(b) Pothier, ib.
(c) Ib.
(f) Poth. ib. Ord. 1735, art. 42.
twenty-one years of age, and subjects of France by birth or naturalization, enjoying civil rights. (a)

Neither legatees, under whatever title they may be, nor their kindred nor affinity to the fourth degree inclusive, nor the clerks nor the servants of the notaries by whom the act is taken, are competent witnesses to a testament by public act. (b)

Under the coutumes it would seem that the husband was not deemed a competent witness. He would be a competent witness under the Code Civil. Under the coutumes and the Code Civil, a testamentary executor taking no interest under the testament, is not excluded from being a witness. (c)

Deaf persons are incompetent witnesses, because they are incapable of understanding that which the testator dictates to the notary, and the reading of the testament by the notary to the witnesses. (d)

Those who do not understand the language which the testator uses resemble in this respect those who are deaf, and would be incompetent witnesses. But as it is required that all acts should be written in the French language, it has been decided that the testator is not bound to dictate his testament in the French language, although the notary must take it down in that language.

A testament was dictated in the German language, and taken down by the notary in French, and the two witnesses were equally conversant with the two languages. It was held to have been duly executed. (e)

If the witness were not incompetent at the time he attested the testament, his subsequent incompetence will not render it void. (f)

(a) Code Civil, art. 980. Toullier, ib. n. 395.
(b) Art. 975. Art. 10, de la loi sur le Notariat. Toullier, ib. n. 402, n. 391.
(d) Ferriere, ib. Toullier, ib.
(f) Toull. ib. n. 405.
If one of the required number of witnesses is incompetent, the testament will be null for the whole, but if there were more witnesses than the law required, the testament will not be avoided by the incompetence of one or more of the witnesses, if there be still a sufficient number competent who attested the testament. (a)

If the incompetence of the witness were unknown, and it be founded on his civil or political status, and he appears to the world in a character which is inconsistent with any civil or political disability, this mistake affords an excuse; (b) but when the incapacity arises from minority or relationship, the attestation is defective, however ignorant the party may be of its existence. (c)

The formalities with which the testament is to express the testator's intention, the internal proof it must contain that those formalities have been complied with, and the manner in which it is to be rendered a perfect act, are prescribed by the *coutumes* of Paris and Normandy, and the Ordinance of 1735.

The Code Civil in these formalities closely follows these *coutumes* and the Ordinance. (d)

They may be considered under the following heads: 1st. The dictation of the will by the testator to the notary; 2nd. The writing by the notary of that which the testator has dictated; 3rd. The reading of the testament so dictated and written by the notary to the testator in the presence of the witnesses; 4th. The signature by the testator, and by the notary, and by the witnesses; 5th. The express mention that these formalities have been observed; 6th. A description of the names of the wit-

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(d) Art. 972, 973, 974.
nesses, of their residence, and of the year and day in which the act was passed; 7th. The language in which the testament may be written.

First, as to the dictation by the testator, the English word which is used does not adequately express the full import of the term *dicter*, nor is it expressed by any synonymous term in the French language. Merlin has thus defined it: "C'est prononcer mot à mot ce qu'on destine à être en même temps écrit par un autre." (a)

It follows from this definition, that a person cannot make a testament by signs or by the interrogatory of another.

But if the declaration in the testament be that it had been pronounced "par le testateur, et écrit par le notaire, à mesure que le disposant prononçait," it will be deemed equivalent to the term *dicter*, and it was so held by an *arrêt* of the Court of Appeal of Paris of July 17th, 1806. (b)

2ndly. That which has been dictated by the testator must be written by the notary, under the *coutumes* and Ordinance, and according to the Code Civil by one of two notaries, or by the single notary if there be only one. (c)

If he writes the true sense and meaning of the disposition which the testator has declared, he complies with the law, and is not bound to adopt the precise terms used by the testator. (d) It is not necessary to express that the notary has written "tel qu'il a été dicté." The law is satisfied, if it be mentioned "que le testateur a dicté," and "que le notaire a écrit." (e)

(b) Sirey, an 1806, part 3, p. 191. Toullier, ib. n. 413. Grenier, ib.n. 233.
(e) Arrêt, Cour de Turin, April 23th, 1806. Sirey, an 1806, p. 189.
It must be written by one of the notaries, and not by a clerk, or by any other stranger, and there must be express mention that it was written by the notary, and if the testament be executed before two notaries, mention ought to be made of the particular notary by whom it was written. (a)

The notary who receives the testament ought himself to write that which the testator dictates to him. (b)

But it was adjudged by an arrêt of August 11th, 1631, that if it be received by the clerk of the notary, in his presence and that of the witnesses, it is sufficient. (c)

The testament ought to contain express mention of its having been written by the notary. Expressions which unequivocally and necessarily import that fact will be sufficient; but a declaration that the testament "a été dicté au notaire, qu'il l'a fait, passé, dressé, rédigé," will not supply the omission of the expression that it was the notary who had written it. (d)

But if the notary had added rédigé de la main de nous notaire, etc., those would be equivalent to the words written. (e)

The whole testament must be read to the testator. It must be read to him in the presence of the witnesses, and there must be express mention, not only that it was read to him, but that it was read to him in the presence of the witnesses.

It seems to have been established by a series of decisions of the French tribunals, that if the reading of the testament be expressed in such terms as to afford ground

(c) Journal des Aud. tom. 1, l. 2, c. 29. Ferriere, ib. p. 258.
(e) Merlin, Rep. ib.
for an inference that it might have been read to the
testator and the witnesses at different times, and not
therefore in the presence of each other, the formality
enjoined by the law has not been observed, and the tes-
tament is null. (a)

It is essential to the validity of the testament that it
should be signed by the testator and by the notary, and
by the witnesses, and that it should contain mention of
such signatures; and if the testator be unable, or does
not know how to sign it, there should be a declaration
of such his inability or ignorance. (b)

It is not material in what part of the act the mention
of the signature, or of his inability, &c., to sign is
made. (c)

If it should be proved that a testator who has been
declared not to know how to sign, in fact did know how
to sign, and was in the habit before and since such de-
claration of signing instruments, his testament would be
annulled, because it must be signed by him, if he knows
how to sign it. (d)

The observations which have been made respecting
the name by which the testator should sign an olographe
testament are equally applicable to this species of tes-
tament.

His signature is so essential to the perfection of the
testament, that although every other form to the writing
by the notary of his certificate should be furnished, yet
if the testator died in the act of making his signature, the
act would be a nullity. (e)

The notaries and witnesses must sign the testament,
and it must make mention of their signature. The

(a) Toullier, ib. n. 426. Sirey, an. 11, p. 259. Grenier, ib. n. 239.
(b) Ferrier, ib. p. 258. Pothier, ib.
(c) Toullier, ib. n. 431.
(d) Merlin, Quest. de Droit, vo. Signature. Arrêt de la Cour de Gre-
noble, 25 Juillet, 1810. Sirey, an 1811, part 2, p. 360, 377; Arrêt, 31
(e) Toullier, ib. n. 444.
974th article of the Code Civil allows *dans les compagnes* a signature by one of the witnesses to be sufficient, if it be executed before two notaries; and where it is executed before one notary, two of the four witnesses should sign it.

There ought to be express mention made of those who do not sign it, and it is also prudent to mention that they declared they were unable, or did not know how to sign, and also the cause which prevented them from signing. *(a)*

The name and place of the notary before whom the act is executed, and the names of the witnesses thereto, and their place of residence, and of the year and the day, and where and when the act has been done, should be stated, and an omission in any of these particulars will render the instrument null. This law extends to testaments. *(b)*

The omission to state the residence of the testator would not be fatal to the instrument. *(c)*

It is not necessary to mention the house in which the instrument was executed, or whether before or after noon. *(d)*

It does not appear that any act would, under the present law of France, be null on the ground of its being written in any other than the present language.

III. The Code Civil admits another form of testament called *mystique*, or secret.

When the testator is desirous of making a mystic or secret testament, he is bound to sign his dispositions, whether he has written them himself, or has caused them to be written by another. The paper which contains his dispositions, or the paper which serves as the en-

*(a)* Maleville, sur l’Art. 947. Toullier, ib.


*(c)* Ib.

velop, if there be any, must be closed and sealed. The testator must present it thus closed and sealed to
the notary and to six witnesses, at the least, or he must
cause it to be closed and sealed in their presence, and
declare that the contents of such paper are his will,
written and signed by himself, or written by another
and signed by him. The notary thereon is to draw up
the act of superscription, which must be written on the
paper, or on the sheet which serves for the envelope.
This act must be signed as well by the testator as by the
notary, together with the witnesses. These formalities
must be observed immediately, and without diversion to
other acts, and in case the testator by an impediment
happening subsequently to the signature of the will, is
rendered unable to sign the act of superscription, men-
tion must be made of his declaration on that subject,
and it will not be necessary in such case to increase the
number of witnesses. (a)

If the testator know not how to sign, or if he were
unable to sign when he caused his disposition to be
written, a witness is to be called to the act of superscrip-
tion in addition to the number contained in the pre-
ceding article, who must sign the act with the other
witnesses, and mention must be made therein of the
cause for which such witness was called. (b)

Those who know not how, or who are unable to read,
were not allowed to make dispositions in the form of a
mystic will. (c)

In the case where a testator cannot speak, but is able
to write, he may make a mystic will, on condition that
such will is written throughout, dated, and signed with
his own hand, and presented by him to the notary, and
to the witnesses, and that at the head of the superscrip-
tion he writes in their presence that the paper which he

(a) Code Civil, art. 976.
(b) Art. 977.
(c) Art. 978.
presents is his will. After this, the notary writes the act of superscription, in which mention is to be made of the testator's having written these words in the presence of the notary, and of the witnesses, and moreover every thing is to be observed which is prescribed in the preceding article. (a)

The olographe testament is also secret, since the testator may, if he please, conceal its contents, or deposit it sealed with a friend or with a notary. Such a deposit requires no form or solemnity. It is sufficient if it be proved at the testator's death entirely written by the testator, and dated and signed under his hand. (b)

But the testament mystique need not be written or signed by the testator; its validity depends on the following provisions which the law enjoins:—

He must declare to the notary, in the presence of the witnesses, that what is contained in the paper which he presents to him is his testament, written and signed by him (if he has both written and signed it), or written by another and signed by him, or written by another and not signed by him. If the testator has himself signed it, six witnesses are sufficient, but if he has not signed it there must be seven witnesses in the act of superscription, and there ought to be mention made of the cause for which the additional witness is called.

The notary must write this declaration on the sheet of the paper which serves as the envelope, and this is called acte de suscription.

The testator must present it to the notary and witnesses so closed and sealed, in order that the testament which it contains may not be withdrawn from it, and another substituted, without breaking the paper and seal. (c)

The testament and the suscription are two distinct acts.

(a) Art. 979. (b) Toulier, ib. n. 461.
(c) See Furgole, des Testam. c. 2, § 3. Sirey, an 1810, p. 353.
The former is a secret act, and its dispositions are in fact unknown or supposed to be unknown to the notary and witnesses. They are not witnesses to the contents of the testament, but to its presentation, and to the declaration made by the testator, that the paper which he presents contains his will; in short they are witnesses to the act of superscription, which is received and written by the notary, but which does not contain any disposition. This act of superscription is the public act, received by the notary in the presence of the witnesses.

There is another striking difference between the two forms of testament. There is no law which excludes heirs, legatees, or other persons taking under the testament, from being witnesses to the act of superscription.

If the testament be neither closed nor sealed, but merely folded, it seems that it is null, although the act of superscription was written in the folding of the same paper, so that it was impossible to change it. (a)

The testator may make known the contents of his will to whom he pleases. The law enables him, but does not oblige him to keep the tenor of his will a secret from every one. (b)

The act of superscription ought to mention, not only the presentation of the testament made by the testator to the notary and the witnesses, but also his declaration that the paper which he presents contains his testament, and that he had written and signed it, or that it had been written by another, and that he the testator had signed it, or that he had not signed it.

The mention of this declaration is essential to the validity of the testament, and the proof of it must be derived from the act of superscription alone, and cannot be supplied. (c)

There must also be mention made that the testator

(a) Toullier, ib. Grenier, tom. 1, p. 476.
(b) Merlin, Rep. tit. Testament, sect 2, § 3, art. 3.
(c) Sirey, an 1806, p. 99, 100. Toullier, ib. n. 471.
has presented the testament to the notary and witnesses; the particular terms in which this is expressed are not material, if they afford the necessary inference that the act has been done. (a)

If the testator declares he has not signed the testament, an additional witness must be present at the act of superscription, and mention ought to be made of the cause for which he is called.

If the testator has signed the testament, and by some obstacle he cannot sign the act of superscription, mention ought to be made of it.

This species of testament is not required to be dated; its date is from the act of superscription. (b)

IV. The Ordinance of 1735 defined and limited the privilege which the testaments of soldiers should receive.

The persons to whom it was granted must be officers or soldiers in the King's service, or attached to and forming part of the army in actual military service, or in a garrison out of the kingdom, or prisoners with the enemy, or in a place which was besieged, or the communication with which was interrupted. (c) A major or other officer of superior rank, and certain other officers named in the 27th article, supplied the place of notaries, and a testament militaire might be received, either by two of those officers, or by one of them assisted by two witnesses; or if the person was wounded, by the chaplain of the troops or hospital in the presence of two witnesses; it must be signed by the testator, or there must be mention made of his declaration that he was unable or did not know how to sign it. It ought to be signed by the person who has received it, and by the witnesses, and mention ought to be made of the declaration of either witness, that he knew not how to sign it, if such be the fact. It is one of the privileges of this will, that a person may be a witness who does not know how to sign it, if the

(a) Merlin, Rep. tit. Test. sect. 2, § 3, art. 3. (b) Ib. (c) Art. 30.
testator himself signs the testament. Aliens may be also witnesses to it.

It may be made in the form of an olographe testament.

Testaments made in the manner which this privilege allows continue valid for six months only after the return of the testator to a place where he might execute his will with the ordinary solemnities.

By the Code Civil, the testaments of military men and of individuals employed in the armies, may be received in any country whatsoever by the commander of a battalion or squadron, or by any other officer of a superior rank in presence of two witnesses, or by two military commissaries, or by one of such commissaries in presence of two witnesses. (a) If the testator be sick or wounded, they may also be received by the chief officer of health, assisted by the military commandant charged with the police of the hospital. (b)

These regulations are admitted in favour of those who are on a military expedition, or in quarters, or in garrison out of the kingdom, or prisoners in an enemy’s country; but those who are in quarters or in garrison in the interior are not allowed the benefits thereof, unless they are in a place besieged, or in a citadel or other place of which the gates are closed, and the communications cut off by reason of war. (c)

The testament made according to this form is null six months after the testator has returned to a place in which he has the power of adopting the ordinary forms.

The Ordinance of 1731 does not contain any provision for testaments made at sea, but the Marine Ordinance of August 1681, provides that testaments made at sea by those who die on their voyage are valid, if they are written and signed by the testator, or received by the purser of the ship, in the presence of three witnesses,

(a) Art. 981.  (b) Art. 982.  (c) Art. 983.
who signed with the testator. If he knows not how to sign, mention must be made of that circumstance. The only property of which disposition can be made by testament executed before the purser is that which the testator has on board, or the wages which are due to him.

The Code Civil has provided that testaments made at sea in the course of a voyage may be received in the following manner: On board ships and other vessels of the state by the officer commanding the vessel, or in his absence by him who supplies his place, in the order of the service, one or other conjointly with the officer of administration, or with him who fulfils these functions. And on board merchant vessels by the supercargo of the ship, or by him who performs the functions thereof, one or other conjointly with the captain, the master, or the commander, or in their absence by those who replace them.

In all cases such testaments must be received in the presence of two witnesses. (a)

On board ships of the state, the testament of the captain or that of the officer of administration, and on board commercial vessels that of the captain, of the master or commander, or that of the supercargo, may be received by those who follow them in the order of service, on conforming themselves as to other points to the regulations of the preceding article. (b)

In all cases a duplicate original shall be made of the testaments mentioned in the two preceding articles. (c)

If the vessel touch at a foreign port in which a commissary for the commercial relations of France resides, the person who has received the testament is required to deposit one of the originals closed or sealed, in the hands of such commissary, who must cause it to be

(a) Art. 988.  
(b) Art. 989.  
(c) Art. 990.
transmitted to the minister of marine, and the latter causes it to be deposited among the rolls of the justice of the peace at the place where the testator was domiciled. (a)

Mention must be made on the roll of the ship in the margin, of the name of the testator, and of the deposit which has been made of the originals of the testament, whether into the hands of a commissary for commercial relations, or into the office of an officer of maritime inscription. (b)

The testament will not be regarded as made at sea, although it be in the course of a voyage, if at the time when it was made the ship had touched land, either foreign or in the French dominions, where there was a French public officer, in which case it will not be valid, except so far as it has been drawn up according to the forms prescribed in France, or according to those usual in the countries where it has been made (c)

These regulations are common to those who are passengers only and do not form part of the ship's crew. (d)

A will made at sea is only valid where the testator dies at sea, or for three months after he has landed in a place where he is able to renew it in the ordinary forms. (e)

A will made at sea must not contain any dispositions for the benefit of the officers of the vessel, unless they are relations of the testator. (f)

The testament comprehended in the preceding articles must be signed by the testator, and by those who shall have taken it.

If the testator declare that he cannot sign, or knows not how to sign, mention of his declaration must be made, as well as of the cause which prevents his signing.

In cases where the presence of two witnesses is requisite, the testament must be signed at least by one of

(a) Art. 991. (b) Art. 993. (c) Art. 994.
them, and mention made of the cause for which the other has not signed. (a)

In France, the Ordinance of 1735 enabled those who might be in an infected place, whether they were in health or diseased, and in whatever country they were, to use the form of an olographe testament. (b)

They might, in whatever country they were, make their testament before two notaries, or two officers of justice named in the 35th and 36th articles, or before one of the said notaries or officers and two witnesses, or before the curé, vicar, or other priest admitted to administer the sacraments, and two witnesses. (c)

The rules respecting the signature of the testator and those who receive the testament, and of the witnesses which were prescribed by the Ordinance in respect to testaments by soldiers, must also be observed. (d)

Testaments made during the time of a plague contrary to the established and solemn forms ceased to be of force beyond six months after communication with the infected place had been established, or after the testator had passed into a place where there was no interruption to the communication with it. (e)

The Code Civil provides that wills made in a place with which all communication is intercepted on account of the plague or other contagious distemper, may be made before the justice of the peace, or before one of the municipal officers of the commune in presence of two witnesses. (f)

These regulations take place as well with respect to those who are attacked by such disorders, as to those who are in the places infected therewith, although they be not actually diseased. (g)

The testaments mentioned in the two preceding articles become null six months after communication has been

(a) Art. 998.  (b) Art. 35, 36.  
(d) Art. 34.  (c) Ib.  
(f) Art. 985.  (e) Art. 37.  
(g) Art. 986.
re-established in the place where the testator remains, or six months after he has passed into a place where it is not interrupted. (a)

In France, testaments *inter liberos*, that which contained either the division which a parent made amongst his children, or the disposition which he made in favour of one of his children, were exempted by the Ordinance of 1735 from the ordinary solemnities. They might be made in *olographie*, or in the presence of two notaries, or of one notary and two witnesses. No other persons but children could be the objects of this testament.

The Code Civil makes no similar distinction in favour of testaments made *inter liberos*.

V. In Lower Canada, there is an article similar to the 289th article of the *coutume* of Paris, and it is thus expressed: “Pour faire un testament solennel, il est requis qu’il soit écrit, daté, et signé de la main du testateur, ou qu’il soit passé par devant deux notaires, ou le curé de la paroisse, dans l’étendue de laquelle le testament se fait, ou son vicaire et un notaire, ou le curé, le vicaire et trois témoins, ou par devant un notaire et deux témoins idoines, suffisants, mâles et agés de 20 ans accomplis, et non legataires, qui sachent signer; et qu’il ait été dicté et nommé par le testateur aux dits notaires, curé, vicaire, et témoins, et qu’il soit fait mention dans le testament qu’il a été dicté, nommé et relu, et qu’il soit signé par le dit testateur et par les témoins, ou qu’il soit fait mention de la cause pour laquelle le dit testateur n’a pu signer.

“Dans les campagnes à défaut de notaire, les testaments passés devant le curé (ou missionnaire desservant la paroisse) et trois témoins sont reçus solennels, pourvu qu’il y soit fait mention, en cas que le testateur et les témoins ne sachent signer, des raisons qui les empêchent.” (b)

The tenth section of the Quebec Act, 14 Geo. 3, c. 83,

(a) Art. 987.  
(b) Cugnet’s Law of Quebec, art. 69, p. 157.
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allows every owner of lands, goods, or credits in the said province, who has a right to alienate the same by deed of sale, gift, or otherwise, to devise or bequeath the same at his or her death, by his or her last will and testament, either according to the laws of Canada, or according to the forms prescribed by the law of England. (a)

The late Henry Caldwell being proprietor of the seigniory of Lauzon, by his testament olographe wholly written and signed by himself, and which had been duly proved before the Honourable Jenkin Williams on the 2nd day of June in the same year, gave and bequeathed all his estates, real and personal, to his son, John Caldwell. The testament commenced as follows: "In the name of God, Amen. I, Henry Caldwell, of Belmont, near Quebec, &c." It was proved to have been wholly written by the late Henry Caldwell, but his signature was not subscribed to it, and the will had no date. The parties having been heard, the Court of King’s Bench of Lower Canada pronounced its judgment on the 13th June 1827, declaring the testament null, because it was not executed according to the laws of Canada, or to the forms prescribed by the law of England, so as to pass the estate or seigniory of Lauzon. From this judgment there was an appeal to the Provincial Court of Appeal.

It was insisted on the part of the appellant that a proprietor in Quebec was at liberty to adopt any form in making his will, known either by the laws of Canada or by the law of England; and as the form followed by the testator is one known by the law of England, in as far as regards the disposition by will of chattel interests, and no distinction being made or known by the laws of Canada as in England between the form of a will of real, and a will of personal property, (any form when legal being

sufficient to pass all kinds of property by the laws of Canada; the form used by him being recognized there as a legal form, must necessarily have the effect to pass the real as well as the personal estate, inasmuch as the effect of such will must be determined by the laws of Canada, where the property lies. It was further insisted that although the will in question was not subscribed or closed by the signature of the testator, yet his name being written by him at the commencement of it in these words, "I, Henry Caldwell, Esq. &c." it was a sufficient signing according to the decisions of the courts of England, on the Statute of Frauds.

It was held by the court "that this argument could not be admitted as correct in principle, for it is evident on reference to the British statute of the 14th of Geo. 3, that the forms of wills thereby introduced were the forms which in England were admitted and known as having the effect and operation of a sufficient conveyance and disposition of the estate of the testator. The plain meaning of the act is, that every person desirous of devising lands in Canada by a will in the English form, must follow that form in such manner as would operate as a devise of land in England, and the same thing in regard of chattels. Now according to the laws of England, it must be admitted on all hands that this will can have no effect in devising the realty, we must therefore consider it in point of form and effect under the laws of Canada.

"It is called an olographe will, and by the testimony adduced appears to have been wholly written by the late Henry Caldwell, but is neither dated nor signed by him, and on this account the objection appears to have been taken that it cannot in point of form be considered as a will, nor have any effect whatever under the law of Canada."

The judgment of the Court of King's Bench was
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affirmed by the Provincial Court, and on appeal to the Privy Council. (a)

VI. The Ordinance of 1731 was not registered in St. Lucia, and does not extend to that colony. The forms of testament adopted there are those which were required by the coutume of Paris.

SECTION III.

FORMS AND SOLEMNITIES OF TESTAMENTS UNDER THE LAW OF ENGLAND.

I. Devises of real property.—Statute of frauds.—Signature.—Publication.
—Acknowledgment before the witnesses.—Attestation and subscription.—Number and competence of witnesses.—Alterations by the stat. 1 Vict. c. 26.—Will written at different intervals and on different sheets of paper.—Reference by the testament to an unattested paper.—Testator cannot reserve to himself a power of disposing of freeholds by an unattested will.—Republication.—Constructive.—Effect of.—In passing intermediately acquired lands.—In reviving the will.—The act 1 Vict. c. 26, abolishes constructive revival of a will.—Codicil.

II. Will of personality.—Absence of all form.—Neither attestation nor signature until the recent act.—Effect of an attestation clause not subscribed by witnesses.—Unfinished.—Unexecuted papers.—Presumptions in respect of.

III. Nuncupative wills.—Restrictions imposed by the statute of frauds.—Under the 1st Vict. c. 26, no nuncupative wills admitted.—Exception in favour of soldiers' and seamen's wills.

I. Under the systems of jurisprudence which were the subjects of the two preceding sections, the forms and solemnities of testaments were the same, whether the property which was comprised in or affected by the testamentary disposition was moveable or immovable.

We now pass to a system of jurisprudence which, until the recent act for the amendment of the law of wills, required a more matured age for the disposal of real property of which the owner had the fee or freehold interest, however insignificant might be its value, than it required for that of personal property, however large might be its amount. Thus, whilst a person who had not attained twenty-one years of age was incompetent to devise a cottage of the value of five pounds, if he were the owner in fee, yet he had the power to bequeath not only personal property, although it might exceed a million in value, but also to dispose of his real property, provided his estate in it was for a period of years however long its duration might be. Again, his will of real property spoke only from its date, and not from his death, whilst his testament of personal property spoke from his death.

This peculiarity in the law of England was frequently instrumental in producing great distress in families, and of defeating the intentions of testators. (a)

The peculiar characteristic which distinguishes a testament is, that its dispositions do not take effect until after the testator's death. A disposition by deed may postpone the possession or enjoyment, or even the vesting until the death of the disponent, yet this result must be produced by the express terms, and cannot flow from the nature of the instrument. Thus, if a man should by deed limit lands to himself for life, with remainder to A. in fee, the effect upon the usufructuary enjoyment would be the same as if he made an immediate devise by will to A. in fee; and yet the case fully illustrates the distinction in question, for, in the former instance, A. immediately on the execution of the deed becomes entitled to a remainder in fee; while, in the latter, he takes no interest whatever until the decease of the testator.

(a) Sugden's Letters to a Man of Property, Letter 3.
The law of England does not require, as essential to the validity of a will, that it should adopt any particular form, or be expressed in testamentary language. It is only requisite that the instrument discloses the intention of the deceased owner respecting the destination of his property after his death.

A letter, (a) a deed-poll, and even an agreement or other instrument between parties, has been held to have a testamentary operation, in regard at least to copyholds and personal estate; for though the principle applies equally to devises of freeholds, its actual application to them has been considerably checked by the Statute of Frauds, which requires an attestation by three witnesses; and these informal and irregular instruments are rarely, if ever, so attested, being in fact executed diverso intuito. (b)

A. by his will duly executed and attested, devised his freehold and copyhold estates to certain uses, with remainder to such persons, and for such estates as he by any deed or instrument in writing, to be executed by him, and attested by two witnesses, should appoint. By an instrument executed on the following day, under his hand and seal, stamped and concluded like a deed, he recited this power in his will, and then proceeded thus: "Now know ye that, by this my deed-poll, I do direct and appoint that my trustees, (naming them,) shall immediately after, &c., convey to certain uses, &c." It was held by Lord Loughborough, assisted by Mr. Justice Wilson and Mr. Justice Buller, that the second instrument was testamentary. Mr. Justice Buller said, that the cases had established that an instrument in any form, whether a deed-poll or indenture,

if the obvious purpose is not to take place till after the death of the person making it, shall operate as a will. In one of these cases, there were express words of immediate grant, and a consideration to support it as a grant; but as, upon the whole, the intention was that it should have a future operation after his death, it was therefore considered as a will. (a)

By the 5th section of the Statute of Frauds (29 Car. 2, c. 3,) it is enacted, "that all devises and bequests of any lands or tenements devised either by force of the Statute of Wills, or by that Statute, or by the force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express direction, and shall be attested and subscribed, in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of none effect."

The statute does not require that the signature should be the personal act of the testator, but allows it to be made by any "other person in his presence and by his direction." This may be convenient where the testator is unable to write, but in such case he usually affixes his mark. It has never been expressly decided that a mark is a sufficient signing; but in an important case, (b) in which the validity of the will was disputed on other grounds, no objection was made on the ground of its bearing only the mark of the testator; and it has been assumed, (c) in the discussion of another point, that a mark was sufficient to satisfy the statute. But sealing alone, without signing, would not suffice. (d)

One signature is sufficient, although the will should

(b) Right v. Price, Doug. 241.  
(c) Wright v. Wakeford, 17 Ves. 458.  
be contained in several sheets of paper, and even where
the testimonium at the end refers to the preceding sheets
as subscribed by the testator, the fact of those sheets being
omitted to be signed will not affect the validity of the
will, as the testator evidently intended the signing of
the last sheet, or the signing and sealing (if the testator
has thought proper to affix a seal), to apply to the
whole. (a)

It is immaterial in what part of the will the testator’s
name is written; and where the whole will is written by
the testator himself, the name occurring in the body as
the usual exordium—"I, A. B., do make," &c., has been
decided to be a sufficient signing. (b) But the signature,
in whatever part of the will it is found, must have been
made with the intention of authenticating the instrument;
for, it should seem, that, if the testator contemplates a
further signature which he never makes, the will will be
considered as unsigned. (c)

The recent act for the amendment of the law with
respect to wills, requires that the will should be signed
at the foot or end thereof by the testator, or by some
other person in his presence, and by his direction. (d)

Although the testator is merely required by the statute
to “sign,” yet it was formerly considered, that, independ-
ently of this enactment, publication was necessary
to complete the testamentary act. (e) On the other
hand, Sir V. Gibbs, C. J. of the Common Pleas, ex-
pressed a decided opinion that publication was not an
essential part of a will, not being, as he conceived, ne-

(a) Winsor v. Pratt, 5 Moore, 484. S. C. 2 Brod. and Bing. 650.
(b) Lemayne v. Stanley, 3 Lev. 1. Freem. 538. 1 Eq. Ca. Ab. 403, pl. 9,
v. Walker, 1 Mer. 503.
(d) 1 Vict. c. 26, § 9.
(e) Ross v. Ewer, 3 Atk. 156.
cessary to devises by custom at common law, nor made so by the statutes of Hen. 8, and Charles the 2nd. (a)

Another question was, whether the attesting witnesses ought to see the testator actually sign, or whether his acknowledgment of the signature was sufficient; and the rule long since established is, not only that an acknowledgment will suffice, but that it may be made before each witness separately, and need not take place in the simultaneous presence of all. Thus, where A. signed and published a will in the presence of two persons, who attested it in his presence; then a third person was called in, to whom the testator shewed his name, telling him that was his hand, and bidding him witness it, which the witness did, in the testator’s presence, who, two hours afterwards, told him that the paper he had subscribed was his will; this was held to be a good execution. (b)

The recent act requires that the signature shall be made or acknowledged by the testator, in the presence of two or more witnesses present at the same time. (c)

As it is sufficient for the testator to sign before some, and acknowledge the signature before the rest of the witnesses, so by necessary consequence an acknowledgment before all will be equally effectual. (d)

By the 13th section of the recent act for the amendment of the law with respect to wills, every will executed in the manner required by that act is valid, without any other publication thereof. (e)

With respect to the acknowledgment required by the

(a) Moodie v. Reid, 7 Taunt. 351.
(c) 1 Vict. c. 26, § 9.
(d) Ellis v. Smith, 1 Ves. Jun. 11.
(e) 1 Vict. c. 26, § 13.
Statute of Frauds, it has been decided that where a testator, who has previously signed his will, merely requests the witnesses to subscribe the memorandum of attestation, though they neither see his signature, nor are made acquainted with the nature of the instrument they attest, yet the will is duly executed according to the statute. (a) "When we find the testator knew this instrument to be his will; that he produced it to the three persons, and asked them to sign the same; that he intended them to sign it as witnesses; that they subscribed their names in his presence, and returned the same identical instrument to him; we think the testator did acknowledge in fact, though not in words, to the three witnesses, that the will was his." (b)

The next requisition is, that the will "be attested and subscribed" by three witnesses. A mark has been decided to be a sufficient subscription, (c) although as it would always in the present state of society be easy to procure persons who can write, it is not prudent to resort to attestation by marks.

No particular form of words is essential to constitute an attestation.

It is not requisite, (though always proper,) that the memorandum subscribed by the witnesses should mention their having subscribed in the presence of the testator, but the fact must be clearly and distinctly proved by oral testimony, when the due execution of the will is questioned, whether the memorandum of attestation records it or not. (d)

(c) Harrison v. Harrison, 8 Ves. 185. Addy v. Grix, ib. 504.
The testator ought not merely to possess the mental power of recognizing, but to be actually conscious of the transaction in which the witnesses are engaged; for if a will were attested in a secret and clandestine manner, without the knowledge of the testator, the fact of his being in the room where it was done would not sustain it. (a) Nor, on the other hand, would the circumstance of the testator not being in the same room invalidate the attestation, if it took place within his view. Thus where the testator lay in bed in one room, and the witnesses went through a small passage into another room, and there subscribed their names on a table in the middle of the room and opposite to the door, and both that door and the door of the room where the testator lay were open, so that he might have seen them subscribe their names if he would; that was held sufficient, though there was no proof that the testator did see them subscribe; for it was possible that the testator might have seen them subscribe. (b)

It is not even necessary that the testator should be in the same house with the witnesses. A *feme covert* having power to make a writing in the nature of a will ordered such an instrument to be prepared, and went to her attorney's office to execute it; but being asthmatical, and the office very hot, she retired to her carriage to execute the will, the witnesses attending her; after having seen the execution, they returned into the office to subscribe it, and the carriage was put back to the window of the office, through which it was sworn by a person in the carriage, the testatrix might have seen what passed. It was decided by Lord Thurlow that the will was well executed. (c)

It is not sufficient that, in another part of the same

(a) Longford v. Eyre, 1 P. Wms. 740.
(b) Ib. Davy v. Smith, 3 Salk. 395.
room the testator might have perceived the witnesses, if in his actual position it was impracticable. (a)

Where the evidence fails to shew in what part of the room the subscription took place, it will be presumed that the most convenient was the actual spot, and the ordinary position of a table probable to have been used, would be material. (b)

The recent act does not require that it should be attested in the presence of more than two credible witnesses. (c)

The inquiry respecting the credibility must be directed to the time of attestation, and not to that of the witnesses' examination. (d)

Incompetency to attest the execution of a will may be created either by interest or crime.

The disqualification on the ground of interest has been narrowed by the statute 25 Geo. 2, c. 6, which has made absolutely void every devise or bequest to attesting witnesses; but the act provides that a creditor, whose debt is charged on the real estate, shall be a good witness. The following points have been decided on this statute; 1st. That it extends only to persons beneficially interested, and not to a devisee or executor in trust. (e) 2ndly. That it does not apply to wills of personal estate; for as such wills do not require an attestation, the ground for vacating the gift to the witness fails. (f) 3rdly. The statute only applies where the witness takes a direct


(b) Winchelsea v. Wauchope, 3 Russ. 444.

(c) Sect. 9.


interest under the will, and not where his interest arises consequentially. Thus where one of the three attesting witnesses to a will was the husband of a devisee in fee of a freehold estate, who would jure uxoris have derived an interest in the devised lands, it was held that the devise was not within the statute, and consequently the attestation was sufficient. (a)

The recent act enacts, that if any person who shall attest the execution of a will, shall at the time of the execution thereof be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid. (b)

It further enacts, that if any person shall attest the execution of any will to whom, or to whose wife or husband, any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts,) shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will or the wife or husband of such person, or any person claiming under such person, or wife, or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will. (c)

It re-enacts the second section of 25 Geo. 2, c. 6, with respect to creditors attesting, being admitted witnesses to prove the execution of the will, or the validity or invalidity thereof, and this competency is allowed in respect of wills of personal estate. (d)

(a) Hatfield v. Thorp, 5 Barn. and Ald. 589.
(b) 1 Vict. c. 26, § 14.
(c) Ib. § 15.
(d) Ib. § 16. Wyndham v. Chetwynd, 1 Burr. 417.
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It had been decided by the Court of King's Bench, (a) and afterwards by the Court of Common Pleas, (b) that where one of the attesting witnesses was the wife of an acting executor, who took no interest under the will, the will was well proved.

The act contains enactments in conformity with these decisions. (c)

Persons rendered infamous by conviction for crimes, are incompetent witnesses. (d)

A memorandum of attestation subscribed to any part of a will composed of several clauses written at distinct intervals has been held to apply to the whole, including as well what was long before written, as what had been recently added. (e)

So if the contents of the will are distributed through several sheets of paper, it would be adequately attested by a single memorandum, if all the detached parts were present when the act of attestation took place. And this presence it seems would be presumed, unless the contrary were distinctly proved. (f)

If a testator make a will, and cause it to be attested by two witnesses, and afterwards makes a codicil, which he also procures to be attested by two witnesses, neither the will nor the codicil would, before the recent act, be adequate to the devise of freehold lands; for although the attesting witnesses aggregately make up the requisite number, yet as the memorandum of attestation subscribed to the codicil was evidently not intended to apply to the will, it cannot be construed to extend to

(a) Bettison v. Bromley, 12 East, 250.
(b) Phipps v. Fischer, 6 Tannt. 220.
(c) Sect. 17.
(e) Carleton v. Griffin, 1 Burr. 549.
(f) Bond v. Seawall, 3 Burr. 1775.
it. (a) If, however, evidence be adduced of such an intention, the attestation will apply to both. (b)

And it seems that a memorandum of attestation will extend to a will and codicil, or several codicils written on the same sheet of paper. Thus, where a testator made a will for the purpose, among other things, of appointing guardians to his children, which was attested by one witness only, and afterwards executed a codicil to the will written on the same sheet of paper, and attested by three witnesses, and which was declared to be a codicil to his will thereunto annexed, the attestation was held to apply to the will, so as to constitute it a good testamentary appointment of guardians within the statute 12 Car. 2, c. 24. (c)

So where A. made a will, professing to devise freehold property, but which was neither signed nor attested, though an attestation clause was drawn out; a fortnight afterwards, a codicil was written below this clause on the same sheet of paper, in the following terms: "I, A., make a codicil to the foregoing will, and therefore ordain that my wife, B., be entitled to two hundred pounds of my property in case she marry," (there was no date). It was signed by the testator and attested by three witnesses, thus—"Witness, J. W., J. H. Q., W. H." The Court of Exchequer held, that the execution and attestation applied to the whole of what was on the paper, and consequently that the will was duly attested for the devise of freeholds. (d)

A testator may refer in his will to some document in order to elucidate or explain his intention. Such a document need not be attested by three witnesses, when it is referred to, not in the character of a testamentary

(a) Lea v. Libb, Carth. 35.
(b) Bond v. Seawell, 3 Burr. 1775.
(d) Doe v. Evans, 1 Crompt. and Mees. 42.
paper, or component part of a will. Thus where a testator devised all lands which were conveyed to him by certain indentures, which he describes, those indentures so referred to might be consulted for the purpose of ascertaining the lands, without any evasion of the Statute of Frauds; the testator’s intention being manifested by a will duly attested, though in such a manner as to involve a reference to a circumstance _dehors_ the will. 

But an attempt to create by a will duly attested, a power to devise freehold lands by a future unattested codicil, would clearly be not only a violation of the statute, but would give to the will an operation in the testator’s lifetime, contrary to the fundamental law of the instrument. Thus a testator, by a will attested by three witnesses, devised his real estate to trustees, upon trust, (subject to certain limitations thereby created,) to convey the same to such persons, and for such estates, as he, by deed or will, attested by two witnesses, should appoint; and the testator, professing to exercise this power, executed an instrument attested by two witnesses, which he styled a deed poll, and thereby carried on the series of limitations commenced in his will; it was decided that this instrument operated as a codicil to the will, and was incapable of affecting the freehold lands for want of an attestation by three witnesses.

Neither can a testator so convert his real estate into personalty by a will duly attested, as to render it disposable by an unattested codicil, as personal estate.

In one instance only, and that founded upon special


grounds, not interfering with this principle, the freehold estate of a testator is indirectly liable to be affected by an unattested codicil. This occurs where a testator has, by a will duly attested, charged his lands with legacies. This charge, it has been held, will extend not merely to the legacies bequeathed by that will, but also to such as may be bequeathed by an unattested codicil. (a) This rule rests on the same foundation as that which is admitted in the case of a general charge of debts. A testator may, after charging his real estate with debts, increase the burthen on land to an indefinite extent, by contracting additional debts, without any further direct act of operation. It has been thought that a charge of legacies ought, by analogy to this rule, to include legacies given by an unattested codicil, and that as a charge of debts extends to all debts which may be owing at the testator’s decease, so a charge of legacies extends to all legacies which then happen to be bequeathed.

But this rule is confined to a simple and general charge. If, therefore, a testator, instead of creating a general charge of legacies, (leaving it to the ordinary rule to determine what are legacies,) subjects his freehold estate expressly to such legacies as he shall thereafter bequeath by an unattested codicil, this is considered as amounting, in effect, to a reservation of a power by will to dispose of the land by an unattested codicil. (b)

A sum, whether annual or in gross, which is charged specifically and primarily upon land, is susceptible of no alteration in regard to the subject or object of the devise by means of an unattested codicil; and therefore, where a testator devised an annuity out of a certain es-


tate, stock, and utensils, it was held not to be affected
by an unattested codicil expressly revoking it. (a)

Before the recent act for the amendment of the law
respecting wills, as the devise operated only on the pro-
erty of which the testator was seised at the time of its
execution, the republication of the will became an im-
portant act.

Republication is either express or constructive. Ex-
press republication is the repetition of the ceremonies
which constitute an execution of the will. Constructive
republication takes place where a testator makes a
codicil to his will, the effect of which, if the codicil be
duly attested by three witnesses, is to republish the will,
and thereby bring within any general or residuary de-
vise which it may contain, lands of inheritance acquired
after the execution of such will, even when the codicil
expresses no intention to republish, or though it be not
annexed to, or declared to be part of, or do not in terms
confirm the will. Although the codicil relates to per-
sonal estate only, the result is precisely the same as if the
general or residuary devise had been incorporated into
the republishing codicil. (b)

It has been held, that the circumstance of a testator,
having by the codicil expressly devised part of his es-
tates, purchased since the execution of the will, to the
uses therein declared concerning his residuary real es-
tate, will not exclude the rest from the operation of the
same residuary devise, brought down by the republishing
effect of the codicil to the date of such codicil. (c)

Thus, where the testator, after charging his real and
personal estate with the payment of his debts, devised

(a) Beckett v. Harden, 4 Maule and Selw. 1. Mortimer v. West, 2 Sim.
Rep. 274.

(b) Sir W. Grant, in Pigott v. Waller, 7 Ves. 98. Goodtitle v. Meredith,
2 Maule and Selw. 5. Guest v. Willasey, 2 Bing. 429. Doe v. Davy,

(c) Coppin v. Fernyhough, 2 Bro. C. C. 291. Hulme v. Heygate,
1 Merr. 285.
the residue of his real and personal estate to his son E., and having subsequently purchased several copyhold estates, by a codicil attested by three witnesses, devised them to his said son in fee, Sir W. Grant, M. R., held, that the codicil was a republication of the will, so as to make the after-purchased lands subject to the devise for payment of debts. (a)

This case evidently supposes that a general charge of debts extends to lands specifically (or to speak more accurately, to lands particularly) devised, as well as to those which pass by the residuary devise, a point which was much discussed (the charge, however, being of legacies instead of debts) in the case of Spong v. Spong,(b) where a testator after devising lands to various persons, and having charged his real and personal estate with his legacies, and then bequeathed some legacies, gave the residue of his real and personal estate to A. The Court of Exchequer held the legacies to be charged as well upon the lands specifically devised as the lands forming the residue; but the House of Lords reversed this part of the decree. Lord Manners argued at some length in favour of the reversal, contending that in construing charges of this nature, specific and residuary devises, though for many purposes governed by a common principle, were to be distinguished, especially as in the case under consideration the testator had shewn such a distinction to be in his view, by devising particular lands to the person whom he made residuary devisee. His lordship intimated that the opinions of Lord Eldon and Lord Redesdale coincided with his own.

The codicil will not have the effect of extending the devise in the will to lands intermediately acquired, if by the language of the codicil itself a contrary intention

(a) Rowley v. Eyton, 2 Merr. 128.
(b) 1 You. and Jer. 300. S. C. in Dom. Proc. 3 Bligh, N. S. 84.
is indicated. (a) G. Bowes, Esq. in 1749 devised all his lands and hereditaments to his wife and five other persons in fee, upon certain trusts. In 1754 he bought and became seised of an undivided part of a freehold property. In 1758, by a codicil duly attested, reciting that he had by his will devised all his lands and hereditaments to his wife and the other persons (naming them) upon trust, he thereby revoked all the above devises, so far as related to two of the trustees, and he thereby gave and devised his said lands, tenements, and hereditaments to the remaining trustees (naming them), their heirs and assigns, upon the same trusts and purposes as he had devised by his will, at the same time revoking the legacies he had given to the removed trustees; and the testator concluded with declaring the codicil to be part of his will. Lord Loughborough sent a case to the King's Bench with the question, whether the codicil was a republication, and that Court certified in the negative, (b) which was in effect confirmed by his Lordship's order. The case was then carried by appeal to the House of Lords, and the question was put to the judges, who were unanimously of opinion that the word "said" confined the operation of the codicil to the lands which had actually been devised by the will. (c)

Where a testator devises lands to A. and the heirs of his body, and A. dies leaving issue in the lifetime of the testator, who subsequently republishes his will, the republication does not entitle the heir in tail of A. to the property devised to his ancestor. (d)

So where a pecuniary legacy to a child has been

(b) 7 T. R. 482.
adeemed or satisfied by a subsequent advancement to
the legatee, it is not revived by a republication of the will
by means of a codicil, if such codicil does not indicate an
intention to revive the legacy. (a)

Another question arises whether the lands of which
the devise has lapsed will pass by a residuary devise in
the republished will.

It has been held, that where a testator devised cer-
tain lands to the sister of A., and the residue of his
lands not thereinbefore disposed of to B., and it turned
out that all the sisters of A. were dead when the will
was made, the estate so devised passed by the re-
siduary clause. (b)

In another case, (c) a testator by his will, after making
certain particular devises, gave all the residue of his
estate not thereinbefore particularly devised to his wife
E. T., her heirs and assigns for ever. The testator
then purchased other real estates, and afterwards made
a codicil, attested by three witnesses, whereby after
reciting that he did by his will devise and bequeath all
the residue of his real and personal estate he was then
possessed of, he ratified and confirmed his will. The
testator then reciting, that since the date of his will he
had purchased other property, devised the same to his
wife for life; and after her death he devised the lands
in question upon trusts that were bad in law, and
the residue specifically to other persons in fee. The
question was, whether the widow was entitled under the
residuary devise in the will, to the part ineffectually
attempted by the codicil to be devised; and the court
determined that she was. Lord Tenterden, C. J., ob-
served, that the will and codicil were to be considered

(a) Isard v. Hurst, 2 Freem. 224. Monck v. Lord Monck, 1 Ball and
Beatty, 298. Drinkwater v. Falconer, 2 Ves. 623. Crosbie v. MacDoual,
4 Ves. 610.
(b) Dow v. Sheffield, 13 East, 526.
(c) Williams v. Goodtitle, 10 Barn. and Cress. 895.
as one instrument, made at the date of the codicil. "Then it appears that there is a devise to the wife for life, then certain other devises follow, and lastly there is a general residuary clause in favour of the wife. It was admitted, that if all that were in a will, the particular devise and residuary clause might well stand together, and the wife would take under the residuary clause. Now I think that the expression at the commencement of the codicil shews the intention of the testator to have been to ratify his will as to all that he was possessed of at the time of the ratification."

If the residuary devise has lapsed, of course the re-publication of the will is inoperative to impart new efficacy to the devise, as well where the lapse affects an aliquot share only of the residue, as where it embraces the entirety. Thus, if a testator devise the residue of his lands to A. B. and C. as tenants in common in fee, and A. dies, and then the testator makes a codicil to his will, by the effect of which the will is republished, he would nevertheless die intestate as to one third, since the subsisting devise, which originally embraced two thirds only, could never by the effect of the re-publication be expanded into a gift of the entirety. (a)

By the recent act, no will or codicil, or any part thereof, which is in any manner revoked, can be revived otherwise than by the re-execution thereof, or by a codicil executed in manner required by the act, and shewing an intention to revive the same; and when any will or codicil, which is partly revoked, and afterwards wholly revoked, is revived, such revival does not extend to so much thereof as has been revoked before the revocation of the whole thereof, unless an intention to the contrary is shewn. (b)

(b) 1 Vict. c. 26, § 22.
A codicil is a supplement to a devise, or an addition
made by a testator to his will, and of which it is con-
sidered as a part, being intended to alter or explain, or
to make some addition to, or subtraction from, the
former dispositions of the testator. \(a\)

II. It was stated by Lord Hardwicke, that "there was
nothing that required so little solemnity as the making
of a will of personal estate, according to the Ecclesiastical
laws of England; for there is scarcely any paper writing
which they will not admit as such." \(b\)

There are scarcely any restrictions in the Ecclesiastical
law with respect to the materials on which, or by which,
a testamentary document may be executed. \(c\) Thus, a
will or codicil, or any part thereof, may be made or
altered in pencil as well as in ink. \(d\) But when the
question is, whether the testator intended the paper as a
final declaration of his mind, and as testamentary, or
whether it was merely preparatory to a more formal dis-
position, the material with which it is written becomes a
most important circumstance. \(e\)

Neither attestation nor signature was essential to the
validity of a will or codicil of personal estate before the
recent act.

An attestation clause at the foot of a testamentary
paper, but which is not subscribed by witnesses, affords
the inference, that the testator meant to execute it in the
presence of witnesses, and that it was incomplete in his
apprehension of it, till that operation was performed.
The presumption of law therefore was against a tes-

\(a\) {Cruise’s Dig. 7.  
\(b\) In Ross v. Ewer, 3 Atk. 163.  
\(c\) Swinb. pt. 4, § 25, pl. 2.  
\(d\) Rymes v. Clarkson, 1 Phill. 35. Green v. Skipworth, 1 Phill. 53. 
Mence v. Mence, 18 Ves. 348.  
\(e\) 1 Phill. 35. Parkin v. Bainbridge, 3 Phill. 321. Lavender v. Adams, 
1 Add. 406.
tamentary paper with an attestation clause, not sub-
scribed by witnesses. \(a\)

The presumption is still stronger if the instrument pur-
ports to dispose of real as well as personal property. \(b\)

This presumption is slight, and may be repelled by
slight circumstances. \(c\) It must be rebutted by some
extrinsic evidence, either that the testator was prevented
from finishing the instrument by the act of God, or that
he intended it to operate in its present form. \(d\) The
fact of the testamentary paper being found sealed up at
the death of the testator, with an appearance that he did
not intend to open it again, was held sufficient to rebut
the presumption, by showing that it was his intention it
should operate in its present form. \(e\) So a recognition
of it as a will by the testator will suffice. \(f\)

By the different acts of Parliament creating stock in
the public funds and annuities attending thereon, it is
provided that any person possessed of the stock, may be-
queath the same by writing, attested by two witnesses.
But the result of several decisions on these acts is, that
a bequest of stock, whether attested by two witnesses or
not, is effectual to pass the subject bequeathed to the
legatee. \(g\)

Beaty v. Beaty, 1 Add. 154. Mathews v. Warner, 4 Ves. 186; 5 Ves. 23,
S. C. Walker v. Walker, 1 Meriv. 503, and see note 1 Add. 159, 160.

\(b\) In the goods of Horne, 1 Hagg. 226. Mathews v. Warner, 4 Ves. 186.

\(c\) Harris v. Bedford, 2 Phill. 178. Thomas v. Wall, 3 ib. 23. Buckle
v. Buckle, ib. 323. In the goods of Jerram, 1 Hagg. 550. Doker v. Goff,
2 Add. 42.

\(d\) Harris v. Bedford, 2 Phill. 178. Beaty v. Beaty, 1 Add. 158. In the
goods of Hurrill, 1 Hagg. 252. In the goods of Wenlock, 1 Hagg. 551.
In the goods of Thomas, 1 Hagg. 696. In the goods of Edmonds, 1 Hagg.
698.

\(e\) Buckle v. Buckle, 3 Phill. 323.

\(f\) In the goods of Jerram, 1 Hagg. 550. In the goods of Vanhagen, 1
Hagg. 478. In the goods of Sparrow, ib. 479.

\(g\) Ripley v. Waterworth, 7 Ves. 440. Franklin v. Bank of England,
1 Russ. 589.
The signature or seal of the testator is not necessary for the validity of a will of personalty, whether the instrument be in the handwriting of the testator, or in another man’s hand. (a)

If it be in the testator’s own writing, though it has neither his name nor seal to it, it is good, provided there be sufficient proof that it is his handwriting. (b)

The presumption of law is against every testamentary paper not actually executed by the testator; and against every paper which is not so executed, as to furnish on the face of the paper the inference that the testator meant to execute it. (c) But if the paper be complete in all other respects, that presumption is slight, and repelled if it be satisfactorily shown that the non-execution was not the effect of any abandonment of the intentions therein expressed. (d)

If the execution were prevented by the act of God, or if the deceased regarded it as a will, and intended it should operate in its present state, and without doing any further act in order to give it testamentary effect, such paper will be admitted to probate. (e)

Although the instrument be written in another man’s hand, and has never been signed by the testator, yet in many cases it will operate as a good testament of personal estate. (f)

(a) Godolph. pt. 1, c. 1, § 7.
(d) Montefiore v. Montefiore, 2 Add. 357, 8.
(f) Wentw. c. 1, p. 15, 14th ed.
Thus, if a person give instructions for a will, and die before the instrument can be formally executed, the instructions, though neither reduced into writing in his presence, nor ever read over to him, will operate as fully as a will itself. (a)

It is not necessary that they should be given to the drawer by the deceased; they may be conveyed to him through the medium of a third person; although the Court, in such a case, would be doubly on its guard. (b)

But it is essential that they should be reduced into writing in the lifetime of the deceased; for otherwise they would amount only to a mere nuncupative will, which would be of no effect under the statute. (c) Thus, where a testator died in the act of dictating instructions to his solicitor in the presence of a third person, and had proceeded as far as the clause appointing an executor, when he was attacked by the seizure which terminated his existence; immediately after his death, the third person, on hearing the instructions read over, observed to the solicitor, that he had omitted a legacy, which the deceased had directed; upon which the solicitor, recollecting the fact, immediately added the legacy. Although the Court entertained no doubt in pronouncing the instructions to be the will of the deceased, as far as the appointment of the executor, yet it decided that the last clause must be struck out, and could not be established, because it had not been committed to writing during the lifetime of the testator. (d)


(b) Lewis v. Lewis, 3 Phill. 109, and see Maclae v. Ewing, 1 Hagg. 317.

(c) Sikes v. Snaith, 2 Phill. 355; see also Rockell v. Youde, 3 Phill. 141.

(d) Nathan v. Morse, 3 Phill. 529.
A mere paper of instructions, even though olographe and signed, cannot be sustained as testamentary, if there was no sudden death or other act of God to prevent the regular execution of the will or codicil by the deceased. (a)

If a testament be found in the testator’s chest, or safely kept among other writings, but is neither written nor subscribed by him, but altogether of another man’s hand, this writing will not prevail as the last will and testament of the deceased, unless it be proved that the same was written by the command of the testator, or unless it be sealed with the seal of the testator: or unless (it may be added) other satisfactory proof be given, that the testator had recognized it distinctly as his will. (b)

It has been observed, that the term imperfect, as applied to an instrument of this description, is carefully to be distinguished from the word “unexecuted.” Not every “imperfect” paper is “unexecuted;” nor is every “unexecuted” paper “imperfect,” except only in a certain sense of that term. (c) Thus a testamentary paper may be finished and complete, looking to the body of the instrument, as purporting to dispose of the testator’s whole property, and so on; still, however, if unexecuted, as for instance, by wanting the deceased’s signature, it is, in a certain sense of the word, though in a certain sense of the word only, an imperfect paper. But the word “imperfect,” when applied technically to instruments of this nature, means, that the document is upon the face of it, manifestly in progress only, and unfinished and incomplete as to the body of the instrument. (d)

When a paper is imperfect in this sense of the word, that is, unfinished as well as unexecuted, not only must

(a) Munro v. Coutts, 1 Dow’s App. Cas. 437.
(b) Swinb. pt. 4. § 25, pl. 10. Williams’s Law of Executors, 52.
(c) Montefiore v. Montefiore, 2 Add. 357.
(d) Ib.
its being unfinished and unexecuted be accounted for, that is, proved to have been caused by the act of God, or that there is some reason other than any abandonment of intention by the testator to which it may be ascribed, but it must also be clearly proved, upon a just view of all the facts and circumstances of the case, that the deceased had come to a final resolution in respect to it, as far as it goes. That proof rests on the person setting up such paper. (a)

The presumption of law against such an instrument, instead of being slight, as in the case of a merely unexecuted paper, is very strong and difficult to be repelled. (b) When there is a mere want of execution in a paper which is complete in other respects, the Court will presume the testator's intentions to be expressed in such a paper, on its being satisfactorily shewn that the non-execution did not arise from abandonment of those intentions so expressed; (c) but where a paper is incomplete in the body of it, the Court must be fully satisfied by proof: First, That the deceased had finally decided to make the disposition of his property expressed in the imperfect paper: Secondly, That he never abandoned that intention, and was only prevented by the act of God from proceeding to the completion of his will. (d)

The form of a paper does not affect its title to probate,
provided it is the intention of the deceased that it should operate after his death. (a) Thus, a deed poll, or an indenture, (b) a deed of gift, (c) a bond, (d) marriage settlements, (e) letters, (f) drafts on bankers, (g) the assignment of a bond by indorsement, (h) receipts for stock and bills endorsed "for A. B." (i) an endorsement on a note, "I give this note to C. D." (j) promissory notes, and notes payable by executors to evade legacy duty, (l) have been held to be testamentary.

A paper containing a disposition by him of his property to be made after death, though it were intended by him to operate as a settlement, or a deed of gift, or a bond, and not as a will or other testamentary instrument, but an instrument of a different shape, yet, if it cannot operate in the latter, may nevertheless operate in the former character. (m)

If a testator by a subsequent paper say he hath bequeathed by a former instrument that which he has not


(d) Masterman v. Maberley, 2 Hagg. 235.


(g) Bartholomew v. Henley, 3 Phill. 317.


(i) Sabine v. Goate and Church, 1783, cited ib.

(k) Chaworth v. Beech, 4 Ves. 565.


bequeathed, the subsequent paper would, it should seem, be admitted to probate, "as being a declaration of his will at the time he made it to dispose by the will." (a)

But it is essentially requisite that the instrument should be made to depend upon the event of death as necessary to consummate it; for where a paper directs a benefit to be conferred inter vivos, without reference expressely or impliedly to the death of the party conferring, it cannot be established as testamentary. (b)

The Ecclesiastical Courts do not confine the testamentary disposition to a single instrument; but they will consider several of different natures and forms, as constituting together the will of the deceased. (c)

Although the law of England does not adopt the rule of the Civil Law, that a testament written by the person in whose favour it is made is void, yet such conduct creates a presumption against the act, and renders necessary very clear proof of volition and capacity, as well as of a knowledge by the testator, of the contents of the instrument; (d) nor does the law of England determine that the act is absolutely void, even though the person making the will in his own favour is the agent and attorney of the testator, but the suspicion is thereby, for obvious reasons, greatly increased. (e)

The recent act extends to wills of moveable as well as of real estate. The same number of witnesses, and the same manner of attestation, the same mode of signature and subscription are required in testamentary disposi-


(b) Glynn v. Oglander, 2 Hagg 438.


(e) 1 Hagg. 391.
tions of moveable property as are required in the devise of real property.

III. A nuncupative testament is when the testator, without any writing, declares his will before a sufficient number of witnesses. (a)

The Statute of Frauds has subjected this species of testament to several restrictions, except when made by mariners at sea, and soldiers in actual service. (b) As to all other persons, the statute enacts, (c) "That no nuncupative will shall be good where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof, nor unless it be proved that the testator at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will, or to that effect; nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days, or more, next before the making of such will, except where such person was surprised or taken sick being from his own home, and died before he returned to the place of his or her dwelling."

"After six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will." (d)

"No letters testamentary, or probate of any nuncupative will shall pass the seal of any court till fourteen days at the least, after the decease of the testator be

(a) Swinb. pt. 1, § 12, pl. 1, 6, and Godolph. pt. 1, c. 4, § 6, 7.
(b) 2 Blk. Comm. 500.
(c) Sect. 19.
(d) Sect. 20.
fully expired, nor shall any nuncupative will be at any
time received to be proved, unless process have first
issued to call in the widow or next of kindred to the
deceased, to the end that they may contest the same if
they please." (a)

"No will in writing concerning any goods or chat-
tels, or personal estate, shall be repealed, nor shall any
clause, devise, or bequest therein be altered or changed
by any words, or will by word of mouth only, except
the same be in the life of the testator committed to
writing, and after the writing thereof read unto the tes-
tator, and allowed by him, and proved to be so done by
three witnesses at the least." (b)

With respect to the witnesses required by the 19th
section, it is declared by the statute 4 Anne, c. 16, s. 14,
"that all such witnesses as are and ought to be allowed
to be good witnesses upon trials at law by the laws and
customs of the realm, shall be deemed good witnesses to
prove any nuncupative will, or any thing relating there-
unto."

The testamentary words must be spoken with an in-
tent to bequeath, not any loose idle discourse in his ill-
ness; for he must require the by-standers to bear witness
to his intention: the will must be made at home, or
among his family or friends, unless by unavoidable
accident, to prevent impositions from strangers; it must
be in his last sickness, for if he recovers, he may alter
his dispositions, and has time to make a written will;
it must not be proved at too long a distance from the
testator's death, lest the words should escape the me-


(a) Sect. 21. (b) Sect. 22.
(c) 2 Black. Com. 501.
All the provisions of the statute must be completely complied with. (a) Accordingly, the enactments, that no nuncupative will shall be good, that "is not proved by the oath of three witnesses," has been held to make such a will invalid, where one of three witnesses present died before he could make proof. Dr. Shalmer, by will in writing, gave two hundred pounds to the parish of St. Clement Danes; and afterwards Prew, the reader, coming to pray with him, his wife put him in mind to give two hundred pounds more towards the charges of building their church; at which, though Dr. Shalmer was first disturbed, yet afterwards he said he would give it, and bid Prew take notice of it; and the next day bid Prew remember what he had said to him the day before, and died that day. Within three or four days after, the doctor's widow put down a memorandum in writing of the said last devise, and so did her maid. Prew died about a month after; and amongst his papers was found a memorandum of his own writing, dated three weeks after the doctor's death, of what the doctor said to him about the two hundred pounds, and purporting that he had put it in writing the same day it was spoken: but that writing which was mentioned to be made the same day it was spoken did not appear; and these memorandums did not expressly agree. About a year after, on the application of the parish to the commissioners of charitable uses, and on producing these memorandums, and proofs by Mrs. Shalmer and her maid, they decreed the two hundred pounds. But on exception taken by the executors, the decree was discharged of this two hundred pounds; and the Lord Chancellor held it not good, because it was not proved by the oath of three witnesses: for though Mrs. Shalmer and her maid had made proof, yet Prew was dead;

(a) Bennett v. Jackson, 2 Phill. 190. Lemann v. Bonsall, 1 Add. 389.
and the statute in that branch requires not only three to be present, but that the proof shall be by the oath of three witnesses. (a)

The statute is also strictly construed with respect to its requisition, that the testator shall bid the persons present or some of them, bear witness that such is his will, or to that effect, which is technically called the rogatio testium. Thus, where a mother in her last sickness called several of her children, and the daughter of the person with whom she lodged to her bedside, and declared her wishes as to the disposition of her effects, and the conduct of her family after her death, such declaration was held to be inadmissible to probate as a nuncupative will on account of the want of rogatio testium. (b)

The testator must call on the persons to bear witness to the act, and he must declare that the words were spoken with the intention of making a will. (b)

The factum of a nuncupative will requires to be proved by evidence more strict and stringent than that of a written one in every single particular. (c)

It is laid down by Swinburne, that a nuncupative testament may be made, not only by the proper motion of the testator, but also at the interrogation of another. (d)

The recent act has abolished nuncupative wills, but retains the exception contained in the 23rd section of the Statute of Frauds, as to the testaments of soldiers in actual military service, and of mariners and seamen being at sea.

The 23rd section of the Statute of Frauds directs that any soldier being in actual military service, or any ma-

(b) Bennett v. Jackson, 2 Phill. 190. See also Parsons v. Miller, and Darnbrook v. Silverside, cited by Sir J. Nicholl in his judgment, ib. 192.
(c) Lemann v. Bonsall, 1 Add. 389.
(d) Swinb. p. 1, § 12, pl. 6.
riner or seaman being at sea, may dispose of his move-ables, wages and personal estate, as before the act.

This clause has been considered to apply to seamen on board merchants' vessels. (a)

The 55 Geo. 3, c. 60, repeals the various acts which related to the wills of petty officers, seamen, and marines in his Majesty's navy. (b) It enacts, that no will made by any petty officer or seaman, non-commissioned officer of marines, or marine, before his entry into his Majesty's service, shall be valid to pass or bequeath any wages, pay, prize, or bounty money, or other allowances of money, to accrue due for or in respect of the service of any such petty officer or seaman, &c. in his Majesty's navy. Nor shall any will made by any such petty officer, &c. in the King's service, be valid to bequeath any such wages, &c. due or to grow due to him, unless it contains the name of the ship to which the person executing the same belonged at the time, or to which he has belonged. In every case there is required a full description of the relationship or residence of the person or persons to whom, or in whose favour as executors, the same shall be granted or made; and also the day of the month, and year, and the name of the place when and where the same has been executed. Such will is not valid, unless executed and attested as follows: In case any such will is made by any such petty officer, &c. at any time while he respectively belongs to and is on board any of his Majesty's ships, as part of the supplement thereof, or be borne on the books as a supernumerary, or as an invalid, or for victuals only, unless such will is executed in the presence of or attested by the captain or commanding officer of the ship, or during his absence on leave, on separate service, by the com-

(a) Morrell v. Morrell, 1 Hagg. 51.

(b) 9 and 10 W. 3, c. 41, § 3, 6. 20 Geo. 2, c. 24, § 6. 9 Geo. 3, c. 30, § 5, 6. 26 Geo. 3, c. 63. 32 Geo. 3, c. 34, and c. 67, § 14, 16. 49 Geo. 3, c. 108, § 1, 6, 10, 17. 54 Geo 3, c. 93, § 7.
manding officer for the time being, who in that case shall state at the foot of such attestation the absence of such captain, &c. at the time of the execution of such will, and the occasion thereof; or in case of the inability of such captain or commanding officer by reason of wounds or sickness to attest any such will, then, unless such will is executed in the presence of and attested by the first lieutenant or other officer next in command of such ship, who shall state at the foot of such attestation the inability of such captain, &c. to attest the same. In case any such will shall be made by any such petty officer, &c. in any of his Majesty's hospitals, or on board any of his Majesty's hospital ships, or in any military or merchant hospital, or at any sick quarters, either at home or abroad, unless such will shall be executed by the governor, physician, surgeon, assistant-surgeon, agent, or chaplain of any such hospital or sick quarters of his Majesty; or by the commanding officer, agent, physician, surgeon, assistant-surgeon, or chaplain for the time being of any such hospital ship; or by the physician, surgeon, assistant-surgeon, agent, chaplain, or chief officer of such military or merchant hospital, or other sick quarters, or one of them. In case any such will shall be made by any such petty officer, &c. on board of any ship in the transport service, or in any merchant ship, unless the same is executed in the presence of and attested by some commission or warrant officer, or chaplain in his Majesty's navy, or some commissioned officer belonging to his Majesty's land forces, or royal marines; or the governor, physician, surgeon, assistant surgeon, or agent of any hospital in his Majesty's naval or military service who may then happen to be on board of such transport or merchant vessel, or by the master or first mate thereof, or one of them. In case any such will shall be made by any such petty officer, &c. after his discharge from his Majesty's service, unless the same (if the party making such will
resides in London or Westminster, or within the bills,) shall be executed in the presence of and attested by the inspector (for the time being) of seamen’s wills, or his assistant, or clerk; or unless the same (if the party resides at or within seven miles from any port or place where the wages of seamen in his Majesty’s service are paid,) shall be executed in the presence of and attested by one of the clerks in the office of the treasurer of the navy, resident at such port or place; or unless the same (if the party resides at any other place in Great Britain or Ireland, or in Guernsey, Jersey, Alderney, Sark or Man,) shall be executed in the presence of and attested by a justice of the peace, or by the minister, or officiating minister, or curate of the parish or place in which such will shall be executed; or unless the same (if the party reside in any other part of his Majesty’s dominions, or any colonies, &c., or foreign possession or dependency of his Majesty, his heirs or successors, or any settlement within the charter of the East India Company,) shall be executed in the presence of and attested by some commissioned or warrant officer, or chaplain of his Majesty’s navy, or commission officer of royal marines, or the commissioner of the navy, or naval store keeper, at one of his Majesty’s naval yards, or a minister of the church of England or Scotland, or a magistrate or principal officer residing in any such island, colony, &c., or if the party resides at any place not within his Majesty’s dominions, or within any place last above enumerated, unless the same shall be executed in the presence of and attested by the British consul, or vice consul, or some officer having a public appointment or commission, civil, naval, or military, under his Majesty’s government, or by a magistrate or notary public of or near the place where such will shall be executed. (a)

(a) Sect. 2.
The third section enacts that every will already made or thereafter to be made by any petty officer, &c. at any time while they were or shall be prisoners of war in parts beyond the seas, shall be as valid as if the same had been respectively executed in the manner required by the acts recited in the first section, or any of them, provided every such will shall have been executed in the presence of and attested by some commissioned or warrant officer of his Majesty’s navy, commission officer of royal marines, physician, surgeon, assistant-surgeon, agent or chaplain to some naval hospital, or some commission officer, physician, surgeon, or chaplain of the army, or any notary public, any thing in any of the said acts to the contrary notwithstanding; but so as not to invalidate or disturb any payment already made under any letter of administration, certificates, or otherwise, pursuant to the said printed acts, or any of them, in consequence of the rejection of any such will by the inspector of seamen’s wills, for want of due attestation, according to the directions of the said acts, or any of them.

By the fourth section, no will of any seaman contained in the same instrument, paper or parchment, with a letter of attorney, shall be available in law for any purpose whatever.

In the monthly muster-books or returns is to be specified which of the persons mentioned therein has made any will during that month, or other space of time from the preceding return, and the date thereof, and which is to be inserted opposite the party’s name, under the head of “will.” (a)

The will before it is attempted to be acted on or put in force, must be sent to the treasurer of the navy, at the Navy Pay Office, London, for examination by the inspector of seamen’s wills, who registers it in the manner mentioned in the act. (b)

(a) Sect. 5.  
(b) Sect. 6.
SECTION IV.

FORMS OF TESTAMENTS UNDER THE LAW OF SCOTLAND, THE COLONIES, AND UNITED STATES.

I. Scotland.—Testament confined to moveable estate.—Form of.—Olographs.

II. In the Colonies, &c. except Bermudas, the Statute of Frauds in force.—In Barbadoes two witnesses sufficient.—Olographs testament.

III. In the United States.—States in which there is no distinction in the forms of testaments, whether the property be real or personal.—Mode of signature and subscription.—States in which two witnesses are sufficient.

I. By the law of Scotland, a will does not carry heritage. But the dead's part may be bequeathed by testament, to which nothing more is necessary than a clear expression of the testator's intention as to the disposal of his effects. (a)

There is no law of death-bed as in heritage, to defeat a will made in mortal sickness.

The testament must be in writing. A verbal will is inadmissible either to nominate an executor, or to recall former wills or bequests. (b)

If the testator cannot write, it may be authenticated by one notary (or a clergyman) and two witnesses. (c)


(b) Houston, Feb. 18th, 1631, Dict. 12,307. Whitefoord, Nov. 3rd, 1742, Dict. 12,338. Smith, Nov. 17th, 1749, Dict. 6594.

(c) 1584, 133. Bog, Jan. 18th, 1623, Dict. 16,960. Trail, Feb. 27th, 1805, Dict. 15,955.
It may be challenged as not being truly the will of
the deceased, if it be not read over to him. (a)

An olograph will is good. (b)

A testamentary instrument is sustained whenever the
testator's intention is sufficiently apparent, although it be
not quite formal, especially if it be executed where men
of skill in business cannot be had. (c) However valuable
may be the subject of the testament, one notary signing
for the testator, with two witnesses, is sufficient, (d)
although two notaries are required by statute to all deeds
of importance. Before the reformation, clergymen fre-
quently entered notaries, but ministers (by which are
meant parochial presbyters) are, by Act 1584, C. 133,
disabled from exercising any civil office, as of judge, ad-
vocate, or notary, except in the case of testaments. The
power which was continued to ministers by this act in the
special matter of testaments, was originally intended for
the single purpose of authorizing the attestation of testa-
ments by such churchmen as had regularly entered notaries;
but custom has extended it without distinction to all mi-
nisters, because they are obliged by their office to be fre-
quently with dying persons, where notaries cannot easily
be got. (e)

A testament was sustained, which a minister, at the
request of the testator, who could not write, had sub-
scribed with the testator's name in place of his own, upon
the minister's afterwards annexing an attestation of the
fact in the character of a notary. (f)

But when it appeared that the witnesses did not hear

(a) Young, Feb. 1688, Dict. 15,929. Arbuthnot, Dec. 4th, 1694, ib.
Robertson, Dec. 15th, 1742, Dict. 15,942-3. See Petrie, Nov. 15th, 1735,
(b) Pennicuik, 1709, Dict. 16,970-1.
(c) Fount. Jan. 1st, 1708, Kerr, Dict. 16,968, Jan. 20th, 1709. Penni-
cuik, Dict. 16,970.
(d) Hadd. Jan. 18th, 1623, Bog, Dict. 16,960.
(e) Erskine, ib.
(f) F. C. Trail, Feb. 27th, 1805, Dict. 15,955.
the deceased give orders to the notary for signing, or see him touch the pen in token of his approbation of the contents, the testament was held invalid. (a)

A testament cannot be sustained if it contain neither the name of the writer, nor the designation of the witnesses. (b)

A codicil was found not effectual, where it was neither olographe, nor attested by witnesses. (c)

A nuncupative or verbal legacy is effectual to the extent of one hundred pounds scots (eight pounds six shillings and eightpence), and several legacies may thus be bequeathed, each to that extent. (d) But a distinction has been admitted between a legacy and a *donatio mortis causē*; the latter being *de praesenti* is effectual. (e) Under the description of nuncupative wills are included wills unsigned, or left incomplete at the testator’s death; (f) but mere directions to make a will have no effect. (g)

II. In all the colonies in the West Indies, except Bermuda, British Guiana, Trinidad, and St. Lucia, and in those of North America, except Lower Canada, the Statute of Frauds is in force, either as part of the laws which being in existence at the time those possessions became annexed to the British Empire were adopted, or as having been expressly enacted by acts of their legislatures.

The provisions of the statute were also extended to devises of slaves.

(a) F. C. 232, Farmers, June 25th, 1760, Dict. 16,849.
(b) F. C. Jan. 12th, 1802, Crichton, Dict. 15,982.
(d) Bell’s Princ. 1868. Smith, Nov. 9th, 1749, Dict. 6,594, Elch. Testament, 10.
(e) Mitchel, Nov. 21st, 1759, Dict. 8,082.
(g) McFarquhar, June 15th, 1779, Dict. 3,600. Monro, July 3rd, 1813, 1 Dow, 437.
The act of the legislature of Barbadoes by which the provisions of the Statute of Frauds are enacted, does not require the same number of witnesses as that statute.

All devises and bequests of any lands, tenements, or slaves, any ways devisable, shall be in writing and signed, or acknowledged by the party so devising the same, or signed by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence, sight, or hearing of the said testator, by two or more credible witnesses, or else they shall be utterly void and of no effect. (a)

The Barbadoes act also admits an olographe will, for there is an express proviso, that nothing in the act shall extend or be construed to extend to any last will or testament, devise or bequest, which shall be written throughout in the proper handwriting of the testator or devisor. (b)

The statute 25 Geo. 2, c. 6, (which makes void all bequests to the attesting witnesses of a will,) by sect. 10, is extended to the American Colonies, where the Statute of Frauds, or any similar statute is in force.

In Barbadoes this section is enacted in terms by the act already referred to. (c)

III. In the states of New York, Missouri, Maine, Rhode Island, Pennsylvania, Ohio, Illinois, Delaware, and Louisiana, the same formalities are required, whether the property is moveable or immovable; but in the other states the distinction between those two species of property is retained.

The Statute of Frauds, with such alterations as are about to be mentioned, regulates the devise of real property. The testamentary disposition of moveable property may be made in the same way, as was admitted by

(a) Act No. 226, cl. 3.  
(b) Act No. 226, cl. 3.  
(c) Cl. 11.
the law of England before the passing of the recent act.

By the New York Revised Statutes, (a) the testator is required to subscribe the will at the end of it, in the presence of at least two witnesses, who are to write their places of residence opposite their names, under a penalty of fifty dollars, but the omission will not affect the validity and efficiency of their attestation.

When the testator signs or acknowledges the will, he must declare the instrument to be his last will; and he is to subscribe or acknowledge it in the presence of each witness, and the witnesses are to subscribe their names at the request of the testator. The statute drops the direction, in the English statute, that the witnesses are to subscribe in the presence of the testator. (b)

The Massachusetts Revised Statutes of 1835, require that the execution of a will to pass, charge, or affect real estate, shall be signed by the testator, or by some other person in his presence, and by his express direction, and subscribed in his presence by three or more competent witnesses. (c)

In Vermont, the will is required to be sealed; but this is peculiar to that state.

Three witnesses are required in Vermont, New Hampshire, Maine, Massachusetts, Rhode Island, Connecticut, New Jersey, Maryland, South Carolina, Georgia, Alabama, and Mississippi.

Two witnesses only are required in Indiana, (d) New York, Delaware, Virginia, Ohio, Illinois, Missouri, Tennessee, North Carolina, and Kentucky. (e)

The Alabama statute contains an enactment similar to the 5th section of the statute 29 Car. 2, c. 3; the words "respectable witnesses" are used instead of "credible witnesses."

(c) 4 Kent's Com. 514.  (d) Ordinance of Congress, July, 1785.
In Pennsylvania, a devise of lands in writing will be good without any subscribing witnesses, provided the authenticity of it can be proved by two witnesses; and if the will be subscribed by two witnesses, proof of it may be made by others. (a)

It seems that in Virginia, two subscribing witnesses are not indispensable, provided the will has been wholly written out, and signed by the testator.

In North Carolina and Tennessee, a will of lands may be good under special circumstances without any subscribing witnesses. (b)

It was required by the Statute of Frauds, that the will should be signed by the devisor, and be attested and subscribed by the witnesses, in his presence; and this direction has been extensively followed in the statute laws of the several states. (c)

Under the Statute of Frauds the attestation of a will by a witness making his mark has been deemed sufficient. And the courts in South Carolina have adopted this construction. (d)

The New York Revised Statutes, it seems, would not admit of the same loose construction, for they say that each attesting witness shall subscribe his name. (e)

In Tennessee, by an act passed in 1784, c. 10, it is enacted, that when any last will is found amongst the valuable papers or effects of any deceased person, or has been lodged in the hands of any person for safe keeping, and the same is in the handwriting of such deceased person, and his name subscribed thereto, or inserted in some part of such will, and if such handwriting is gene-

(a) Hight v. Wilson, 1 Dallas, 102. Huston, J., 1 Watts, 463.
(c) 4 Kent's Com. 514.
(d) Adams v. Chaplin, 1 Hill's Ch. Rep. 266.
(e) 4 Kent. ib.
rally known by the acquaintances of such deceased person, and it is proved by at least three credible witnesses, that they verily believe such will and every part thereof to be in the handwriting of the person whose will it appears to be, it shall be sufficient to convey an estate in lands. (a)

There is a similar provision in the statute law of Virginia. (b)

In Pennsylvania two witnesses are necessary to prove a will of lands, &c. (c) but it is not necessary the witnesses should be present at the execution of the will, nor that there should be subscribing witnesses to a will; nor that the proof of the will should be by the subscribing witnesses, if there be any; nor that the will should be sealed or signed by the testator if written by himself, or drawn by his instructions; but the handwriting of the testator, or the special instructions, &c., are to be proved by two witnesses, or equivalent to two witnesses.

By the Delaware supplemental act, it is enacted, "that where no such last will and testament concerning any goods, chattels, or personal estate hath been made in writing, according to the directions of the act, any nuncupative will made in the manner and form as is directed in the act to which this is a supplement, is available, and may be received and proved according to the directions of that act." This part of the act is copied verbatim from the 19th, 20th, 21st, and 22nd sections of the Statute of Frauds; (d) except that the 4th section of the Delaware act declares, that "no nuncupative will shall be good where the estate thereby bequeathed shall exceed the value of fifty pounds, that is not proved upon the oath or solemn affirmation of two credible witnesses at the least." The 19th section of the Statute of Frauds, limited the sum to thirty pounds.

(a) Griffith's Reg. p. 773. (b) 4 Kent's Com. 514.
(c) Pennsylvania, 3 Griff. Reg. 254.
(d) Griffith's Reg.
The Civil Code of Louisiana expressly abolishes the custom of willing by testament, by the intervention of a commissary or attorney. (a)

The institution of heir and all other testamentary dispositions committed to the choice of a third person, are null, even should that choice have been limited to a certain number of persons designated by the testator. (a)

Testaments are divided into three principal classes: 1. Nuncupative, or open testaments. 2. Mystic, or sealed testaments. 3. Olographic testaments. (b) Testaments, whether nuncupative or mystic, must be drawn up in writing, either by the testator himself, or by some other person, under his dictation. (c)

The Code abrogates the custom of making verbal testaments; that is to say, resulting from the mere deposition of witnesses, who were present when the testator made known to them his will, without his having committed it, or caused it to be committed to writing. (d)

Nuncupative testaments may be made by public act, or by act under private signature. (e)

The nuncupative testaments by public act must be received by a notary public, in presence of three witnesses residing in the place where the testament is executed, or of five witnesses not residing in the place.

It must be dictated by the testator, and written by the notary as it is dictated.

It must then be read to the testator in presence of the witnesses.

Express mention is made of the whole, observing that all those formalities must be fulfilled at one time,

(a) Louisiana Code, art. 1566.  (b) Art. 1567.
(c) Art. 1568.  (d) Art. 1569.
(e) Art. 1570.
without interruption, and without turning aside to other acts. (a)

It must be signed by the testator; if he declares that he knows not how, or is not able to sign, express mention of his declaration, as also the cause that hinders him from signing, must be made in the act. (b)

It must be signed by the witnesses, or at least by one of them for all, if the others cannot write. (c)

A nuncupative testament under private signature, must be written by the testator himself, or by any other person from his dictation; or even by one of the witnesses, in presence of five witnesses residing in the place where the will is received, or of seven witnesses residing out of that place. (d)

Or it will be sufficient if, in the presence of the same number of witnesses, the testator presents the paper on which he has written his testament, or caused it to be written out of their presence, declaring to them that that paper contains his last will. (e)

In either case, the testament must be read by the testator to the witnesses, or by one of the witnesses to the rest, in the presence of the testator. It must be signed by the testator, if he knows how or is able to sign, and by the witnesses, or at least by two of them, in case the others know not how to sign; and those of the witnesses who do not know how to sign, must affix their mark. (f)

This testament is subject to no other formality than those prescribed by this and the preceding article.

In the country it is sufficient for the validity of nuncupative testaments under private signature, if the testament be passed in the presence of three witnesses residing in the place where the testament is received, or

(a) Art. 1571.  
(b) Art. 1572.  
(c) Art. 1573.  
(d) Art. 1574.  
(e) Ib.  
(f) Art. 1575.
of five witnesses residing out of that place, provided that in this case a greater number of witnesses cannot be had. (a)

The mystic or secret testament, otherwise called the closed testament, is made in the following manner:

The testator must sign his dispositions, whether he has written them himself, or has caused them to be written by another person. The paper containing those dispositions, or the paper serving for their envelope, must be closed and sealed.

The testator must present it thus closed and sealed to the notary and to seven witnesses, or he must cause it to be closed and sealed in their presence. Then he must declare to the notary in presence of the witnesses, that that paper contains his testament, written by himself, or by another by his direction, and signed by him, the testator. The notary must then draw up the act of superscription, which is to be written on that paper, or on the sheet that serves as its envelope, and that act must be signed by the testator, and by the notary, and the witnesses. (b)

All that which is thus prescribed must be done without interruption or turning aside to other acts; and in case the testator by reason of any hindrance that has happened since the signing of the testament, cannot sign the act of superscription, mention must be made by him thereof, without its being necessary in that case to increase the number of witnesses. (c)

Those who know not how or are not able to write, and those who know not how to sign their names, cannot make dispositions in the form of the mystic testament. (d)

If any one of the witnesses to the act of superscription

(a) Art. 1576. (b) Art. 1577.
(c) Art. 1578. (d) Art. 1579.
knows not how to sign, express mention must be made thereof.

In all cases the act must be signed by at least two witnesses. (a)

The olographic testament is that which is written by the testator himself. In order to be valid, it must be entirely written, dated and signed by the hand of the testator. It is subject to no other form, and may be made anywhere, even out of the state. (b)

Erasures not approved by the testator are considered as not made; and words added by the hand of another as not written.

If the erasures are not so made as to render it impossible to distinguish the words covered by them, it is left to the discretion of the judge to declare if he considers them important, and in this case only to decree the nullity of the testament. (c)

It is sufficient for the validity of a testament, that it be valid under any one of the forms prescribed by law, however defective it may be in the form under which the testator may have intended to make it. (d)

The Code declares the following persons absolutely incapable of being witnesses to a testament. 1. Women of what age soever. 2. Male children who have not attained the age of sixteen years complete. 3. Persons insane, deaf, dumb, or blind. 4. Persons whom the criminal laws declare incapable of exercising civil functions. 5. Slaves. (e)

Those who are constituted heirs or named legatees, under whatsoever title it may be, cannot be witnesses to the testament. (f)

Mystic testaments are excepted from the preceding article. (g)

(a) Art. 1580.  (b) Art. 1581.  (c) Art. 1582.
(d) Art. 1583.  (e) Art. 1584.  (f) Art. 1585.
(g) Art. 1586.
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* By the residence of the witnesses in the place where the testament is executed, is understood their residence in the parish where that testament is made; that residence is necessary only when it is expressly required by law. (a)

Testaments in which the formalities are not observed, are null and void. (b)

Testaments made in foreign countries, or in the states and other territories of the union, take effect in Louisiana, if they be clothed with all the formalities prescribed for the validity of testaments in the place where they have been respectively made. (c)

The wills of persons employed in armies in the field, or in a military expedition, may be received by a commissioned officer, in presence of two witnesses. (d)

If the testator be sick or wounded, they may be received by the physician or surgeon attending him, assisted by two witnesses. (e)

The testament made in the form above prescribed is null six months after the return of the testator to a place where he has an opportunity of employing the ordinary forms. (f)

Testaments made during a voyage at sea may be received by the captain or master, in presence of three witnesses, taken by preference from among the passengers; in default of passengers, from among the crew. (g)

The testament made at sea can contain no disposition in favour of any of the persons employed on board the vessel, unless they be relations of the testator. (h)

These testaments, and that of persons employed in the military service, are subject to no other formality than that of being reduced to writing, and being signed

(a) Art. 1587.  (b) Art. 1588.  (c) Art. 1589.
(g) Art. 1594.  (h) Art. 1595.
by the testator, if he can write, by him who receives it, and by those in whose presence it is received. (a)

The testament made at sea is not valid unless the testator dies at sea, or within three months after he has landed at a place where he is able to make it in the ordinary forms. (b)

(a) Art. 1592, 1596.
(b) Art. 1597.
CHAPTER X.

OF THE REVOCATION OF TESTAMENTS.

I. Revocation express.—By an act confined to revocation.—In the Civil Law the second testament was a revocation of the former, because there could not be two testaments.—The second testament must be rite perfectum.—In what manner the acts of revocation perfected under the coutumes of Paris and Normandy.

II. Cancellation, &c. of one of several originals, &c.—Erasure by testator, the presumption is that it was made animo revocandi.—When the erasure is presumed to be made by testator.—Silence of the coutumes of Paris and Normandy, and the Code Civil, on the subject of revocation by cancellation, &c.—In England and the United States, it constitutes one of the modes of revocation.—The definition given by the recent act.

III. Revocation by a subsequent testament making dispositions different from those contained in a former testament.—Effect of a testament containing dispositions as well as an express revocation, but invalid as a testament.—Two wills, and it cannot be discovered which was the last made.—Revocation and institution of other heirs, on the ground that those named in the former will were dead, but in this fact the testator mistaken.—When the revocation is made under the erroneous belief that the second instrument is effectual.—Revocation of a second testament would not, under the Civil Law, revive a testament which it had previously revoked.—Doctrine of the Courts in England prior to the rule established by the recent act.

IV. Revocation by operation of law under the Civil Law, and the jurisprudence of Holland, by the birth of a child.—Not a revocation under the coutumes of Paris and Normandy and the Code Civil.—The birth of a child and marriage afforded by the law of England a presumption of intention to revoke.—By the recent act marriage alone is a revocation.—Testament revoked if the testator lost his civil status.

V. Effect of an alienation of the property bequeathed under the Civil Law and the other systems of jurisprudence.—Under the law of England.—Effect of a void conveyance.—Law in the United States.

I. It is the peculiar character of the testament, that it is ambulatory until the testator’s death: “Ambulatoria est
voluntas defuncti usque ad vitæ supremum exitum." (a) It therefore remains in his power to change wholly or partially the intentions which he had declared in his former testament, nor can he, by any provision in that testament, preclude himself from exercising this power: "Nemo potest in testamento suo cavere, ne leges in suo testamento locum habeant: quia nec tempore, aut loco, aut conditione finiri obligatio hæredis legatorum nomine potest." (b)

That power is exercised either by an express revocation, or by certain acts which of themselves import, or from which the law infers a revocation.

The revocation may be effected by the law, independently of the will of the testator.

The express revocation of the testament is made either by an act confined to the revocation of that testament without making any other disposition, or by making another testament, which expressly revokes the former testament.

An implied revocation is made when the second testament contains dispositions contrary to those contained in the former testament. Although it is usual for the testator to substitute another testament for that which he would revoke, yet he may confine himself to the revocation alone.

Such express revocation cannot, however, take place by the mere signification of his desire. (c)

An act, therefore, executed with the same forms and solemnities which the law required for the constitution of the testament, would be necessary to effect this revocation. (d)

(a) Dig. Lib. 34, tit. 4, l. 4.
(c) Inst. lib. 2, tit. 17, § 7. Cod. lib. 6, tit. 23, l. 27. Brunneman, ad Cod. h. lib. and tit. Voet. lib. 28, tit. 3, n. 1. Wissenbach, ad Cod. h. lib. and tit.
Such also is the doctrine of the law of Spain (a) and Holland. (b)

The former testament was in the Civil Law revoked by a second testament, although the latter made no mention of the intention to revoke. It operated as a revocation of the first, because as the testament must contain a disposition of the whole succession, the two testaments could not subsist together. The second, therefore, annulled the first: "Testamentum rumpitur alio testamento, ex quo hæres existere poterit, vel agnatione sui hæredis: aut in irritum constituitur, non aditâ hæreditate." (c)

But it was necessary that the second testament should be made in due form: "Tunc autem prius testamentum rumpitur, cum posterius rite perfectum est: nisi forte posterius vel jure militari sit factum, vel in eo scriptus est qui ab intestato veuire potest: tunc enim et posteriore non perfecto superius rumpitur." (d)

It does not operate as a revocation, if it be defective either in respect of the solemnities which are essential to its valid execution, or if it wants any of the qualities essential to the constitution of a testament. A preterition of the testator's children, or an omission to institute an heir, or an institution of the heir, made in terms so doubtful or confused, that the testator's intention could not be ascertained, or if made subject to a condition which had failed, or an imperfect and unfinished expression of the testator's intentions, would prevent the subsequent testament from revoking the former. (e)

This rule admitted of exceptions. The case of a pri-

(a) L. 25, tit. 1, p. 6.
(c) Dig. lib. 28, tit. 3, l. 1.
(d) lb. l. 2.
vileged testament is one of those exceptions. Another is that of a testator who had, by a former testament, instituted a stranger as his heir; but by his second testament institutes the person whom the law would have called to the succession, in case he had died intestate. This second testament, although it should be null, would revoke the former, provided only that it have five witnesses, and in favour of the heir of the blood it would take effect: “Si quis testamento jure perfecto, postea ad alium venerit testamentum, non alias quod ante factum est, infirmari decernimus, quam si id, quod secundo facere testator instituit, jure fuerit consummatum: nisi forte in priore testamento scriptis his, qui ab intestato ad ejus hereditatem vocantur. Eo enim casu, licet imperfecta videatur scriptura posterior, firmato priore testamento, secundam ejus voluntatem ultimam intestati valere sancimus. In qua voluntate quinque testium juratorum dispositiones sufficiunt. Quo non facto valebit primum testamentum, licet in eo scripti videantur extranei.” (a)

Under the coutumes of Paris and Normandy, a simple act received by two notaries, or by one notary and two witnesses, without being clothed with any form, was sufficient to revoke the testament.

When the effect of the revocation was to leave the person intestate, it might be made by a simple declaration sous seign privé, written and signed by the hand of the testator, importing that he revoked the testament which he had made. (b)

It was proposed at the conferences on this part of the Code Civil, that an express revocation of a testament should be effected only by means of the same solemnities which the law required to render the testament valid. But this proposal was rejected, and the article 1035 was

(a) Cod. lib. 6, tit. 23, l. 21, § 3.
adopted. It declares that wills cannot be revoked in the whole or in part, but by a subsequent will, or by an act before notaries, bearing a declaration of change of intention. (a)

By the sixth section of the Statute of Frauds, no devise in writing of lands, tenements, or hereditaments, nor any clause thereof, is revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same; but all devises and bequests of lands and tenements remain and continue in force, unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same.

The 22nd section provides that "no will in writing, concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise, or bequest therein be altered or changed by any words or will by word of mouth only, except the same be in the life of the testator committed to writing; and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least." But it has been held, that the statute does not prevent a revocation by such instructions as would operate as a will, if they were put into writing in the testator's lifetime, according to the rules laid down in the preceding chapter. Thus, an executed will was held to be revoked by a will written while the testator was alive, but who died before it was brought to him. The contents thereof having been proved by witnesses who had heard him give the instructions agreeable to what was written down, it was decided in the Prerogative Court, and the decision was affirmed by the Delegates, that the parol proof of the instructions ought to be received, and that it was not a case within the Statute of Frauds. (b)

(a) Toullier, ib. art. 1053. (b) Sellars v. Garnet, 1 Lee's Eccles. Rep. 509.
But evidence of the testator's intention orally announced, to adopt the prior of two wills, both of which were found at his decease uncancelled, is not admissible, although it appeared that most of the bequests in the posterior will had lapsed. (a)

The civil law allowed a revocation to be made in a less formal manner if the testament intended to be revoked were made ten years before. The testator might then declare the revocation before three witnesses. (b)

II. The other modes by which the testator may by his own act revoke his testament, are what the commentators on the civil law described as deletio, inductio, inscriptio, superscriptio: "Quae in testamento legi possunt, ea inconsulto deleta et inducta nihilominus valent: consulto, non valent. Id vero, quod non jussu domini scriptum, inductum, deletumve est, pro nihiloe est. Legi autem sic accipiendum, non intelligi, sed oculis perspici, quae sunt scripta. Cæterum, si extrinsecus intelligitur, non videbuntur legi posse: sufficit autem, si legibilia sint inconsulto deleta, sive ab ipso, sive ab alio, sed nolentibus. Inducta accipiendum est, et si perducta sint." (c)

The term deletio is "maculis quibusdam, quas lituras dicimus, eandem corrumpere." (d)

Inductio is properly speaking cancellation "cancellatio dicitur eiiam inductio, et verbum inducere scripturam, idem significat, quod cancellare. (e) Vocatur etiam perductio. Quoad effectum vero hosce modos scripturam inducendi et corrumpendi non differre, sed omnes sub vocabulo cancellationis comprehendi." (f)

(a) Daniels v. Nockolds, 3 Hagg. 777.
(b) Cod. lib. 6, tit. 23, l. 27. Voet, lib. 28, tit. 3, n. 1. Neostad, Decis. 1, n. 9.
(c) Dig. lib. 28, tit. 4, l. 1.
(d) Cujac. in Pand. lib. 28, tit. 4.
REVOCATION OF TESTMENTS.

Under the term *deletio* they include cancellation, tearing, cutting, burning, breaking, or opening the seals of a closed testament.

These acts of revocation are comprised in the terms used in the Statute of Frauds, namely, burning, tearing, cancelling, or obliterating.

Neither of these acts is a revocation unless it be done by the testator himself, or by another with his sanction and authority, and unless also it be done advisedly and deliberately. (*a*)

Thus, if a testator unintentionally throws ink upon his will instead of sand, (*b*) or obliterates it during a fit of insanity, (*c*) it will remain in full force, notwithstanding this accidental or involuntary obliteration; while on the other hand, if he cast it into the fire with the intention of destroying it, but it is preserved without his knowledge by a third person, the revocation is nevertheless complete. (*d*)

The destruction of a will by a third person in the lifetime, but without the knowledge of the testator, will not affect its validity; *à fortiori* still less, if done after his decease. (*e*)

Where a testator, upon a sudden provocation of one of the devisees, tore his will asunder, and afterwards being appeased fitted the pieces together and expressed his satisfaction that it was no worse, and that no material injury was done; it was held that the will remained unrevised. (*f*)

The cancellation may be either total or partial, and when it erases or cancels only a part of the testament, the remainder continues in full effect. (*g*)

(*e*) Dig. lib. 36, tit. 4, l. 1, § 2, 3; tit. 3, l. 20, and lib. 37, tit. 11, l. 1, § 11. Voet, lib. 28, tit. 4, n. 2. Lauterb. Disp. 17, de Cancell. c. 2.

(*f*) 1 P. Wms. 346. (*c*) Scruby v. Fordham, 1 Add. 74.


If it has been done unadvisedly, and the parts obliterated can still be read, they remain valid. If the part erased cannot be read, it has no other effect than if the erasure had been made after the will had been completed, and of subjecting the party to the necessity of establishing it, if it be possible, by proof. But if it had been made before the completion of the will, it is the testator's own act that he supplies nothing in the place of that which was erased, and it must be presumed he intended that the will should remain in its erased state and revoked. (a)

This rule is not admitted in the erasures made in a codicil, because to parts erased in the latter, no effect is given, although they can be read. (a)

If the names only of the instituted heirs be erased, it seems that by a favourable and equitable construction, the legacies may still be claimed against the fisc, or the heirs succeeding ab intestato. (b)

If the name of the instituted heir be erased, but that of the substitute left, the latter can take no benefit under the will, and must be considered as erased also, because there is no institute to whom he can be substituted. If, however, several persons had been instituted as heirs, but the name of one only is erased, the others will not be prejudiced. If he struck out the names of all, alleging that one of them had given him offence, it is clear that neither the other heirs nor legatees would be prejudiced by that erasure. (c)

The cancellation of one of several duplicates of a testament, is not treated by the Digest as necessarily inferring a revocation: "Pluribus tabulis eodem exemplo scriptis unius testamenti voluntatem eodem tempore dominus solenniter complevit: si quasdam tabulas in publico depositas abstulit, atque delevit, quae jure gesta sunt, praesertim cum ex ceteris tabulis, quas non abstulit,

(a) Voet, ib.
(c) Ib.
res gesta declarentur, non constituentur irrita. Paulus notat: sed si, ut intestatus moreretur, incidit tabulas, et hoc adprobaverint hi, qui ab intestato venire desiderant, scriptis avocabitur hereditas." (a)

Voet and Lauterbach adopt this text: "Pluribus tabulis, eodem exemplo, i.e. ut omnium idem sit tenor, si quis testamentum fecit, et postea quasdam ex iis cancellavit, testamenti vires non infirmantur; nisi cancellatio eo animo à testatore fuerit facta, ut intestatus decederet, et heres legitimus hoc probaret." (b)

The duplicate thus cancelled was, it is seen, one of those which had been deposited in some public place, and the law infers that by allowing one of them to remain there, the testator intends to leave a testament in full effect. Voet admits that this inference would be repelled, if it could be shewn that the cancellation was made by the testator with the intention that he should die intestate, or unless those instituted heirs by a former will which had been revoked by the subsequent will, could shew that the obliteration of this one copy of the subsequent will was made for the purpose of restoring the prior will. (c)

If the testator obliterated, or destroyed not the testament, but a mere copy or draft of it, and which had not the solemnities required for the execution of wills, the inheritance would be taken under the testament. (d)

Grotius considers that the cancellation of the copy taken from the notary which the testator has retained in his possession, is not a revocation of the original, which is in the notary's protocol, unless it be proved that this cancellation was made by the testator with the intention and desire that he might die intestate:

"Deleto testamenti exemplo (de Grosse), quod testator ad servat, non rumpitur exemplar (de Minute), quod in

(a) Dig. lib. 28, tit. 4, l. 4.
(b) Lauterb. ib. c. 4, § 38. Voet, lib. 28, tit. 4, n. 1, et seq.
(c) Ib.
(d) Ib.

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protocollo notarii inventur, nisi probetur testatorem delevisse, ut intestatus decedere.

"(a)"

Lauterbach contends, that when a muncupative testament has been reduced to writing, and is deposited with the notary, if the testator cancels the copy given to him by the notary, it operates as a revocation, even although the protocol remains entire with the notary. (b)

The doctrine prevailing in England is, that where there are two parts of a will, and the devisor cancels one, the presumption in general is, that he intends to destroy the effect of both; but the strength of such presumption depends upon circumstances. (c) If the uncanned part was in the possession of a third person, (d) the animus revocandi is clear beyond question, since the testator has cancelled all within his reach; (e) if both parts were in the testator's possession, and but one is found uncanned, the act is more equivocal; and if in addition to this, it appears that the cancelled will was first altered by the testator, and then cancelled together with the alterations, it is rather to be presumed that the testator, being dissatisfied with those alterations, had decidedly cancelled the part of the will which contained them, and had preserved the unaltered duplicate with the view of recurring to his original intention. (f) And the presumption it seems would be in favour of the will, where


(d) Cwp. 49.

(e) Boughey v. Moreton, 3 Hagg. 191, n.

(f) Pemberton v. Pemberton, 13 Ves. 310.
one part was found partly mutilated, and the other carefully preserved, both being in the testator's own possession. (a)

The cancellation or obliteration of a testament is an equivocal act, and its effect in revoking a testament depends upon its being done with an intention to revoke. (b)

The intention with which the act is done is a question of fact.

It may be said as a rule that when it is clear the erasure, &c. was made by the testator, the presumption is, that it was made advisedly et animo cancellandi. (c)

If it is not clear that the erasure was made by the testator, the presumption will depend on the place where the testament is found. If it were in the testator's possession, the presumption is that the erasure was the deliberate act of the testator: "Hic autem primò omnium videndum, an testamentum cancellatum reperitur in custodiā defuncti testatoris, an verò penes alium et tertium. Illo in casu cancellatio ab ipso testatore censetur facta. Solent enim testatores ultimas suas voluntates diligentissimè custodire; unde quicquid circa illas factum, ab ipsis testatoribus factum presumitur. Et quidem consultò atque ex voluntate. Unde qui contrarium dicit, probare debet, id quod deletum est, incautè et casu factum esse."

"Apud tertium, si testamentum reperitur cancellatum, in dubio non à testatore, sed à tertio cancellatio presumitur facta. Unde qui hujusmodi testamentum, vel in eo cancellata, voluntate testatoris revocata et infirmata esse dicit, illud probare tenetur." (d)

Where a testator has a will in his own custody, and

(a) Roberts v. Round, 3 Hagg. 548.
(b) Voet, lib. 28, tit. 4, n. 3.
(d) Lauterbe. ib. c. 4, § 50, 52.
that will cannot be found after his death, the presumption is, that he has destroyed it himself. It cannot be presumed that the destruction has taken place by any other person without his knowledge or authority, for that would be presuming a crime. (a)

If on the contrary, it were found in the possession of a third person, the presumption would be that the erasure was not the act or deliberate act of the testator. (b)

Neither the coutumes of Paris and Normandy, nor the Code Civil, contain any provisions respecting the revocation of testaments by those acts which have been mentioned. It is the opinion of M. Toullier, that when they are established to the satisfaction of the court, they will revoke the testament. (c)

In England, by the Statute of Frauds, and in the jurisprudence of the United States, a will is revoked by burning, tearing, cancelling, or obliterating the same by the testator himself, or in his presence, and by his direction and consent.

The recent act enacts, that no will shall be revoked otherwise than by the marriage of the testator or testatrix, or by another will or codicil executed in manner thereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is thereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same. (d)

The act further enacts, that no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such

(b) Mascard. de Prob. conc. 256. Voet, lib. 28, tit. 4, n. 4.
(c) Toullier, des Dispos. Test. liv. 3, tit. 3, c. 5, n. 655, et seq.
(d) 1 Vict. c. 26, § 20.
alteration shall not be apparent, unless such alteration shall be executed in like manner as thereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such alteration, or at the foot or end of, or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will. (a)

The effect of a second or subsequent testament duly made in wholly revoking a prior testament, independently of the dispositions it contained, was peculiar to the civil law and the jurisprudence of Spain.

It resulted from the rule, that there could be no testament without the institution of an heir, and from another rule, that a person could not die partly testate and partly intestate.

The same consequence did not result from two or more codicils made by the testator. The second, third, or other codicils did not revoke a former codicil. All the codicils would subsist so far as their respective contents were not inconsistent with those of the last codicil.

It has been already stated, that in Holland these rules were not retained as part of its jurisprudence, and that codicils, therefore, in their effects, were not distinguished from testaments. Hence several testaments might subsist, and the last revoked those which preceded it so far only as its provisions were inconsistent with them. (b)

The institution of the heir was not adopted by the coutumes of Paris or Normandy, or by the Code Civil, and therefore the effect of a subsequent testament in revoking

(a) Sect. 21.

a former testament depends on the inconsistency of the latter with the former, or on the express declaration of the testator that the former testament was thereby revoked.

Subsequent wills which do not revoke in express terms those which precede them, annul only such of the dispositions therein contained as are incompatible with the subsequent wills.

Such also is the doctrine of the law of England and of the United States.

When the subsequent testament, besides containing dispositions inconsistent with those in a former testament, also contains an express revocation of that testament, but is invalid as a testament, the question arises whether, although it cannot have effect as a testament, it may operate as a revocation. In the Civil Law this question would arise only in respect of the revocation of codicils, and of legacies and bequests contained in testaments: "Legata et fidei-commissa revocari possunt et quidem nudâ voluntate." (a)

There has been considerable controversy on this question, and on the import of the following text in the Civil Law: "Si jure testamento facto fidei-commissum tibi relinquero, deinde postea alius feceris non jure, in quo fidei-commissum relictum tibi, vel alius quam quod priore testamento, vel omnino non sit relictum: videndum est, mens mea hæc fuerit facientis postea testamentum, ut nolim ratum tibi sit priore testamento relictum: quia nudâ voluntate fidei-commissa infirmarentur? Sed vix id obtinere potest: fortassis ideo, quod ita demum à priore testamento velim recedisse, si posterius valiturum sit; et nunc ex posteriori testamento fidei-commissum ei non debetur, etiamsi iидem hæredes utroque testamento instituti, ex priori extiterunt." (b)

(b) Dig. lib. 32, tit. 3, l. 18.
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The objection is that there is no intention to revoke, unless the disposition in the revoking instrument takes effect. The commentators however considered that this text applies to tacit, and not to express revocations. Gothofred says, "in hac autem lege non ita constat de voluntate mutatur, cùm nihil contrarii in testamento posteriori habeatur." (a)

Bartolus holds the same opinion: "Legatum relictum in voluntate solemni, per voluntatem minus solemnem non intelligitur tacitè revocatum. Fidei-commissum relictum in primo testamento non debitur, licet sequens voluntas sit invalida. Respondeo leges contrarie loquantur quando legatum expressè adimitur. Unde licet adimatur in voluntate inutili, non tamen debetur. Sed hic quando tacitè adimit contendo aliam voluntatem, tunc ita demum videtur velle revocare, si sequens voluntas valuerit." (b)

Vinnius expresses his concurrence in this opinion: "Omminò assentior Bartolo posse legatarium opposità exceptione doli submoveri, etiamsi imperfecto testamento legatum adeemptum esse proponatur." (c)

Pothier adopts this opinion: "Quoiqu’un second testament, qui contient une clause de révocation du premier, soit nul dans la forme, le premier ne laisse pas d’être révoqué par cette clause; car le révocation des testaments ne pouvant se faire nudè voluntate, quoique le second testament, qui contient la clause de révocation, ne soit pas revêtu des formalités nécessaires pour le rendre valable, il doit au moins être valable pour cette clause de révocation, qui n’est point assujettie à ces formalités." (d)

M. Toullier maintains, that the acte, although it may want some of the solemnities required for the valid exe-

(a) Gothofred, ad Pand. lib. 30, tit. 3, l. 18.
(b) Toullier, liv. 3, tit. 2, c. 5, n. 626.
(c) Vinnius, ad Inst. lib. 21, tit. 21, p. 467.
(d) Poth. Tr. des Testam. c. 6, sect. 2, § 1, p. 373. Furgoë, Tr. des. Inst. c 11, n. 42.
cation of a testament, will effectually revoke the former testament, if it contains an express revocation. (a) Of this opinion also is M. Duranton.

M. Grenier, in the former edition of his Treatise on Donations and Testaments, adopted this opinion, but he is now opposed to it, and in this he has the authority of M. Merlin. (a) But the question is still unsettled: "nous avouerons," says M. Duranton, "que la question est encore vivement controversée, et la jurisprudence elle-même n'est pas encore bien fixée." (b)

It is admitted, that if the acte would not be valid as a notarial act, as for instance, because the notary was incompetent, or if the subscription on a mystic testament were null, and therefore as a notarial act was void, or if the olographe testament were void, because it was not written wholly by the testator, such an act would not effect the revocation. (c)

Although the Statute of Frauds required that a will which revokes a devise of lands should be attested by the same number of witnesses as a will devising them, yet in some particulars the formalities prescribed are different in the several instances. First, it is required in a devising will, that it should be subscribed by the witnesses in the testator's presence, but in a revoking instrument it is not; and, secondly, a revoking instrument is required to be signed by the testator in the presence of the witnesses, while a devising will need not be signed in their presence. This difference, however, which seems accidental, has been attended with little practical result. If the revoking instrument contains a new disposition, any revoking clause therein will be a


(b) Sirey, tom. 3, 2, 544; tom. 7, 2, 644; tom. 9, 2, 302; tom. 11, 2, 57; tom. 12, 1, 33. (Cour de Cassation, Section Civile), tom. 13, 2, 342; tom. 22, 1, 11; tom. 7, 2, 673, et tom. 10, 1, 126. Duranton, liv. 3, tit. 2, p. 150.

(c) Toullier, ib. n. 630.
nullity, whether the substituted devise takes effect or not. If the devise with which the clause in question is associated be effective, the latter is unnecessary, for the new devise itself produces the revocation, and the efficiency of the will as a revoking instrument cannot, in such a case, become a subject for consideration. If the new devise be ineffectual on account of the attestation being insufficient for a devising, though sufficient for a revoking will, the revoking clause will be inoperative on another principle, namely, that the revocation is dependent on, and fails with the attempted new disposition, the purpose to revoke being considered subservient to another purpose for which the instrument is incompetent, in other words the testator did not intend to revoke unless the new disposition took effect.

The subsequent testament is not the less effectual in revoking the former testament, because the person named as heir in the subsequent will cannot, or will not take the succession, for it is sufficient if he might have been the heir: "Posteriore quoque testamento, quod jure perfectum est, superius rumpitur; nec interest extiterit aliquid hæres ex eo, an non. Hoc enim solum spectatur, an aliquo casu existere potuerit. Ideoque, si quis aut noluerit hæres esse, aut vivo testatore, aut post mortem ejus antequam hæreditatem adiret, decesserit, aut conditione sub quâ hæres institutus est, defectus sit: in his casibus paterfamilias intestatus moritur. Nam et prius testamentum non valet ruptum à posteriore: et posteriorius aequo nullas habet vires, cum ex eo nemo hæres extiterit." (a)

Revocation made in a subsequent will, will have its full effect, although such new act remains without being carried into execution in consequence of the incapacity of the heir appointed, or of the legatee, or by their refusal to take. (b)

(a) Inst. lib. 2, tit. 17, § 2.  (b) Code Civil, art. 1037.
It seems by the doctrine of the law of England that if the second devise fails, not from the informality of the instrument, but from the incapacity of the devisee, the devise will be revoked, notwithstanding the gift intended to be substituted is of no effect. (a)

If two wills should be produced as being both made at the same time, but it did not appear which was the first or the last made, neither could take effect if the heirs instituted were instituted in each. But if the same person had been instituted heir in both wills, but the legacies in the two wills were different, or if the second will contained merely a gift of a legacy, the first will would not be revoked by the second. (b)

If from absence of date and of every other kind of evidence it is impossible to ascertain the chronological relation of two wills, both are necessarily void, and the heir as to the realty, and the next of kin as to the personality, are let in; but this unsatisfactory expedient is never resorted to until all attempts to educe from the several papers a scheme of disposition consistent with both have been tried in vain. (c)

It is an established rule that the dispositions of the will are not to be disturbed farther than is absolutely necessary for the purpose of giving effect to the codicil. (d) Thus where a testator by his will devises lands to A. in fee, and by a codicil devises the same lands in fee to the first son of B. who should attain the age of twenty-one, and should assume the testator's name, the first devise would be revoked only quoad the interest comprised in the executory devise in the codicil; so that until B. had a son who attained his majority, and assumed the tes-

(b) Vost, lib. 28, tit. 3, n. 9.
(d) Vost, lib. 28, tit. 3, n. 8. Van der Keessell, th. 399.
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tator’s name, the property would pass to A. under the devise in the will. (a)

So where a testator devises lands to A., subject to a rent-charge to B., and then by a codicil revokes the devise to A. of the land, which he gives to another, without noticing the rent, the latter remains a charge on the land in the hands of the substituted devisee. (b)

The former testament may retain its effect, notwithstanding the revocation, if it be apparent that the testator had been induced to revoke it under an error or mistake of a fact. Thus, if he had made a second testament and instituted other heirs from an impression and belief that those instituted in the former will were dead, and he stated such impression and belief in his second testament, the heirs named in the first will would take. (c)

A similar doctrine is admitted by the law of England. Thus where a testator having bequeathed to the two grandchildren of his late sister five hundred pounds each, by a codicil declared that he revoked the legacies bequeathed by his will to such grandchildren, “they being dead;” it being proved that they were living, it was held that the legacies were not revoked. (d)

Where it is to be fairly inferred that the act of cancellation is so connected with the making of another will that the testator meant it to depend upon the efficiency of the new disposition, if the will intended to be substituted fails of effect from defect of attestation or any other cause, the revocation will fail also, and the original will still subsist. As where A. some time

(a) Duffield v. Duffield, 3 Bligh, N. S. 261.
(c) Dig. lib. 28, tit. 5, l. 92. Barry, de Success. lib. 10, tit. 1, n. 13. Voet, lib. 28, tit. 3, n. 7.
before executed a will duly attested, to each sheet of
which a seal was affixed; he gave to his solicitor instruc-
tions to prepare another, and signed the draft prepared
for those instructions, and then proceeded to tear off the
seals from the old will; when after all the seals but one
had been thus removed, he was informed that the new
will would not be operative upon his lands in its then
state, which induced him to desist; and before the new
will was complete, the testator died, it was held that the
former will remained unrevoked. (a)

So where a testator strikes out the name of one de-
vicee, at the same time interlining that of another, or
substitutes a larger or smaller interest or share for that
which he had previously given, if the interlineation is
inoperative, (as it necessarily is in regard to freeholds
if unattested,) the obliteration will also fail of effect. (b)

The revocation of the second testament would not in
the civil law of itself revive the first revoked or cancelled
will. It would be necessary that such revocation should
be accompanied by a declaration that the revocation was
made with the intention of reviving the first will. (c)

This is the doctrine of some of the most judicious
and learned of the commentators on the civil law:
"Exemplum addert Papinianus, si quis aliud, hoc est,
primum testamentum fecisset, deinde posterius; et pos-
terius hoc incidisset, ut prius valeret, tunc enim prius
testamentum valeret ac prorsus revivisceret, sublato jam
posteriore ad hunc finem, ut primum valeret." (d)

If the testator solemnly revokes the second will, de-
claring he wishes the first to be in force, or if the sub-
sequent will be clearly proved to have been revoked by

Grantly v. Garthwaite, 2 Russ. 90.
(c) Dig. lib. 39, tit. 3, l. 5.
(d) Fochin. Controv. lib. 5, c. 93. Dig. lib. 37, tit. 11, l. 12. Voet, lib. 28,
tit. 3, n. 8.
him to the end that the prior will may be in force, the prior will becomes restored. (a)

In the common law courts of England it has been laid down as an absolute proposition excluding all question of intention, that the revocation of a latter will revives a former uncancelled will. Thus where the former will, being a will of lands, was made in 1757, the second in 1763. The former was never cancelled, the second was cancelled by the testator himself. Both wills were in the testator's custody at the time of his death, the second cancelled, the first uncancelled. It was held that the first will was valid, because the second being cancelled before the testator's death had no operation whatever, and therefore the first stood unrevoked. (b)

In another case, (c) Lord Mansfield said that "it had been settled, that if a man by a second will even revoke a former, yet if he keep the first will undestroyed, and afterwards destroy the second, the first will is revived;" and in giving his judgment in the same case, his Lordship again laid down that "if a testator makes one will and does not destroy it, though he makes another at any time virtually or expressly revoking the former, if he afterwards destroy the revocation, the first will is still in force, and good." However in a more modern case, (d) when these authorities were cited before the Delegates, Lord Tenterden, C.J. appeared to doubt whether it ought to be laid down as a decided principle of law without limitation, that the cancellation of the second will revives the first: and Mr. Baron Richards observed, that he thought he might venture to say it had not been universally so considered. (e)

In the Ecclesiastical courts it seems that a different

(a) Vost, lib. 28, tit. 3, n. 5.
(b) Goodright v. Glasier, 4 Burr. 2512.
(c) Harwood v. Goodright, 1 Cowp. 91.
(d) Moore v. Moore, 1 Phill. 419.
(e) Sir John Nicholls' Observations in Wilson v. Wilson, 3 Phill. 554.
doctrine from that laid down in the common law courts had prevailed; for it had been decided in a variety of cases that the presumption is against the revival of the prior will, and that the onus is thrown on the party setting it up, to rebut the presumption. (a)

But the judgment of the Delegates has been understood to establish, that it is to be regarded as a question of intention, to be collected from all the circumstances of the case, (b) and that the legal presumption is neither adverse to, nor in favour of, the revival of a former uncancelled, upon the cancellation of a latter revocatory will. (c)

By the recent act it is enacted that "no will or codicil, or any part thereof which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner thereinbefore required, and shewing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shewn." (d)

IV. The birth of a child after the testament had been made, and for whom the father had not provided, had the effect in the civil law of annulling that testament, however formally it had been made.

The effect given to the birth of a child rests on the same principles and results as the obligation by which a testator was bound to institute his child as his


(d) 1 Vict. c. 26, § 22.
heir, unless he had just grounds for disinheriting him. An omission to revoke or otherwise correct the testament, so as to institute a child born after the testament was made, is not distinguished from the omission to institute him when the child is living at the time the testament was made: "Testamentum rumpitur agnatione sui hæredis." (a) "Ratio naturalis, quasi lex quedam tacita, liberis parentum hæreditatem addiceret, velut ad debitam successionem eos vocando, propter quod et in jure civili sœorum hæredum nomen eis inductum est, ac ne judicio quidem parentis, nisi ex meritis de causis, summoveri ab eà successione possunt." (b)

The birth of a child would have the same effect in annulling the testament, notwithstanding at the time the testator made it, he had other children, for whom he had provided by that testament: "Si pater duos filios hæreses instituerit, et agnatione posthumi ruptum testamentum fuerit, quamvis hæreditas pro duabus partibus ad eos pertineat, tamen fidei-commissæ libertates prestari non debent, sicuti ne legata quidem aut fidei-commissæ prestari coguntur." (c)

But if the child born after the testament died in the father's the testator's lifetime, the testament would be restored to its full effect. (d)

The testator might provide against this revocation of his testament by instituting as one of his heirs any child thereafter to be born.

It seems that if he had instituted children qui vivo me nascenrentur, a child born after his death would not be included in this institution, (e) and therefore the testament would be revoked; but a subsequent law permitted such a construction to be given to this institution, (f)

(a) Dig. lib. 29, tit. 3, l. 1, l. 3, § 4. (b) Dig. lib. 48, tit. 20, l. 7.
(c) Dig. lib. 40, tit. 5, l. 47, l. 24, § 11. (d) Dig. lib. 28, tit. 3, l. 12.
(e) Dig. lib. 28, tit. 2, l. 10. (f) Cod. lib. 6, tit. 39, l. 4.
as to include children born after the father’s death, as well as those born in his lifetime.

The Jurisprudence of Holland gives a similar effect to the birth of a child after the testator has made his testament: “Postumus præteritus testamentum, etiam clausulâ codicilliari munitum, ob defectum voluntatis, rumpet agnascendo, cum pater presumitur de eo non cogitasse.” (a)

The law of Spain also adopts the same rule. (b)

Under the coutumes of Paris and Normandy, a testament would not be revoked by the subsequent birth of any child to the testator. Such child would in common with the other children be entitled to his legitime. (c)

It is said by Pothier and other jurists, that if a person make his testament in ignorance of his wife’s pregnancy, and there is afterwards a child born, the testament would be set aside, non precisement à cause de sa preterition, but upon the presumed intention of the father that he would not have made the bequests in his testament, if he had believed he should have had a child. (d)

But it is admitted by the same jurist, that the will loses its effect only in consequence of the presumption that it was not the testator’s intention that it should remain in force if he had a child. If therefore he has afforded any grounds for believing that it was his wish that the testament should be executed, notwithstanding the birth of his child, it would not be revoked: “Cette volonté paraît, si, depuis la naissance de cet enfant, son testament lui a passé par les mains, s’il y a fait quelque apostille,

(a) Van der Kessell, Thes. 306. Vost, lib. 5, tit. 2, n. 7, 14, 17.
(b) Gomes, l. 24, Taur. and l. 21. L. 1, tit. 18, lib. 10, Nov. Rec.
(d) Pothier, Tr. des Test. c. 6, § 1.
quelque addition; car c'est une marque non équivoque qu'il a persévéré dans la même volonté, nonobstant la naissance de cet enfant."(a)

The Code Civil, contains no provision by which a testament is revoked on account of the birth of a child, although unknown to the testator. (b)

The Ecclesiastical Courts of England at an early period adopted as a rule, not that the birth of a child alone, but that this event conjointly with marriage, revoked a will of personal estate. Such a change in the testator's circumstances and situation was considered to afford a presumption, that he could not intend that the disposition of his property previously made by him should continue unchanged. (c)

This rule was afterwards extended to devises of freehold estate. (d) The birth of a child alone or marriage alone, would not effect the revocation of a devise of freehold, but both circumstances must concur. (e) The revocation takes effect not only when the testator was unmarried, but also where he is a married man, who survives his wife, marries again, and has issue by his second wife. The will is revoked when the child is posthumous, and although the testator had never received any intimation from his wife of her pregnancy. It has been said, that there is a tacit condition annexed to the will,


(b) Toullier, ib. n. 670.


that the testator does not intend it to take effect, if there should be a total change in the situation of his family. (a)

It has not been decided, whether the revocation would be effected, if children were the issue, not of a subsequent marriage, but of a marriage existing at the time the testator made his will; as if he has children born of that marriage, and his wife dying he again marries, but has no children by the second wife. Lord Alvanley inclined to the conclusion, that the order of the events made no difference, and that the will was equally revoked in either case. (b)

It will be observed, that marriage and the birth of a child do not constitute an absolute revocation. They only afford a presumption of an intention to revoke. That presumption may be repelled by all such circumstances as demonstrate a contrary intention on the part of the testator.

There is no ground for it when the will itself contains a provision for the future children, although there should be no provision for the wife, because the birth of children necessarily supposes marriage. The presumption is equally repelled whenever it can be unequivocally shewn that the testator contemplated the possibility of his standing in the marital and parental relations. (c)

It has been decided, that a provision for the wife, exclusively of children, would negative the presumed revocation. (d) It has been held in the Ecclesiastical Courts, that the will remains unrevoked where the wife and children are provided for by settlement. (e)

(a) Doe v. Lancashire, 5 T. R. 49.
(b) Gibbons v. Caunt, 4 Ves. 848.
(c) Kenebel v. Scafton, 2 East, 530. Gray v. Allham, cited 1 Amb. 490, is erroneously reported; the case had no relation to revocation by the birth of a child.
(d) Brown v. Thompson, 1 Eq. Cas. Ab. 413, pl. 15.
(e) Talbot v. Talbot, 1 Hagg. 705. Johnson v. Wells, 2 ib. 561.
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It has never been expressly decided that the revocation is presumed where the will does not dispose of the whole estate, although it seems from the opinions of Lord Mansfield (a) and Lord Ellenborough (b) that it would not take place.

Marriage and the birth of a child or children revoke a will only where the effect of the testator's intestacy would be to let in such afterborn child or children; for if it would operate for the benefit of a pre-existing child, the ground for revoking the will obviously fails.

Thus, a testator having a son and two daughters devised his real and personal estate to be sold for payment of his debts and for the benefit of these children. The testator was at that time a widower, he married again, and had one child. A question was raised, whether the will as to the real estate was revoked; Sir William Grant held that it was not; "In all the cases, the will has been that of a person who, having no children at the time of making it, has afterwards married and had an heir born to him. The effect has been to let in such afterborn heir, to take an estate disposed of by a will made before his birth. The condition implied in those cases was, that the testator, when he made his will in favor of a stranger or more remote relation, intended that it should not operate, if he should have an heir of his own body. In this case there is no room for the operation of such a condition, as this testator had children at the date of the will of whom one was his heir apparent, who was alive at the period of the second marriage, of the birth of the children by that marriage, and of the testator's death. Upon no rational principle therefore can a testator be supposed to have intended to revoke his will on account of the birth of other children, those children not deriving any benefit whatever from the revocation, which would have operated

(a) Brady v. Cubit, Doug. 31. (b) Kenebel v. Scrafton, 2 East, 541.
only to have let in the eldest son to the whole of that estate, which he had by the will devised between the eldest son and the other children of the first marriage."(a)

A will which has been once revoked by marriage and the birth of a child continues revoked, notwithstanding the decease of such child before the will takes effect, (b) although a contrary doctrine was once held. (c)

The admission of parol evidence to rebut this presumption in cases of a devise of real estate, has been strongly opposed by Lord C. J. Eyre, Lord Kenyon, Mr. Justice Buller, and other eminent judges. But in the Ecclesiastical Courts it was admitted in respect of wills of personal estate. (d)

The recent act for the amendment of the law respecting wills enacts that every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the statute of distributions.) (e)

The act also puts an end to every question respecting the admissibility of evidence of circumstances to afford a presumption of revocation, for it enacts, that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances. (f)

The English law on the subject of revocation by the

(a) Sheath v. York, 1 Ves. and Bea. 390.
(e) 1 Vict. c. 26, sect. 18. (f) Sect. 19.
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birth of a child and marriage, was held to be that of New
York. (a)

By the New York Revised Statutes, (b) if the will dis-
poses of the whole estate, and the testator afterwards
marries, and has issue born in his lifetime or after his
death, and the wife or issue be living at his death, the
will is deemed to be revoked; unless the issue be pro-
vided for by the will or by a settlement, or unless the
will shews an intention not to make any provision.

No other evidence to rebut the presumption of such
revocation is to be received.

This provision is a declaration of the law of New York,
as established in the case referred to, with the additional
provision of prescribing the exact extent of the proof
which is to rebut the presumption of a revocation. (c)

By the statute laws of the states of Maine, Vermont,
New Hampshire, Massachusetts, (d) Connecticut, New
York, (e) New Jersey, Pennsylvania, Delaware, Ohio,
and Alabama, a posthumous child, and, in all of those
states except Delaware and Alabama, children born after
the making of the will, and in the lifetime of the father,
will inherit in like manner as if he had died intestate,
unless some provision be made for them in the will, or
otherwise, or they be particularly noticed in the will.

It would seem, that under the statute of Connecticut
of 1801, the birth of a child, for whom no provision is
made by the testament, revokes it wholly. (f)

In Pennsylvania and Delaware, marriage, or the birth
of child who is not provided for, is a revocation pro tanto
only. In Pennsylvania, under the construction given to
the act of that state of 1794, the subsequent birth of issue

(a) Brush v. Wilkins, 4 John's Ch. Rep. 506. 4 Kent's Com. p. 525.
(b) Vol. 2, 64, § 43.
(c) 4 Kent's Comm. p. 523 to 526.
(f) 4 Kent's Comm. 525.
is, in itself, a revocation of a previous will so far only as regards such issue. (a)

In Ohio, Indiana, Illinois, and Connecticut, the birth of a child avoids the will, if no provision has been made therein for such a contingency. (b)

It has been justly observed, that the reasonable operation of this rule is only to disturb and revoke the will pro tanto.

The statute law in Maine, New Hampshire, Massachusetts, and Rhode Island, goes further, and applies the same relief to all children and their legal representatives, who have no provision made for them by will, and who have not had their advancement in their parent’s life, unless the omission in the will should appear to have been intentional.

In South Carolina the will is revoked by the subsequent marriage and birth of a child.

In Virginia and Kentucky, a child born after the will, if the testator had no children before, is a revocation, unless such child dies unmarried, or an infant. If he had children before, the birth of other children afterwards unprovided for, causes a revocation pro tanto.

In Louisiana, neither marriage nor the birth of a child operates as a revocation. (c)

Under the civil law, the testament became annulled if the testator was afterwards deprived of his civil status, as if he were reduced to a state of servitude by an enemy, and lost his rights as a citizen, or were condemned to death, or deportation: "Si civitatem amittat per subitam servitutem, ab hostibus, v. g., captus. Si quis fuerit capite damnatus, vel ad bestias, vel ad gladium, vel alia pena qua vitae adimit. Non solum autem eorum qui capite sunt damnati, sed ne eorum quidem testamenta rata sunt, sed irrita fient, quorum memoria post

(a) Tomlinson v. Tomlinson, 1 Ashmead, 224.
(c) 4 Kent’s Com. ib. Louisiana Code.
mortem damnata est, ut puta ex causâ majestatis, vel alià tali causâ." (a)

But if the testator should afterwards receive a pardon, his testament was revived and acquired its former efficacy: "Quemadmodum autem ejus, qui captus est ab hostibus, testamentum irritum factum, vires suas recipere dicimus si reversus fuerit, similis ratione dicendum est, ergo et si quis damnatus capite, in integrum indulgentiâ principis sit restitutus, testamentum ejus convalescet." (b)

This cause of revocation is recognized by the law of Spain, (c) the former law of France, (d) and the Code Civil. (e)

In the jurisprudence of Holland and England, attainder and conviction destroy the testament only in those acts in which the testator's property is confiscated, and when therefore that which he has bequeathed belongs no longer to him but to the state. (f)

Under the civil law, the testament spoke from the death of the testator. It comprised the whole property which belonged to him at the time of his death, as well as at the time of making his testament. The alienation by him in his life of any part of his estate, so that at the time of his death he ceased to have any interest in it, would necessarily have the effect of withdrawing the part so alienated from the operation of his will; but if he had made any disposition of it after he had executed his testament, and had again taken back the whole or some part of his former interest, that which he thus received and retained at the time of his death would pass under his former testament. That testament would remain un-

(a) Dig. lib. 28, tit. 3, l. 6, § 5, 6, 11.
(b) Dig. ib. § 12. Poth. ad Pand. lib. 28, tit. 3, § 18.
(c) L. 15, tit. 1, p. 6.
(d) Poth. Tr. des Test. c. 6, § 2. Domat, b. 3, tit. 1, § 5, n. 11.
(e) Code Civil, art. 25. Toull. ib. n. 668.
(f) Veet, lib. 28, tit. 1, n. 39, and tit. 3, n. 12.
revoked. The only effect of the latter disposition would be to diminish the interest which the heir would take.

The same principle is adopted in the jurisprudence of Spain, Holland, and France.

Even the total alienation of a subject which had been specifically bequeathed to a legatee, did not constitute under the civil law an absolute revocation. It afforded only a presumption of an intention to revoke, which might be repelled by evidence, and if the alienation were not voluntary, it did not afford this presumption. (a)

A partial voluntary alienation of the subject of the bequest, implied a revocation only to the extent to which the alienation had been made. It seems that this doctrine of the civil law was adopted in Spain, Holland, and in France. (b)

The Code Civil treats every alienation, even that by sale with the power of re-purchase, or by exchange, of the whole or part of the thing bequeathed, made by the testator, as implying a revocation of the legacy as to all that has been alienated, although the subsequent alienation be null, and the thing be returned into the hands of the testator. But the legacy still subsists as to that part which has not been alienated. (c)

Thus, if the testator had alienated the usufruct of a subject which he had bequeathed, the bequest would subsist in respect of the nuda proprietas, which still remained in him. (d)

The bequest was revoked, although the alienation was invalid, as where it had been given by the husband to the wife. If the testator again acquired the subject which he had alienated, the bequest was not restored. (e)

(a) Dig. lib. 31, tit. 3, l. 11, § 12, and lib. 34, tit. 4, l. 18. Inst. lib. 2, tit. 20, § 12. Cod. lib. 6, tit. 37, l. 3.
(c) Art. 1038. Toullier, ib. n. 650.
(d) Dig. lib. 34, tit. 4, l. 2, § 1. Toull. ib. Poth. Tr. des Test. c. 6, sect. 2, § 1.
(e) Dig. ib. l. 15. Poth. ib. Code Civil, Art. 1038.
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By the law of England, every devise of land, in whatever terms it is expressed, is specific; and in order to make such a devise, it was essential, not only that the testator should be seised at the time of the execution of his will, but that he should continue so seised without interruption until his decease.

The absolute sale and conveyance of the estate by a testator in his lifetime is of course a revocation of the devise; and if by his will he had given it to trustees for sale, with a direction to divide the produce among certain persons, such legatees would have no claim to the monies arising from the testator's sale, although they could be traced into an investment on security, consisting of a mortgage on the sold estate. (a)

If an estate held by leases for lives is surrendered by the testator after making his will in consideration of a new lease being granted, the renewal, by conferring on him an estate different from that which existed at the time of the execution of the will, is a revocation of it. Thus A. being seised of the manor of S. held by a lease for three lives, devised it to two trustees and their heirs, whom he directed to renew the lease. The testator subsequently surrendered the lease, and took a new one. It was held that the renewal of the lease was a revocation of the devise, for by this surrender of the whole lease the testator had put all out of him, had divested himself of the whole interest; so that there being nothing left for the devise to work upon, the will fell, and the new purchase being of a freehold descendible could not pass by a will made before such purchase. (b)

The renewal of a chattel lease (whether absolute or determinable with lives) also revokes a specific bequest unless the language of such bequest specially point to the future term. The revocation in this case is produced,

(a) Arnald v. Arnald, 1 B. C. C. 401.
(b) Marwood v. Turner, 3 P. Wms. 163.
not by any principle of law which prevents the testa-
mentary disposition of the after-acquired property, but
by the inapplicability of the terms of the bequest to
such property. (a)

But where it may be fairly inferred from the terms
of the bequest or the contents of the will, that the testator
intended the right of renewal to pass as an accessory
to the immediate subject, the construction will be governed
by this apparent intention. (b)

A specific bequest of leaseholds revoked by renewal
falls to the residuary legatee; his title to the residue,
including as well that which becomes residue by the
lapse or ademption of specific bequests or otherwise, as
that which originally composed it, is not in any man-
ner affected by the changes which the property may
have undergone in the testator's lifetime. (c)

A devise of real estate will be revoked by a conveyance
made subsequently to the will, although from the limi-
tations or effect of such conveyance the property became
instantly revested in the testator. Thus if A. being
seised in fee of Whiteacre devise such land by name, or
all his lands generally to B. in fee, and afterwards by
any assurance conveys Whiteacre to the use of himself
for life, remainder to his wife for life, remainder to his
own right heirs, the devise of Whiteacre will be re-
voked. (d)

In this case the revocation is not produced by any
change effected in the nature of the testator's es-
tate, because he was in of his old estate; but it is a
consequence of the momentary interruption of his

(b) Carte v. Carte, 3 Atl. 174.  Colegrave v. Manby, 2 Russ. 238.  See
also S. C. 6 Madd. 73.  Slatter v. Norton, 10 Ves. 197.  James v. Dean,
15 Ves. 236.  Churchman v. Ireland, 1 Russ. and M. 251.  Back v. Ket,
Jac. 534.
(c) Stirling v. Lydiard, 3 Atl. 199.  See also Digby v. Legard, Dick. 500.
(d) Burgoine v. Fox, 1 Atl. 575.
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seisin. (a) But no revocation would be effected if such interruption had taken place, not by the act of the testator himself, but by the tortious act of a stranger. As where a testator is dispossessed subsequently to the making of his will, and re-enters, the entry restores the original seisin, and by relation the dispossessor is considered to have been seised ab initio, so that his devise remains unrevoked. (b) The devise of an equitable interest is also revoked by a conveyance similar to that which would have revoked a devise at law. If a testator who had the equity of redemption in certain lands devised them, and afterwards in contemplation of marriage conveyed the devised lands to the use of himself and his heirs until the intended marriage, and after such marriage to other uses, though the marriage never took effect, yet the devise was held to be revoked. (c)

In the preceding cases the devise was revoked by the conveyance, although its operation was in effect nothing more than to vest the estate in the testator. The same doctrine extends with certain exceptions to conveyances for partial purposes. If a testator, in order to secure a jointure rent to an intended wife, limits the devised lands to trustees for a term, and then proceeds to limit the fee to himself, the latter limitation, though altogether unnecessary for his purpose, revokes the devise. (d)

The rule that a conveyance of the fee for a partial purpose effects a revocation, admits of two very important exceptions. The first is in the case of a partition between tenants in common or co-heirs, which by whatever kind of assurance effected, will not revoke

a previous devise, provided the conveyance be confined to the mere object of the partition, i.e., assures to the testator in the allotted lands an estate precisely corresponding with that which he had in his undivided share. (a)

The other exception is, where a testator subsequently to his will makes a mortgage of the devised lands, which revokes the will in equity pro tanto only. (b) And although as against the mortgagee the devisee takes the property cum onere, yet he is entitled to have the estate disincumbered out of the personal estate of the testator not specifically bequeathed. (c)

It is immaterial whether the testator has the legal estate or is equitable owner only; (d) that it contains a power of sale, (e) which power is accompanied by a declaration that the surplus of the monies arising from the sale shall be personal estate of the testator; (f) or lastly, whether the mortgage be made to the devisee himself, or to a stranger. (g)

Another case of revocation in equity is that of a contract by the testator for the sale of lands which he had devised, (h) provided such contract was originally binding on him, notwithstanding it may happen to be rescinded subsequently to his decease, and as it seems, even though it should be rescinded antecedently to that event. (i)

The legal estate passes under the devise, and the

(b) Perkins v. Walker, 1 Vern. 97.
(f) Hodges v. Green, 4 Russ. 28.
(h) Mayer v. Gowland, Dick. 563.
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deviser is bound to carry the testator's contract into effect by conveying the estate to the purchaser.

The instrument intended as a conveyance, although incapable of taking effect as such, operates to revoke a previous devise, where the failure of the conveyance arises from either the incapacity of the grantee, or the want of some ceremony which is essential to the efficacy of the instrument. Thus a deed of gift by the testator to his wife of personal estate which he had previously bequeathed by his will, revoked the bequest, though the deed was inoperative under the rule of the common law, which incapacitates the wife from taking property by way of gift from her husband. (a)

But a deed executed by one who is under a personal incapacity to make the attempted disposition, has no effect in revoking a prior will; for, as the principle proceeds upon intention, a power to perform the act seems to be a necessary ingredient. Therefore, where a feme covert, who had a power to appoint by will only, and had also the fee in default of appointment, made a will in pursuance of the power, and subsequently executed a deed professing to convey the lands, it was held that the deed was inoperative to revoke the testamentary appointment. (b)

A conveyance which is void at law on account of fraud or covin, is not a revocation; but a different rule was formerly considered to apply in regard to deeds which are valid at law, though impeccable in equity. (c)

This distinction was disregarded in a subsequent case, where a deed, which the Court of Chancery decreed to be delivered up, as having been obtained by an oppressive exercise of the parental authority, was held by Lord Thurlow, reversing a decree of Sir R. P. Arden, M. R.,

1 Roll. Ab. 615, pl. 6, 7. S. C. 1 Blackst. 349. 2 Swanst. 274.
(b) Eilbeck v. Wood, 1 Russ. 564. (c) Hick v. More, Amb. 215.
not to be a revocation, on the ground that the Court, by ordering the deed to be delivered up, declared it to be no deed, and, therefore, it could not be a revocation; but it would seem the latter decision is questioned. (a)

If a man makes his will devising lands, and then exchanges those lands for others, and dies, if the exchange is vacated subsequently to the testator’s death, in consequence of a defect in the title, or in the aliening capacity of the other party, this does not restore the operation of the devise. (b)

By the recent act, no conveyance or other act made or done subsequently to the execution of a will, of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death. (c).

Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. (d)

The doctrine of the English law, until the alteration made by the recent act, respecting the effect of conveyances by a testator in revoking his will, prevailed in the States of America. (e)

But the New York Revised Statutes have declared that no bond, agreement, or covenant made by a testator for a valuable consideration to convey any property previously devised or bequeathed, shall be deemed a revo-

(a) Hawes v. Wyatt, 2 Cox, 263. S. C. 3 B. C. C. 156; but see Ex parte Earl of Ilchester, 7 Ves. 374.
(b) Att. Gen. v. Vigor, 8 Ves. 256.
(c) 1 Vict. c. 26, sect. 23.  (d) Sect. 24.
cation of the will, either in law or in equity; but the property passes by the will, subject to the same remedies for a specific performance against the devisee or legatee, as might be had against the heir or next of kin, if the property had descended. So a charge or incumbrance upon any estate for securing the payment of money, or the performance of covenants, shall not be deemed a revocation of any will previously executed; but the devise or legacy takes effect, subject to the charge or incumbrance. Nor shall any conveyance, settlement, deed, or other act of the testator, by which his estate or interest in property previously devised or bequeathed shall be altered, but not wholly divested, be deemed a revocation; and the same estate or interest shall pass by the will, which would otherwise descend, unless, in the instrument making the alteration, the intention thereby to revoke shall be declared. If, however, the provisions of the instrument by which such alteration is made be wholly inconsistent with the terms and nature of the previous will, the instrument shall operate as a revocation, unless the provisions therein depend on a condition or contingency, and the same has failed. (a)

The New Jersey Revised Bills, as reported in 1834, followed these provisions of the Revised Statute of New York. They have also gone further, and declared, that if the testator, after making his will, sells and conveys the lands devised, and he afterwards repurchases the same, or takes them again by descent or devise, the will operates on them, and is not deemed revoked. (b)

(b) 4 Kent's Com. 533, and n.
CHAPTER XI.

RULES IN THE CONSTRUCTION OF TESTAMENTS.

General Rules.—Intention of testator.—Effect to be given to the whole will.
—As collected from its language.—The import of that language.—Inconsistent and repugnant dispositions how treated.—Resort to extrinsic circumstances when admissible.

Particular Rules.—A devise or bequest of the subject imports a disposition of the testator's whole interest in it under the civil law, and other systems of jurisprudence.—Contrary rule of the law of England until the recent act.—Rule in the States of America.—Institution of heir.—Universal legatee.—Residuary devisee or legatee.—The Fulcianis law.—The title under institution as heirs to the shares of coheirs which have lapsed.—Jus accrescendi.—When it takes place amongst legatees.—Doctrine of the law of England.—Construction of the words liber, enfans.

Children—Who take under this description.—Legitimate by birth or subsequent marriage.—Heir.—Next of kin.—Family.

In the several systems of jurisprudence which are here considered, certain rules are adopted for the interpretation of testaments, and for determining the effect to be given to them. Some of those rules are general, and are applicable to the whole of the testament. It is their object to discover the testator's real intention and give effect to that intention consistently with law.

There are other rules which determine the particular import and effect of the institution or dispositions which the testament may contain, and of certain expressions which it may adopt. The latter rules may frequently control, and sometimes defeat, the real intention of the testator.
Rules of the first description are to be found in the
Digest, and have been adopted by those codes which are
found on the Civil Law. Many of them constitute
part of the law of England, and there are few which
will not be found comprehended within the spirit and
meaning of those adopted by the Civil Law as they have
been explained by its commentators.

Technical words are not necessary to give effect to
the institution of heir, or to any species of disposition in
a testament. (a)

The intention of the testator is to be carried into
effect, if it can be ascertained, and the testament is to be
construed liberally in order to ascertain that intention:
"In testamentis plenius voluntates testantium interpr¬
tantur." (b) "In ambiguis orationibus maximè sen¬
tentia spectanda est ejus, qui eas protulisset." (c)
"In conditionibus testamentorum voluntatem potius
quam verba considerari oportet." (d)
"Sic in legatis, et in testamentis, defuncti mens et
voluntas potissimum consideratur, eaque domina et
regina dicitur in ultimis elogiiis." (e)
"Non enim in causâ testamentorum ad verborum
definitionem utique descendendum est, cum plerumque
abusivè loquantur, nec propriis nominibus ac vocabulis
semper utantur." (f)

Effect ought to be given to the whole will if possible.
It is not to be construed per parcella, but by the
entirety. (g)

(a) Dig. lib. 29, tit. 5, l. 1, §§ 3, 5, 6, 7, l. 58. Cod. lib. 6, tit. 23, l. 7.
(b) Dig. lib. 50, tit. 17, l. 12.
(c) Ib. l. 96.
(d) Dig. lib. 35, tit. 1, l. 101.
(e) Bronchorst, de Reg. Jur. ad l. 96.
(f) Dig. lib. 32, tit. 1, l. 69, § 1; lib. 35, tit. 1, l. 19, § 1.
(g) Dig. lib. 36, tit. 1, l. 57, § 1. Merlin, Rep. tit. Legis, Sect. 4, § 1.
thorpe, 3 Ves. 105.

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Effect ought to be given to every word, unless inconsistent with the general intention. (a) Where a testator’s intention cannot operate to its full extent, it shall take effect as far as it can. (b)

All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole: (c) "Non alter à significatione verborum recedi oportet, quum cum manifestum est, aliud sensisse testatorem." (d)

"Et cum in verbis nulla ambiguitas est, non debet admitti voluntatis quesitio." (e)

Where a testator uses technical words, he is presumed to employ them in their legal sense, (f) unless the context contains a clear indication to the contrary. (g)

Words in general are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected; (h) and they are in all cases to receive a construction which will give them all effect, rather than one which will render some of them inoperative. (i)

Words occurring more than once in a will, are presumed to be used always in the same sense, (j) unless a

(a) Gittins v. Steele, 1 Swanst. 28.
(d) Dig. lib. 32, tit. 1, l. 69.
(e) Dig. lib. 32, tit. 3, l. 25, § 1.
(h) Page v. Leapingwell, 18 Ves. 466.
contrary intention appears by the context, (a) or unless the words be applied to a different subject. (b) And upon the same principle, where a testator uses an additional word or phrase, he shall be presumed to have an additional meaning. (c)

Words of limitation may be transposed, (d) supplied, (e) or rejected, (f) if warranted by the immediate context, or the general scheme of the will; but not merely on a conjectural hypothesis of the testator’s intention, however reasonable, in opposition to the plain and obvious sense of the words. (g)

Words which it is obvious are mis-written, (as dying with issue, for dying without issue) may be corrected. (h)

Devises not grammatically connected, nor united by the expression of a common purpose, must be construed separately, and without relation to each other; though it may be conjectured, from circumstances, that the testator

(a) Goodright v. Dunham, Doug. 267.


(h) Burr v. Davall, 8 Mod. 59.
had the same intention in regard to both. (a) There must be an evident intention to connect them. (b)

Where the testator has assigned a motive for the bequest, that motive may be taken into consideration, for the purpose of explaining any ambiguity in the testament. But where there is no ambiguity, such motive is not to be regarded. (c)

An express and positive devise cannot be controlled by the reason assigned, (d) nor by inference and argument, from the other parts of the will. (e)

The construction cannot be strained to bring a devise within the rules of law. (f)

But where the will admits of two constructions, that is to be preferred, which is to render it valid; and therefore the Court has adhered to the literal language of the testator, though it was highly probable that he had written a word by mistake for one which would have rendered the devise void. (g)

An instance is given in the Digest, where, if the expression had been taken in its natural sense, it would have been wholly inconsistent with the intention of the


(c) Dig. lib. 31, tit. 3, 1, 41; lib. 34, tit. 1, 1, 4. Pothier, Tr. des Test. c. 7, Regl. 5.

(d) Cole v. Wade, 16 Ves. 36.


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testator: “A te, Seia, peto, ut, quidquid tibi specialiter in auro, argento, legavi, id cum morieris reddas, restituas illi et illi vernis meis: quorum rerum ususfructus, dum vives, tibi sufficiet. Quæsitum est, an usufructus auri et argenti solus legatariae debeatur? Respondit, verbis, que proponerentur, proprietatem legatam addito onere fidei-commissi.” (a)

Pothier gives another instance. If a person under the coutume of Paris instituted such a person as son héririer, as the institution of an heir is not recognized by the coutume, this expression must be understood not in its natural sense, but as importing an universal legatee. (b)

Favour or disfavour to the object, ought not to influence the construction: (c) “Cum in testamento ambiguè aut etiam perperam scriptum est; benignè interpretari, et secundum id quod credibile est cogitandum, credendum est.” (d) “Commodissimum est, id accipi, quo res, de quà agitur, magis valeat, quam pereat.” (e)

Of two modes of construction, that is to be preferred which will prevent a total intestacy. (f)

If there were parts of the testament repugnant to each other, every endeavour must be made to reconcile them: “Semper enim laborandum est, tum in testamentis, tum in testibus, tum in instrumentis, ut pugnantiæ potius concilientur, quàm ut actus erroris arguatur.” (g)

If two parts of a testament are inconsistent, and are totally irreconcilable, the latter prevails: “In testamentis novissimæ scripturæ valent:” (h) “Clari et aperti juris est, in fideicommissis posteriores voluntates esse firmiores.” (i)

(a) Dig. lib. 34, tit. 2, l. 15.
(b) Pothier, Tr. des Test. c. 7, Reg. 3.
(c) Thelluason v. Woodford, 4 Ves. 574. Noel v. Weston, 2 Ves. and Bea. 269. (d) Dig. lib. 34, tit. 5, l. 24. (e) Ib. l. 12.
(g) Dig. lib. 34, tit. 5, l. 12. Brachorst, de Reg. Jur. ad l. 188.
(h) Dig. lib 30, tit. 1, l. 12, § 3. (i) Cod. lib. 6, tit. 42, l. 19.
"Ce qui est écrit en dernier lieu est présumé contenir la volonté en laquelle le testateur a persévéré, et contenir une dérogation à ce qu'il a écrit auparavant de contraire." (a)

A rule adopted by the civil law is, "Ubi pugnantis inter se in testamento juberentur, neutrum ratum esse." (b) It applies only to those cases in which, although the meaning of the testator might be collected, it would be impossible to carry it into effect. (c) With this qualification the rule of the English law coincides. "If a meaning can be collected, but it is left wholly doubtful, in what manner that is to take effect, the will is totally void for uncertainty." (d) But a Court never construes a devise void, unless it is so absolutely dark that they cannot find out the testator's meaning. (e)

If there be any ambiguity whether the larger or the less sum be bequeathed, the construction should be that the less sum was bequeathed: "Semper in obscuris, quod minimum est, sequimur." (f) "Quod si ita fuerit, quantum unus heres habebit, tantum Titbaso heredes meas dare volo; minor pars erit accipienda, quae venit in legato." (g) Thus, if a testator bequeathed to a stranger so much as one of his children would have in his estate, if the shares were unequal the bequest will be that which is equal to the least share taken by any child. (h) This construction is admitted from favour to the heir. (i)

If a testator who had two farms or tenements of the same name, but of different value, devise one of them, without distinguishing it from the other, naming it only by the name that was common to both, and without giving

(b) Dig. lib. 50, tit. 17, l. 188.
(c) Faber, de Reg. Juris, ad l. 188. Bronchorst, ib.
(d) Constantine v. Constantine, 6 Ves. 102.
(e) Minshall v. Minshall, 1 Atk. 412. (f) Dig. lib. 50, tit. 17, l. 9.
(g) Dig. lib. 31, tit. 2, l. 43, § 1. (h) Poth. ib. (i) Ib.
any intimation which of the two it was his intention to devise, the heir in this case has the choice of them, and may retain the most valuable, and give that which is of least value to the legatee: "Scio ex facto tractatum, cum quidam duos fundos ejusdem nominis habens, legasset. fundum Cornelianum: et esset alter pretii majoris, alter minoris, et hæres diceret minorem legatum, legatarius majorem, vulgo fatebitur, utique minorem eum legasse, si majorem non potuerit docere legatarius." (a)

"Si de certo fundo sensit testator, nec appareat de quo cogitavit, electio hæredis erit quem velit dare." (b)

This rule must be taken in connection with another rule, by which the heir is precluded from making such a choice as would defeat the testator's intention, and therefore regard is to be had to the quality of the testator, the subject bequeathed, and the legatee: "Legato generaliter relictto, veluti hominis, Gaius Cassius scribit, id esse observandum, ne optimus vel pessimus accipiatur. Quœ sententia rescripto imperatoris nostri, et Divi Severi juvatur, qui rescipserunt, homine legato actorem non posse elegi." (c)

Some French jurists would adopt the maxim in its full extent. Ricard and Bourjon maintain that the heir should be preferred: "Parce qu'à l'égard de l'héritier institué, suivant le droit romain, le testateur est censé l'avoir plus considéré, attendu qu'il lui a donné une qualité qui témoigne davantage son amitié envers lui, s'il n'apparaît du contraire: et pour ce qui est de l'héritier ab intestat parmi nous, duquel le légataire prend son legs, la proximité du sang lui donne la présomption de préférence, suivant même la volonté du testateur si elle ne se trouve expliquée d'une autre sorte en faveur du légataire." (d) But their opinion is opposed by the Chancellor D'Aguesseau and M. Merlin. (e)

(a) Dig. lib. 30, tit. 1, l. 39, § 6. (b) Ib. l. 37, § 1; l. 32; l. 3, § 1.
(c) Dig. lib. 30, tit. 1, l. 37; l. 100.
(d) Merlin, Rep. tit. Legis, sect. 4, § 1, n. 4. (e) Ib.
The rule of the law of England is, that the heir is not to be disinherit without an express devise, or necessary implication; (a) such implication importing, not natural necessity, but so strong a probability, that an intention to the contrary cannot be supposed. (b)

If the testator has sufficiently explained himself in his testament as to the person whom he institutes heir, or to whom he bequeathes a legacy, or as to the subject bequeathed, but has added some quality, or other designation which appears to be false; as, if having named his heir or legatee, he add these words, "who is a son of such an one, or of such a country;" or that having devised some land or tenement described by its name, or by its situation, or otherwise, he had added, "that he had bought the said land or tenement of such a person;" the institution or bequest will not be void: "Falsa demonstratio non perimit legatum." (c) "Placuit falsam demonstrationem legatario non obsesse: nec in totum falsum videri, quod veritatis primordio adjuvaretur." (d)

"Si quis in fundi vocabulo erraverit et Cornelianum pro Semproniano nominavit; debetur Sempronianus." (e)

The same rule is adopted in England. (f) So if there be an error in the description of the tenure, as if leasehold is described as freehold, or freehold as leasehold, (g) or if


(c) Dig. lib. 31, tit. 1, l. 75.

(d) Dig. lib. 31, tit. 2, l. 76, § 3.


(g) Day v. Trig, 1 P. Wms. 286. Denn v. Kennys, 9 East, 366.
the parish in which the property is situated is correctly stated, but the county mis-stated, provided the identity of the parish is not thereby brought into question, the error is not material. (a)

So if a testator devise to John, the son of his brother William, and William’s only son is named Samuel, the claim of Samuel is unquestionable, notwithstanding the misnomer. (b)

Where a testator has fully explained himself, either as to the institution of heir, or his devise or bequest, and adds to it a motive in making the disposition, such disposition will have its effect, although it should be found that the fact assigned by him as his motive was not true. Thus, for example, if the testator had said, I give to such a one, because he has rendered me such a service; although this service had not been rendered, yet the will of the testator, which would be sufficient alone, although he should give no reason for it, would render the bequest valid, unless he had made it a condition on which the bequest depended, as if he had said, My will is, that there be paid to such a one, the sum of so much, in case it shall appear that he has done such a business, or on condition that he do it; these bequests and others of the like kind would be conditional, and would depend on the execution of that which the testator had explained: “Quod juris est in falsâ demonstratione, hoc vel magis est in falsâ causâ. Veluti ita, Titio fundum do quia negotia mea curavit. Item, fundum Titius filius meus præcipito quia frater ejus ipsi ex arcâ tot aureos sumpsit. Licet enim frater hujus pecuniam ex arcâ non sumpsit, utile legatum est.” (c)

“Falsam causam legato non obesse, verius est; quia

(c) Dig. lib. 35, tit. 1, l. 17, § 2.
ratio legandi legato non cohaeret. Sed plerumque doli exceptione locum habebit, si probetur alias legaturum non fuisse.” (a) “At si conditionaliter concepta sit causa, veluti hoc modo: Titio si negotia mea curavit, fundum do: Titius filius meus, si frater ejus centum ex arcâ sumpsit, fundum praecipito. Ita utile erit legatum, si et ille negotia curavit, et hujus frater centum ex arcâ sumpsit.” (b)

If a testator bequeathed a subject in terms which he believed comprehended it, but had mistaken them, since according to the natural meaning of those terms they would not comprehend it, if there be nothing in his testament which discovers this intention, proof is not admissible for the purpose of shewing the meaning attached by the testator so as to give another meaning than that which the words bear, taken in their common and natural sense: “Non aliter à significacione verborum recedie oportet, quam cum manifestum est aliiu sensisse testatorum.” (c) “Quod si quis, cum velit vestem legare, supellectilem adscripsit, dum putat supellectilis appellatio vestem contineri. Pomponius scripsit, vestem non debere.” (d) “Non enim ex opinionibus singulorum, sed ex communi usu nomina exaudiri debere.” (e)

When the testament itself does not furnish the means by which the intention of the testator can be interpreted, then the qualities of the persons, and those of the things, are to be considered, if those qualities can assist in discovering his intention. Thus, the several usages of places are distinguished either with reference to the sense of the words, or other difficulties which those usages may assist to explain, and especially the particular usages of the testator in the economy and management of his affairs, and other similar circumstances. But an expression clear in itself is not to be

(a) Dig. lib. 35, tit. 1, l. 72, § 6.  
(b) Ib. l. 17, § 3.  
(c) Dig. lib. 31, tit. 3, l. 69.  
(d) Ib. tit. 1, l. 4.  
(e) Dig. lib. 33, tit. 10, l. 7, § 2.
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exposed to an interpretation contrary to its natural sense: "Si numeros nummorum legatus sit, neque apparens quales sunt legati: ante omnia ipsius patris-familias consuetudo, deinde regionis, in qua versatus est, exquirenda est: sed et mens patrisfamilias et legatorii dignitas, vel caritas et necessitudo, item eorum, quae precedunt, vel sequuntur, summarum scripta sunt spectanda." (a)

"Optimum ergo esse Pedius ait, non propriam verborum significationem scrutari: sed imprimis, quid testator demonstrare voluerit: deinde in quâ presuppositione sunt, qui in quâque regione commorantur." (b)

"Si cui annuum fuerit relictum sine adjectione summe, nihil videri huic adscriptum, Mela ait; sed est verior Nervas sententia, quod testator prostat solitus fuerat, id videri relictum: si minus ex dignitate personae statui oportet." (c)

It is said by Domat, that if there should be found other testaments, although revoked, the former might be referred to for the explanation of that which was obscure and uncertain in the subsisting testament; but this must be done without making valid any part of the revoked testament. (d)

The law of England does not admit evidence to clear up ambiguities apparent on the face of the will, either to supply omissions, remove redundancies, or induce the transposition or change of words or clauses, or give to them a strained signification, (e) in relation either to personal or real estate. (f) Thus if a testator devise

(a) Dig. lib. 31, tit. 1, l. 50, § 3.
(b) Dig. lib. 33, tit. 7, l. 18, § 3.
(c) Dig. lib. 33, tit. 1, l. 14.
(d) Domat, b. 3, tit. 1, sect. 7.
to one of the sons of A., or if he wholly omits the name of the devisee, as evidence cannot be received to show which of the sons was intended in the one case or in the other, so as to supply the omission, the devise would be void. (a) But Courts of Equity have admitted in some instances evidence in aid of defective descriptions, as where the Christian name was omitted, the bequest being to — Price, son of — Price; (b) or the initial letters only of both Christian and surname were given, the bequest being to W. G. and Mr. S. G.; (c) but a bequest to Lady — has been held to be too defective to be supplied. (d)

Extrinsic evidence is also admissible, to remove ambiguities arising upon the application of the terms of the will to the person and subject matter to which they relate.

Thus, where there was a devise, “of all my farm and lands, called Trogues Farm, now in the occupation of A. B.” it was held that two closes, part of Trogues Farm, but in the occupation of L. M., passed under the devise, and that evidence had been properly admitted of a notice from the devisee to L. M. to shew that he considered these closes as part and parcel of Trogues Farm. (e)

Thus, if a testator devise Blackacre to his grandson John, and it turns out that the testator has two closes called Blackacre, or two grandsons named John, evidence may be adduced to show which of the closes, or which of the grandsons is intended. (f)

And if it turned out that the testator had no grandson John, but two grandsons respectively named Robert

and William, it seems that either of these might support his claim by parol evidence; for where some particulars in the testator’s description apply to one, and some to the other, extrinsic evidence will be let in for the purpose of aiding the discovery of the actual intention. (a)

Where there are two objects of exactly equal pretensions, whether more or less nearly answering to the description, as where the gift is to the testator’s cousin John, and there are two cousins John, or two cousins named William and Samuel, and no John, and the evidence fails to establish any superiority of claim in either, such equality is necessarily fatal to the pretensions of both. (a)

In these cases, evidence of circumstances throwing light on the testator’s intention is always to be preferred to that of his oral declarations.

Thus, where a testator gave a legacy to a public charity, the title of which applied to one institution, and the locality to another, the Court, in deciding on their conflicting claims, admitted evidence of one having received the support and patronage of the testator at and subsequent to the making of his will, but rejected the evidence of the drawer of the will as to the testator’s oral intimation of his actual intention. (b)

Where a difficulty arises on the face of the will itself from the writing or characters used, or from the adoption of foreign expressions or technical terms of art, they are always capable of being ascertained or explained by aid of extrinsic evidence. Thus, where the testator, a celebrated sculptor, (c) executed a codicil as follows: “Memorandum, that in case of my death, all the marble in the yard, the tools in the shop, bankers, mod, (d) tools for carving, the rasp in the draw, with (nevre or nepre),

(b) Capel v. Robarta, 3 Hagg. 156.
(c) Goblet v. Bleachey, Hil. 1839, before the Vice Chancellor. 2 Stark. Evid. 935.
(d) Mod was written at the end of a line, followed by a small mark, the purport of which was equivocal.
and the draw in the parlour, shall be the property of A. G." The plaintiff contended that the word mod. meant models; the defendant, that it was a contraction for modelling, and that it was to be joined in construction with the following words, "tools for carving." It was referred to the master, to inquire and state to the court what the testator meant by the word mod., and also by the words between with and and, and that he should be at liberty to call to his assistance persons skilled in the art of writing, and persons who had a competent knowledge of tools and articles used in statuary. The master, after receiving evidence on the subject, and after inquiry into the collateral facts of the case, reported that the word mod. was intended by the testator to mean "models;" and that by the words between the two words draw and and, the testator intended "with the apron;" and after exception taken, the master's report was confirmed. (a)

Where the ambiguity is not such as to avoid the instrument, but cannot be removed merely by judicial construction of the will alone, (b) the uncertainty must necessarily be removed by evidence to ascertain what is ambiguous, by means of the context of extrinsic circumstances, and thus to confine expressions in themselves capable of different applications, according to the subject matter to which they are to be applied, to a certain and definite application to the particular circumstances. In such instances the evidence is usually admitted, not for the purpose of enabling the court to construe the terms of a will, but to apply a general description, capable of different special applications to different states of circumstances, to that state of facts which really exists. (c)


(c) 2 Stark. Evid. 926.
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If a party bequeaths his stock, although the term stock is general, and is capable of signifying a great number of subject matters, and according to the trade or occupation of the testator may mean either cattle, as part of a farmer's stock; goods in a shop, as part of a grocer's stock; or timber in a yard or warehouse, as part of a merchant's stock; yet the will is not void for this uncertainty, because it is capable of being removed by extrinsic proof of the testator's trade and circumstances, and confined to the stock which he possessed in the particular instance.

Thus where a testator bequeaths stock, jewels, or household furniture, different subjects may pass according to circumstances, and as the party who uses them is a merchant, nobleman, or jeweller. (a)

So it may happen, that on the face of a will the terms of devise may be such that they would operate differently, and would give a different estate according to extrinsic circumstances, such as the relation in which the devisee and the testator stood to each other. Thus, if the testator devise an estate to A., after the death of B., the effect would be different, according to an extrinsic fact, viz., the relation in which A. and the testator stand to each other: if A. be the heir at law of the testator, B. will take a life estate; but if A. be not heir at law to the testator, B. will take nothing. (b) Here, on the face of the will is an uncertainty, for no one, on merely reading the will, can tell whether B. will take a life estate or not, but the doubt is capable of being entirely removed by extrinsic evidence of a fact. (c)

If words of description refer (as almost every description necessarily does) to some extrinsic fact, evidence may be resorted to for the purpose of ascertaining whether any given subject or object is within the words;

(c) 2 Stark. Evid. p. 923, 4, 5, 6.
or in the language of Lord Thurlow, (a) "although evidence cannot be read to prove what the testator meant by the words used in his will, yet it may as to facts upon which the testator made his will." Thus, where a person devises his estate at Ashton, though parol evidence is not admissible to show that he intended more or less to pass under this denomination than the words properly embrace, yet resort may, and indeed must be had to such evidence, for the purpose of ascertaining whether any particular field comprises part of the testator's Ashton estate. (b)

So, if a testator bequeath a legacy to a servant, if in his service at the time of his decease, evidence may be adduced to show that the claimant was in his service at that time, and for this purpose the testator's conduct towards the claimant, and even his declarations respecting the legacy, might be material as elucidating the fact that the testator considered the legatee to be in his service. (c)

Again, where a testator bequeaths a specific legacy of stock, in terms which do not absolutely designate any of the existing public stocks, the state of his property in the funds when he made the will is admissible as throwing light on his probable intention. (d) And such inquiries have been sometimes directed, with more doubtful propriety, in elucidation of general stock legacies. (e)

The courts will look at the circumstances under which

(a) Jeacock v. Falconer, 1 Bro. C. C. 295.
(c) Herbert v. Reid, 16 Ves. 481.
the devisor makes his will, as the state of his property, (a) of his family, (b) and the like. (c)

The construction is not to be varied by events subsequent to the execution, (d) but the courts in determining the meaning of particular expressions will look to alternate circumstances, in which they might have been called upon to affix a meaning to them. (e)

It has been stated in a preceding volume, that by the civil law, and in every system of jurisprudence but that of England and some of the states of America, a disposition of a subject either by act inter vivos or by testament transferred to the disponee the whole interest in perpetuity, and if the grantor or testator intended that the disponee should take less than the whole interest, it was requisite that he should express that intention by limiting the interest to an estate less than that of an absolute estate in perpetuity.

A bequest of the subject imports the whole interest, the entire and absolute property: "Si alii fundum, alii usumfructum ejusdem fundi, testator legaverit: si eo proposito fecit, ut alter nudam proprietatem habet, errore labitur. Nam detracto usufructu, proprietatem eum legare oportet eo modo: Titio fundum detracto usufructu lego, vel Scio ejusdem fundi usumfructum hæres dato: Quod nisi fecerit, usufractus inter eos communicabitur:

(c) Jones v. Newman, 1 Bl. 60. Careless v. Careless, 1 Mer. 384.

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quod interdum plus valet scriptura, quam peractum sit." (a)

The law of England on the contrary required that
the intention to dispose of the absolute interest in
perpetuity should be expressed in the conveyance, or be
collected from the testament, and where that intention
was not expressed in the conveyance nor collected from
the testament, the grantee or devisee would take only
an estate for life. Thus a devise of lands or heredita-
ments, or the rest and residue of the testator’s heredita-
ments to A., without any expression or hint of the estate
which he is to take therein, gives him only an estate for
his life. (b)

But a devise of all the testator’s estate or interest, or
property in any lands, or of all the rest of his estate or
of his effects, both real and personal, will give the
devisee an estate in fee. (c) So will the devise of his estate
at or of such a place, or called by such a name, or con-
sisting of so many acres, notwithstanding that these
expressions may appear to indicate rather the land itself
than the interest in it. (d) The word part or share as
denoting the testator’s interest carries the fee. (e)

In these and other cases in which the courts have
collected from the expressions of the will, the intention
of the testator to dispose of his whole property, they have

(a) Digg. lib. 33, tit. 2, l. 19. Voset, lib. 7, tit. 1, n. 8, and tit. 8, 9. Sande,
Decis. Fria, lib. 5, tit. 1, def. 2. Carps. Def. For. part 3, const. 13, def. 9, 10.
ad Pand. lib. 34, p. 678, and de Verbis et Rer. et Signif. disp. 10, p. 55, and
ib. de Regulis Juris. Faber, Rational, tit. de Usufruct.
(b) Denn v. Mellor, 5 T. R. 558. 2 Bos. and P. 247, S. C.
Chichester v. Oxenden, 4 Tunt. 175. Roe v. Wright, 7 East, 259. Harding
v. Gardner, 1 Brod. and B. 72.
(d) Doe d. Gwilliam v. Gwilliam, 2 N. and M. 247.
(e) Paris v. Miller, 5 M. and S. 408. Poock v. Bishop of Lincoln,
3 Brod. and B. 27.
allowed those expressions to import and operate as a devise of the fee. (a)

The rule was the same whether the disposition was by deed or will, except that if it were by deed the fee must be conveyed expressly by the appropriate terms; but if it were by will, the fee might be devised by any language which shewed the testator's intention to devise it. And where the words in which the disposition is made are not sufficient to carry the fee-simple, this intention may be collected from an introductory clause, shewing the testator’s intention to dispose of all his property. And where it is evidently intended that each of several persons should take the same degree of interest, and directions are given concerning one of them, which presuppose that he takes the fee, the implication extends to them all. (b)

The recent act enacts that where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee-simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will. (c)

The extent to which a similar provision prevails in the United States has been stated in a preceding volume.

In Connecticut, if the devisee or legatee, being a child or grandchild of the testator, dies before him, and no provision is made for such contingency, the issue of such devisee or legatee take as if he had survived the testator. But if there be no such issue, the estate so disposed of by that devise or legacy is to be treated as intestate estate. (d)

The alteration of the law in New York, Virginia, and

(a) Bac. Ab. Estate, 156.
(b) Cowper, 660. 4 Bac. Ab. ib. 6 T. R. 612. 3 Brod. and B. 41.
other states, in making the devise operate upon all the real estate owned by the testator at his death, has been already noticed.

In Pennsylvania, by the act of 1810, no devise or legacy to lineal descendants, and in New Jersey to a child or grandchild, lapses by reason of the death of the devisee or legatee in the lifetime of the testator, if such devisee or legatee leave issue surviving the testator. (a)

By the institution of an heir, or by appointing an universal legatee, all such specific legacies of immovable as well as moveable property as do not take effect, but lapse either by the death of the legatee in the testator’s lifetime, or by his non-acceptance, devolve on the person so instituted or appointed. This rule is adopted because as such heir or legatee must have borne the burthen of delivering the bequest, he ought to have the benefit of the removal of that burthen: "Pro secundo vero ordine, in quo ea vertuntur, quæ in causa caducī fieri contingēbant, vetus jus corrigentes, sancimus, ea, quæ ēa evenērint, simili quidem modo manere apud eos, à quibus sunt derelicta, hāredes forte, vel legatarīos, vel alios, qui fidei-commissō gravari possunt: nisi et in hunc casum, vel substitutus, vel conjunctus eos antecedat. Sed omnes personas, quibus lucrūm per hunc ordinem desfetur, eām etiam gravamen, quod ab initio fuerat complexum, omnimodo sentire: sive in dando sit constitutum, sive in quibusdam faciendis, vel in modo, vel conditionis impleández gratiā, vel aliā quacunque viā excogitatum. Neque enim ferendus est is, qui lucrūm quidem amplexitūr, onus autem ei annexum contemnit." (b)

This is the doctrine of the law of Holland and Spain. (c)

Under the coutumes of Paris and Normandy, and the

(a) Rev. Stat. of New Jersey, as reported in 1834. 4 Kent’s Comm. p. 542.
(b) Cod. lib. 6, tit. 51, l. 1, § 4.
(c) Voet, lib. 29, tit. 1, n. 16, 39. Tit. 9, Part. 6.
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Code Civil, the universal legatee has the benefit of such lapse. No distinction is made whether he is first constituted universal legatee, and then certain legacies are given, or whether the legacies are first given, and afterwards the testator devises to him, "le surplus de mes biens." The surplus in the latter case includes the legacies, which as the legatees died in the testator's lifetime formed part of his biens, and therefore belong to the devisee of that surplus. (a)

This rule would not prevail if a specific or particular devisee were charged with the payment of the legacy. In the latter case this devisee would have the benefit of the lapse. (b)

By the law of England, as a devise of real estate operates only on the property of which the testator was seised at the time of its execution, every devise, however general in its terms, is necessarily specific. (c) The residuary devise therefore has no more extensive operation than if the testator, instead of devising the rest of his estate, had given by name the lands of which he had not previously disposed. Subsequent events cannot cause to be comprehended in such a devise any subject not originally within its reach. If a devise in fee of particular lands lapses by the death of the devisee in the testator's lifetime, (d) and also it seems if the devise were void ab initio, (e) the residuary devise is not entitled to stand in the place of the original devisee.

As the residuary devise comprehends all of which the testator was seised at the time of making his will, and of which he had not thereby made any disposition, it

(b) Pothier, ib. Toull. ib. n. 682.
(c) Hill v. Cock, 1 Ves. and B. 175.
follows that if a particular devise in the will dispose of less than his entire estate in the subject matter, the residuary devise will attach on the remaining estate precisely in the same manner as if such interest had been in terms given to the residuary devisee. Thus, if lands of inheritance are devised to a person for life or in tail, or if the fee-simple be devised in certain events, a residuary clause will carry the reversion in fee expectant on such estate for life or estate tail, (a) or the fee-simple in the alternative events. (b)

So if the immediate rents and profits are left undisposed of by any particular devise in the will, the residuary clause will carry such rents and profits, which would otherwise descend to the heir. (c)

Where real estate is directed to be sold for particular purposes, the conversion is considered as made for those purposes and no further; and in the event of their entirely or partially failing, the property, or the unapplied portion of it (as the case may be), retains its original character of real estate, and devolves, as such, on the real representative. (d)

A residuary devise of real estate will carry the undisposed of produce of particular lands devised to be sold. (e)

Where a sum of money payable out of the produce of lands, unmixed with the produce of the personal estate,

(e) Goodtitle v. Knot, Cowp. 43. Culpepper v. Ashton, 2 Ch. Cas. 115, 221.
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lapses, it falls into the residue of such fund, for the benefit of the devisee. (a)

Until the recent act, if a devise were made to A. and his heirs, or to A. and the heirs of his body, and A. died in the lifetime of the testator, the devise absolutely lapsed, and the heir, special or general, of A., took no interest in the property, he being merely included in the words of limitation, i. e. in the terms which are used to mark the quantity or duration of the estate to be taken by the ancestor, through whom alone any title could flow to such heir. (b) The intention of a testator was thus frequently defeated.

In this respect, as well as in making the residuary devise include lapsed and void devises, the recent act has made a most beneficial alteration. It enacts, that where any person to whom any real estate shall be devised for an estate tail, or an estate in quasi entail, shall die in the lifetime of the testator, leaving issue, who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will. (c)

Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any), contained in such will. (d)

(c) 1 Vict. c. 26, sect. 32. (d) Sect. 25.
A will of personal estate comprises all the property belonging to the testator at the time of his decease.

The Courts are unwilling to suppose that it was the testator's intention to confine the disposition to present personal property, which would generally produce a partial intestacy. Even a gift of all the property "I am possessed of," has been thought not to have this restrictive effect. (a) But the inconvenience of so restricting the disposition will not defeat a clearly expressed intention. (b)

There cannot be an intestacy in regard to any the least part of the personal estate, while there is an operative residuary gift, for it comprises whatever does not eventually pass under the specific and particular bequests of the will, as well those which are originally void, as those which lapse by the decease of legatees in the lifetime of the testator; even though it should become, by this means, a bequest of the entire personal property. (c) A residuary clause may, however, be so specially framed as not to take in lapsed legacies. (d) A gift, however, of the residue of real and personal estate "not hereinbefore specifically disposed of," has been held to include specific legacies lapsing, the words being read, "not hereinbefore particularly disposed of." (e)

If the disposition of an aliquot share in the residue itself fails, intestacy is produced to the extent of such failure: for if in a bequest of a residue in moiety, it were held that a lapsed moiety accrued to the other, the gift of a moiety of the residue would eventually carry

(a) See Wilde v. Holtermeyer, 5 Ves. 816. See also Bland v. Lamb, 2 Jac. and Walk. 399.
(b) Davers v. Dewes, 3 P. Wms. 40.
(e) Roberts v. Cooke, 16 Ves. 451.
the whole. (a) So, where the residue was bequeathed
to three persons as tenants in common, the revocation
by a codicil of the bequest as to one of the three
legatees was held not to entitle the other two, but to let
in the title of the next of kin to such one-third share. (b)

By the Civil Law, the heir was entitled to retain
one-fourth of the testator's estate under the Falcidian law.

This law or plebiscitum was introduced by P. Falcidius,
the Tribune, for the purpose of restraining the excessive
liberality of a testator to the prejudice of his heir. It
divided the testator's inheritance into twelve parts, and
prohibited him from bequeathing more than nine-twelfths
or three-fourths, so that the heir or heirs should always
be entitled to retain one-fourth, Quarta Falcidiana. (c)

It extends to legacies which are payable by those heirs
who would succeed to the inheritance ab intestato, and to
fidei-commissa left by the testator, to donations mortis
causa, and to donations between husband and wife,
which are not complete, and do not take effect until the
death of him or her from whom the gift proceeded. (d)

It is not admitted in donations or contracts inter
vivos. (e)

The right to deduct it belongs to the heir alone, and
not to any legatee or fidei-commissary burthened with a
particular legacy. (f)

It extends to a legacy of a debt. The heir has a right
to receive from the debtor to whom it has been
bequeathed a rateable proportion of the one-fourth. (g)

(a) Sir T. Plumer, in Skrymsher v. Northcote, 1 Swanst. 570. See also
Owen, 1 Atk. 495. Pest v. Chapman, 1 Ves. Sen. 542.

Toml. ed. 246.

(c) Dig. lib. 35, tit. 2. Lauterbach, ad h. lib. and tit. Vost, ad h. lib.
and tit.

(d) Dig. ib. l. 1, § 2. Cod. lib. 6, tit. 50, l. 2. Vost, lib. 35, tit. 2, n. 4.


(f) Dig. ib. l. 47, § 1. Vost, ib. n. 4.

(g) Dig. ib. l. 22, § 3, l. 82, and lib. 31, tit. 2, l. 77. Vost, ib. n. 6.
It might also be claimed or retained by the heir if the bequest were of a prædial servitude, and the legatee of such servitude was bound to offer a fourth part of its value.\(^a\)

If the subject of the bequest be an annuity, a value is set on such annuity, regard being had to the age and state of health of the annuitant, and the deduction is made with reference to that value. \(^b\)

The claim could not be sustained if the testator had in his life made a donation of the one-fourth for the purpose of satisfying this portion, \(^c\) or if he had expressly forbidden, either by his will or any codicil, that it should be claimed. \(^d\)

A testator is considered as having expressly prohibited the deduction when he prohibits the alienation of the legacy which he has bequeathed, and directs that it should remain with the successors of him to whom it was bequeathed, \(^e\) or declares that the entire legacies shall be paid without any diminution. \(^f\)

The right to the Falcidian portion is forfeited if the heir adiates the inheritance without the benefit of inventory. \(^g\)

Legacies left for pious uses, as to the church, the poor, &c. are not subject to this claim, \(^h\) whether they be given directly, or by the interposition of a third person. \(^i\)

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\(^a\) Dig. lib. 35, tit. 2, l. 7, l. 80. Voet, ib.


\(^c\) Dig. lib. 35, tit 2, l. 56. Voet, ib. n. 10.


\(^e\) Neostad, Cur. Holl. Decis. 5, in Fine.


\(^g\) Cod. lib. 6, tit. 30, l. 22, § 14.

\(^h\) Novell, 131, c. 12.

The Falcidian portion is to be deducted from each legacy rateably, and it is not competent to select and retain one particular thing as a fourth of the whole inheritance, unless the testator has himself by his will expressly assigned one particular legacy, or one part of the property to make good this fourth. (a)

The right to make this deduction belongs to heirs and their universal successors, as the heirs of such heirs, to the fisc, in case of confiscation or vacant inheritance, and also to the particular successors of such heirs; for as the latter sustain the burthens to which the inheritance was subject, it is only just that they should have the benefit of this deduction. (b)

The fidei-commissary heir is not entitled to make the deduction, unless the person beneficially interested in the fidei-commissum gives it up; in that case he takes the inheritance at his own risk and loss in the place of the fiduciary, and therefore becomes entitled to make the deduction. (c) Neither can a legatee make this deduction. (d)

Where several heirs are instituted as joint heirs to a particular part or to the whole inheritance, they can deduct no more than one-fourth. But if they are instituted separately to distinct parts of the inheritance, and the part of one heir is either wholly exhausted or too heavily burthened by legacies, but the part of the other is in no respect burthened, it is competent for the former to deduct a fourth of his part from the legacies which have been left. (e)

If one of two co-heirs should fail to take up his portion

(a) Cod. lib. 6, tit. 49, l. 2. Voet, ib. n. 18.
(b) Voet, lib. 35, tit. 2, n. 19.
(c) Cod. ib. l. 10, 3, 5. Voet, ib. n. 19.
(d) Dig. lib. 35, tit. 2, l. 47, § 1, and tit. 3, l. 5. Voet, ib. n. 19. Matthaei. de Legat. et Fidei. c. 6, n. 6.
of the inheritance, so that it accrued to the other co-heir, who thus became heir to the whole inheritance, if the portion which accrues is burthened, and that to which it accrues be not burthened, the heir is entitled to deduct the Falcidian portion in the like manner, as if he had been instituted by the testator sole heir to the whole inheritance. But when on the contrary, the portion not burthened accrues to that which is burthened, the fourth is not deducted from the latter, and thus the legatees are aided by the failure of the portion. (a)

In computing the Falcidian deduction, everything is taken into account. Whatever is received by the heir *jure hereditis*, has the effect of reducing the amount to be deducted, or of leaving nothing to be deducted. Thus, if A. and B. were instituted heirs of the whole inheritance in equal shares, but the share of A. is burthened with numerous legacies, whilst that of B. is burthened with none, and B. refuses to adiate, and A. acquires his share *jure accrescendi*, the latter cannot, in answer to the claim of the legatees for their legacies, insist on the insufficiency of his original share to pay them. In this case he must be considered heir of the whole, and not merely of his original half; and it is only in the event of his not having by means of the accrued, as well as the original share, one-fourth, that he is entitled to make the deduction. (b)

Whatever the heir acquires by that title, is reckoned as part of the fourth, as legacies, which have been ineffectually bequeathed, or have subsequently become ineffectual, or have by any other means lapsed.

The fruits or rents, which at the time of the testator's

(a) Voet, ib. n. 20.

(b) Dig. lib. 35, tit. 2, l. 78, 74. Peres. Cod. lib. 6, tit. 50, n. 10. Voet, lib. 35, tit. 2, n. 20, 25.
death were ripe, and after his death gathered or received by the heir, are to be also taken into account. (a)

If co-heirs are burthened with unequal legacies to be paid to each other, and some burthened beyond the one-fourth should be desirous of deducting it from their co-heirs, the legacies received by the co-heirs must be computed in estimating the one-fourth; and so also must a legacy given to the heir, for the purpose of paying the whole of the legacies. (b)

A donation by the testator in his lifetime is not imputed against the one-fourth, unless given in order that the heir might pay the whole of the legacies bequeathed by the will. (c)

If a person insolvent left a legacy, and the heir settled or compromised with the creditors for payment of less than their demands, and by means of such settlement derived something, he is not obliged to give this to the legatees. So, if the succession were insolvent, and the heir sold it, the price he obtains from the folly of the purchaser is not to be accounted part of the testator's estate. (d)

The Falcidian deduction is made with reference to the amount or extent of the testator's estate, as it existed at the time of his death, so that whatever be its subsequent increase or decrease, it is the gain or loss of the heir. (e)

There must be deducted from the estate the necessary and suitable funeral expenses, as well as the testator's debts, and in the latter are included *dotes praegatae*, and a debt which has been bequeathed, and also the expenses of making the inventory, registering the will, as well as bequests for pious purposes. There are also to be deducted those legacies which are not subject to the Falcidian portion, in consequence of the terms in which they

(a) Dig. lib. 35. tit. 2, l. 74, l. 91, l. 9. Voet, ib. n. 25.
(b) Dig. ib. l. 94. Voet, ib. n. 25.  
(c) Ib.
(d) Dig. lib. 35, tit. 2, l. 3. Voet, lib. 35, tit. 2, n. 25.
have been bequeathed, for these must for this purpose be considered as no part of the inheritance. (a) After these deductions have been made, the rest of the inheritance is brought together, and constitutes the clear estate, in respect of which the Falcidian deduction is to be made. (b)

The Falcidian law was adopted in the jurisprudence of Holland, but it forms no part of that of Spain, or of the other codes which are here considered.

In the civil law, if the testator institutes two or more persons as his heirs, and one of them dies in the testator's lifetime, the share of the latter does not pass to the heirs of the testator, but accrues to the surviving heirs. This rule is known as that of the *jus accrescendi*. It is founded on the principle before adverted to, that a man cannot die testate as to part, and intestate as to the rest of his estate. (c)

It takes place in whatever manner the heirs are called to the succession, whether jointly or separately, and whether their portions are distinguished or not. As the right to the inheritance is an universal right, comprising the whole estate and all the charges, and as this right is indivisible, so that one cannot be heir only for a part and the other part remain vacant, and be without heirs, the portion of that heir who does not or cannot accept his part, is acquired to his co-heirs. The heir who has once accepted his own part, succeeds to that which is vacant, and he is not at liberty to renounce it, and he will be liable to bear the charges of it. The same rule holds as to those who are substituted to him, whether it be that the several heirs be substituted one to another, or that other persons are substituted to the heirs: "Si quidem cohæredes sunt omnes conjunctim, vel omnes disjunctim vel instituti vel substituti; hoc, quod fuerit quoquo modo evacuatum, si in parte hæreditatis vel partibus consistat, aliis cohæredibus cum suo gravamine pro hæreditariâ"

(a) Ib.  
(b) Voet, ib. n. 27.  
(c) Dig. lib. 29, tit. 2, l. 53.
parte, etiamsi jam defuncti sunt, acquiratur; et hoc nonentibus ipso jure, accrescat, si suas portiones jam agnoverint. Cum sit absurdum ejusdem hæreditatis partem quidem agnosceretur, partem vero repuere.” (a)

“Quis semel aliquâ ex parte hæres extiterit, deficientium partes etiam invitus excipit, id est, tacitè ei deficientium partes etiam invito ad cresciunt.” (b)

“Si quis hæres institutus ex parte, mox Titio substitutus, antequam ex causâ substitutionis ei deferatur hæreditas, pro hærede gesserit, erit hæres ex causâ quoque substitutionis: quoniam invito quoque ei accrescit portio.” (c)

“Testamento jure facto, multis institutis hæredibus, et invicem substitutis: adeuntibus suam portionem, etiam invitis, cohæredum repudiantium accrescit portio.” (d)

When the jus accrescendi exists between several heirs, either instituted or substituted, those to whom the vacant parts accrue have their share in them, in proportion to the shares which they have in the succession: “Cum quis ex institutis, qui non cum aliquo conjunctim institutus sit, hæres non est, pars ejus omnibus pro portionibus hæreditariis accrescit; neque refert, primo loco quis institutus, an alicui substitutus hæres sit.” (e)

When the testator divides his succession, and gives one-half to two or more heirs, and the other half to others, if one of these heirs does not succeed, his part remains in the mass of that half of which it was a part, and accrues to the coheirs of the said half, and not to the coheirs of the other half. But if one of the heirs had been instituted singly by himself for a moiety, or some other part of the inheritance, and he did not take it, his part would accrue to all the other heirs, without distinction, according to their portions in the inhe-

(a) Cod. lib. 6, tit. 51, l. un. § 10, and tit. 24, l. 2.
(b) Dig. lib. 29, tit. 2, l. 53, § 1.
(c) Ib. l. 35.
(d) Cod. lib. 6, tit. 26, l. 6.
(e) Dig. lib. 28, tit. 5, l. 59, § 3.
ritance: "Hæredes sine partibus utrum conjunctim an separatim scribantur, hoc interest, quod, si quis ex conjunctis decessit, hoc non ad omnes, sed ad reliquos qui conjuncti erant, pertinet. Sin autem ex separatis, ad omnes, qui testamento eodem scripti sunt hæredes, portio ejus pertinet." (a) "Si quidam ex hæredibus institutis vel substitutis permixti sunt, et alii conjunctim, alii disjunctim nuncupati: tunc si quidem ex conjunctis aliquis deficiat, hoc omnimodo ad solos conjunctos cum suo veniat onere, id est, pro parte hæreditatis, quæ ad eos pervenit. Sin autem ex his, qui disjunctim scripti sunt, aliquid evanescat, hoc non ad solos disjunctos, sed ad omnes tam conjunctos, quam etiam disjunctos similiter cum suo onere pro portione hæreditatis perveniat." (b)

The *jus accrescendi* also takes place amongst legatees, not universally, as in the case of heirs. It depends on the language in which the subject is devised to them.

If a testator bequeath or devise one and the same thing to two or more legatees, without any mention of portions, these legatees being conjoined by the thing bequeathed, the *jus accrescendi* exists between them in the same manner as if the testator had added that the thing should belong entirely to him of the two legatees who should be left alone to reap the benefit of the bequest. If one of them does not, or cannot receive his portion it remains to those who have taken theirs: "Conjunctim legati, hoc est, tota legata singulis data esse, partes autem concursu fieri." (c)

"Toties est jus accrescendi (*usufructus*) quoties in duobus, qui in solidum habuerunt, concursu divisus est." (d)

If the same subject be bequeathed to two or more legatees, but so as that the testator divides it among them, as if he bequeaths it to them in equal portions, or

(a) Dig. lib. 28, tit. 5, l. 63.  
(b) Cod. lib. 6, tit. 51, l. un. § 10.  
(c) Dig. lib. 31, tit. 3, l. 80.  
(d) Dig. lib. 7, tit. 2, l. 3.
assigns to every one his own share, the *jus accrescendi* has no place.

If the portion of any one of these legatees should become vacant, the others would have no right to it; but it would belong to the heir or other legatee, if charged with the payment of the legacy; as if the testator devised a farm or tenement to a legatee, and had charged him to give to others either a portion of the said land, or the usufruct of the whole, or of a part thereof, or a sum of money to be divided among them: "Quoties ususfructus legatus est, ita inter fructuarios est jus accrescendi, si conjunctim sit ususfructus relictus. Cæterum, si separatim unicuique partis rei ususfructus sit relictus, sine dubio jus accrescendi cessat." (a)

The law of Spain admitted the *jus accrescendi* according to the rules adopted by the civil law. (b)

The law of Holland rejects the rule of the civil law that a party could not die partly testate and partly intestate, and therefore does not make the same strict application of the *jus accrescendi* between heirs jointly instituted. It adopts or rejects it, as will best give effect to the testator's intention.

If the testator called some to the succession collectively, as his surviving sons and his grandsons, the sons of a deceased son, if one of the latter refuse the inheritance, his share survives to the other grandsons, and not to the testator's sons, although if one of the sons died his share would accrue to the other sons, as well as to the grandsons. (c)

If the the testator instituted the heir to a specific or particular property, *ex re certâ*, without instituting a general heir, the residue of the testator's estate will devolve as in the case of intestacy on his heirs at law, (d)

(a) Dig. lib. 7, tit. 2, l. 1.  
(b) Tit. 9, Part. 6  
(c) Someren, de Repres. c. 5, n. 18, p. 88  
(d) Voet, lib. 29, tit. 2, n. 40.

Van der Kessell, Thes. 326.

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unless it were a son who has been thus instituted, for in that case he, as the legitimate heir, would take the whole inheritance. (a)

It was the opinion of Grotius, that according to the law of Holland, where a minor had instituted his tutor and a stranger, and consequently the institution of the former was void, the lapsed share would belong to the co-heir, the stranger, and not to the heir at law of the testator. (b)

Amongst co-legatees, the law of Holland adopted the rules of the civil law. (c)

The *jus accrescendi*, or *droit d'accroissement*, between instituted co-heirs, could have no place under the coutume of Paris, which did not admit of the institution of an heir. It was admitted amongst co-legatees, according to the rules adopted by the civil law. (d)

The doctrine adopted by the former and present law of France is that the person bound to pay the legacy has the benefit of its lapse, and all the heirs or legatees participate in it in the same proportion as they would contribute in discharging it.

The heirs *ab intestato* alone are burthened with the discharge of particular legacies, if there is no universal legatee, or a legatee by universal title, and therefore they alone benefit by the lapse of the legacy.

If there be an universal legatee, he is put by the will of the testator in the place of the heir, at least as to the disponable property. He therefore is bound to pay the legacies, as between him and the heir of the blood, and

(a) Voet, ib.


(d) Ferriere, ad Trad. des Inst. liv. 2, tit. 20, p. 243. Pothier, Tr. des Test. c. 6, sect. 5, § 1.
therefore has the benefit of all the lapsed legacies, to the exclusion of the heir of the blood, who takes nothing beyond the reserved portion. (a)

It is immaterial whether the testator commences by giving to A. all his property, and thus making him universal legatee, and afterwards giving £1000 to B., or by commencing with a gift of £1000 to B., and the residue of his estate to A. In both cases if B.'s legacy lapses, it will be taken by A. and not by the heirs of the blood.

On the other hand, if the testator having given to A. by universal title, as for instance, a fourth of his goods, and the surplus or residue to B., if either of these bequests should lapse, it would belong to the heir at law. (b)

There are three modes by which several persons may be instituted or made legatees. 1st. In re tantum; 2ndly, In re et verbis, and 3rdly, Verbis tantum. They are jointly devisees or legatees in re tantum, when the same specific thing is bequeathed to two or more persons by distinct and separate phrases. "I bequeath farm A, to Titus. I bequeath to M. the same farm, A." They would both take jointly the farm, and if the share of either lapsed, the other would take it by accretion. The Code Civil adopts the same rule, but it admits the droit d'accroissement, in a bequest re tantum, only when the subject is not capable of division without deterioration. (c)

If the disposition were "I give to Titus and Mark the farm A., this would be a disposition in re et verbis, and le droit d'accroissement takes place whether the thing be capable or not of being divided without deterioration. (c)

The droit d'accroissement is not admitted, if the testator has in naming the legatees in one and the same

(a) Code Civil, art. 1009. Toullier, liv. 3, c. 5, n. 679. (b) Ib. (c) Art 1045., 1044. Toullier, ib.
disposition, assigned to each of them the share which he is to have in the subject of the bequest. They are in this case *conjuncti verbis tantum*. Thus, a bequest to Pierre, to Paul, and to Jean of the farm in equal shares or in thirds, each takes only the part assigned to him, and has no right to the other shares. (a)

A distinction is to be made, whether the severance is in the disposition itself, or only in the execution. In the case which has been proposed, the severance was in the disposition; the disposition was only of one-third to each of the legatees. But if the disposition had been made to them jointly, as to Pierre, Paul, and Jean, to be divided between them in equal portions, they remain *conjuncti re et verbis* in the disposition. Such was the decision of the Court of Cassation of the 19th October, 1808, reversing an arrêt which adjudged that the *droit d'accroissement* had no place under the testament of le Sieur Delaporte, who had instituted as heirs by one and the same disposition, le Sieur Planté and his two sisters: "Pour faire et disposer de son entière hérédité par portions égales." (b)

When a devise or bequest of real or personal property is made to two or more persons as joint tenants, that is, if there be no words of severance in the disposition, no lapse takes place, unless all the objects die in the testator's lifetime; because, as joint tenants take *per my et per tout*, or, as it has been expressed, "each is a taker of the whole, but not wholly and solely;" any one joint tenant existing when the will takes effect, will be entitled to the entire property. Thus, if lands are devised to A. and B., or to them and their heirs, or personal property is bequeathed to A. and B., and one dies in the testator's lifetime, or if the bequest failed from any other cause, the other surviving the testator will take

(a) Toullier, liv. 3, c. 5, n. 690.
(b) Toullier, liv. 3, tit. 2, c. 5, n. 691.
the whole. (a) But if the devisees or legatees in any of
these cases had been made tenants in common, the
failure of the gift as to one object, would not have en-
titled the others to the whole, without an express gift
over of the share of the deceased object in such
event. (b)

Where, however, the devise or bequest is to persons,
who, by the rules of construction, are to be ascertained at
the death of the testator, the decease of any of such
persons during the testator's lifetime will occasion no
lapse in the disposition, even though the devisees or
legatees are made tenants in common, since members
of the class antecedently dying never become objects of
the gift. Thus, if property be given generally to the
children, or to the brothers or sisters of A., equally to
be divided between them, the entire subject of gift will
vest in any children or child, brother or sister, surviving
the testator, without regard to previous deaths; (c) and
the rule is the same where the gift is to the children of
a person then deceased. (d)

If, however, the class is defined at some period in
the testator's lifetime, the subsequent decease of any of
its members in the interval between that period and
the decease of the testator, would occasion the lapse of
their shares, precisely in the same manner as if the gift
had been originally made to them nominativm. (e)

The description son, child, issue, and every word of
that species must be taken primâ facie to mean legiti-
mate son, child, &c. "Filium eum definimus qui ex

Smith, 4 East, 419.
(b) Page v. Page, 2 P. Wms. 489.
(c) Doe d. Stewart v. Sheffield, 13 East, 596.
(e) Allen v. Callow, 3 Ves. 289.
viro et uxore ejus nascitum. (a) But this rule imports that it will yield to the intention of the testator, and when that intention requires, include natural children. (b)

A child legitimated by the marriage of his parents subsequent to his birth, will take under the description of a legitimate child. A singular case occurred in which this rule was applied. Le Sieur de la Fargue, a wealthy planter in St. Domingo, had a slave named Petite-Nanon, with whom his great nephew Le Sieur Jean Guerre long cohabited. In January, 1744 he made his will by which he bequeathed, to his said grand nephew, J. G., the plantation on which he resided, together with all his slaves: "voulant toutefois qu'au cas que ledit Sieur Guerre décéderait sans enfants nés en légitime mariage, ladite habitation et choses en dépendantes retournassent au profit de la dame Avril, et des Sieurs François et Pierre Jamet, pour être partagées entre eux également, la leur substituant audit cas de l'un à l'autre, pour par eux, en jouir, et disposer comme ils avisseraient." (c) In 1748, J. G. manumitted the slave Petite-Nanon, and in 1755, he married her, having at that time five children by her, all of whom he acknowledged by acte at the celebration of the marriage. He died in 1763. Le Sieur Jamet took possession, claiming under the substitution, and insisting that Guerre must be deemed to have died without children, and that consequently the substitution took effect, because his illegitimate children being the issue of a white man and slave, the rule did not apply to such issue. The title of the children


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was sustained, and the claim of Jamet rejected by the sentence of the Sénéchal of Port de Paix, 7th January, 1764. But this sentence was reversed on appeal to the superior court at Cape Français. From this sentence there was an appeal to the Conseil D'Etat, when the judgment was reversed, the sentence of the Sénéchal established and the children restored to their rights.

The substitute attempted to found a distinction on the person with whom the marriage had taken place, and on the effect of the Edit of the 1st July 1726, by which "tous les esclaves affranchis, nègres, ou nègres libres, et leurs enfans ou descendans, sont incapables de recevoir des blancs aucune donation entre-vifs, à cause de mort ou autrement, sous quelque prétexte que ce puisse être." It was answered, that the present was a question of succession and not of donation, and there was no law which denied to the marriage of a slave and a white person the effect of legitimating their issue. (a)

In the civil law, the description, liberi includes grandchildren and great-grandchildren. Liberorum appellatione nepotes et pronepotes ceterique, qui ex his descendant, continentur. (b) Dumoulin in his commentary on the coutume of Paris considers that the law of France gave the same construction to the term enfans. "Verbum Gallicanum enfans non est de se restrictum ad primum vel alium gradum; sed indifferenter supponit quosvis descendentes, sicut verbum liberi in lege Romanâ." (c)

But although such be the import of this description, it will be controlled by any expressions which shew the intention of the testator to give it a more restricted meaning. Thus, if the expression be joined with others which import that they are to be the children of particular persons, it will be confined to those who are in the

(b) Dig. lib. 50, tit. 16, l. 320.
first degree: "Invitatis ad fidei-commissum liberis, qui
ex Titio et Sempronia nascerentur soli primi gradus
liberi, non etiam nepotes invitati videntur, quia licet
liberorum appellatione continentur, adeoque filiorum
cum de favore, et commodo ipsorum agitur, illud tamen
non minus verum quam tritum est articulo ex non nisi
proximam et immediatam causam significari. Ut perinde
sit, ac si fidei-commissum iis duntaxat relictum esset,
qui ex Titii et Sempronii corporibus nascerentur: quo
case apertius est vocatos eos videri non posse qui non
ex Titio et Sempronia, sed ex eorum liberis suscepi
essent." (a) Such was the decision of the senate on this
question.

According to the present doctrine of the courts in
England, a gift to children will not apply to grand-
children, though it was formerly considered that if there
was no child, the grandchildren might take. (b)

Under a bequest to the children of five persons de-
scribed as the testator’s late brothers and sisters, the
grandchildren of one of the five, who was then dead,
leaving grandchildren, but no child, could not take con-
currently with the children of the other four; since, to
have included them, would have involved the incon-
gruity of reading the word ‘‘children’’ in two different
senses.” (c)

A great niece cannot take under a gift to nephews
and nieces, though subsequently in a codicil described
by the testator as his niece. (d)

A gift to brothers and sisters extends to brothers and
sisters of the half blood. (e)

(a) Jul. 1584. Faber, Cod. lib. 6, tit. 20, def. 12. Arrêt du Cour. de

(b) 2 Vern. 106. 1 Ves. sen. 201. 3 Ves. and Bea. 69. See Lord Wood-
houselee v. Dalrymple, 2 Mer. 419.

(c) Radcliffe v. Bulkeley, 10 Ves. 195.

(d) Shelley v. Bryan, Jac. 207.

(e) 2 Mer. 383. Cotton v. Searanke, 1 Madd. 45.
RULES IN THE CONSTRUCTION OF TESTAMENTS. 569

A gift to descendants or issue (which seem to be co-extensive terms), will comprise descendants of every degree, unless narrowed by the context. \(a\)

An immediate devise or bequest to children i.e. a gift to take effect in possession at the testator’s decease, whether of a person living, \(b\) or dead, \(c\) whether the term be children simply, or all the children, \(d\) comprehends the children at the testator’s decease, and those only. But if no child is then living, it extends to all who at any time afterwards come into existence. \(e\)

Where the devise or bequest is to a person for life, or for any other particular estate or interest, with an ulterior gift to children, the latter includes the objects living at the testator’s death, and all who afterwards come in esse during the continuance of the estate for life, or other particular estate or interest. \(f\)

If the possession or distribution is postponed until the attainment of a particular age, the gift will include the children living at the death of the testator, and those who come into existence before the eldest reaches the prescribed age, \(g\) or if the distribution is to take place


\(g\) Ringrose v. Bramham, 2 Cox, 384.
at the majority of the youngest child, then children born up to that period will be let in. (a)

The terms hæres meus, mon heritier, import all my heirs:
"Si ita relictum fuerit, quantum hæres meus habebit, tantum Tithaso dari volo: pro eo est, quasi ita scriptum sit, quantum omnes hæredes habebunt." (b)

"Si plures gradus sint hæredum, et scriptum sit, hæres meus dato: ad omnes gradus hic sermo pertinet. Sicuti haec verba, quisquis mihi hæres erit. Itaque si quis velit non omnes hæredes legatorum præstacione onerare, sed aliquos ex his, nominatim damnare debet." (c)

A bequest naming those of the masculine gender includes also females, but a bequest to those of the female gender will not include males: "Quæsitum est, an, quod hæredes fratribus rogati essent restituere, etiam ad sorores pertineret? Respondit, pertinere, nisi aliud sensisse testatorem probetur." (d)

"Si ita sit scriptum, filiabus meis centum aureos do; an et masculini generis et feminini liberis legatum videatur? nam si ita scriptum esset, filiis meis hosce tutores do, responsum est, etiam filiabus tutores datos esse, quod non est ex contrario accipienda, ut filiarum nomine etiam masculi contingant: exemplo enim pessimum est, feminino vocabulo etiam masculos contineri." (e)

"Quisquis mihi alius filii filiusve hæres sit, Labeo, non videri filiam contineri. Proculus contra: mihi Labeo videtur verborum figuram sequi, Proculus mentem

(b) Dig. lib. 31, tit. 2, l. 43.
(c) Ib. lib. 32, tit. 3, l. 98.
(d) Dig. lib. 32, tit. 3, l. 93, § 3.
(e) Dig. lib. 31, tit. 2, l. 45.
testantis, respondit: Non dubito, quin Labeonis sententia vera non sit." (a)

Where a pecuniary legacy is given by a testator to his heir, the word is to be understood in its legal and ordinary sense, unless controlled by the context of the will, and the heir at law will take the legacy, and not the next of kin. In such a case it makes no difference that there are three co-heirs. (b)

The word "heirs" in a will, has been construed "children," and they have taken a legacy given to them by that appellation. (c)

A testator gave to the children of his sister, the late E. W., whose names he enumerated, "or to their heirs," certain legacies. Three of the children died in the lifetime of the testator. It was held that the legacies to these children did not lapse, but that their next of kin took by substitution at the death of the testator. The same testator gave all the residue of his property "in equal shares to each of his sisters, M. S. and S. G., and upon their deaths respectively to their heirs. Both sisters died in the lifetime of the testator. It was held that the next of kin of M. S. and of S. G. living at the death of the testator, were entitled by substitution to the gift of the residue. (d)

A legacy to A., "and failing him by decease before me, to his heirs," A. dies before the testator, having made a will containing a residuary bequest: it was held that the legacy belonged to the next of kin of A. living at the time of the testator's death. (e)

If a testator calls persons to the succession by a general description, as cognati, &c. he is understood to intend that they shall succeed in the order in which the law

(a) Dig. lib. 50, tit. 16, l. 116.
(b) Mounsey v. Blamire, 4 Russ. 384.
(c) Loveday v. Hopkins, Ambl. 273.
(d) Gittings v. M'Dermott, 1833, 2 Myl. and K. 69.
(e) Vaux v. Henderson, 1 Jac. and W. 388, cited.
would call them to the succession in the case of intestacy. (a)

The construction ordinarily given to the terms *proximus, proximiores, &c.* has been stated in a preceding volume. It may be represented as the general doctrine of the commentators, that they are understood as designating those whom the law calls to the succession *ab intestato*. (b)

Under the description of next of kin, those only it seems take who would be entitled under the Statute of Distribution. (c)

Under the term "relations, or near," those are included who would take the personal estate under the Statute of Distribution. (d)

A gift to nearest relations is confined to the next of kin, properly so called, exclusively of persons whom the statute admits *jure representationis*, (e) unless from other expressions in the will it appears the testator used the term in a more extended sense. (f)

When the persons to take are those entitled under the Statute of Distribution, the manner in which they take is that which is adopted by that statute, (g) unless the testator has pointed out a different mode of distribution, as that they should all take *per capita*, when under the statute they would have taken *per stirpes*. (h)


(b) Aute, vol. 2, p. 110.


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There are other descriptions given to devisees or legatees which admit of various meanings. They can only be ascertained by considering the occasion on which they are used, and the subjects to which they are applied.

The description of "family" under the civil law and the jurisprudence founded on it, included not only parents, children, propinquii, but even a son-in-law and daughter-in-law, if the marriage of the son or daughter had been dissolved by death: (a) "Familiae nomen talcum habere vigorem, parentes et liberos, omnesque propinquos, et substantiam: libertos etiam et patronos, nec non servos per hanc appellationem significari: et si quis per suum elogium fidei-commissum familiae suae reliquerit, nulla speciali adjectione super quibusdam certis personis facta: non solum propinquos, sed etiam his deficientibus, generum et nurum. Eos enim nobis humanum esse videtur ad fidei-commissum vocari: ita velidicet, si matrimonium morte filii, vel filiae fuerit dissolutum: nullo etenim modo possunt gener, vel nurus filiis viven- tibus ad tale fidei-commissum vocari: cum hi procul dubio eos antecedant: et hoc velidicet gradatim fieri, ut post eos liberti veniant. Hoc eodem valente et si quis rem immobilem cuidam legaverit, vel fidei-commisserit, eamque alienare prohibuerit adjiciens, ut si hoc fidei- commissarius prætererit, familiae suae res acquiratur." (b)

It did not include the cognati, or those related on the side of the wife: "Fœminarum liberos in familia earum non esse, palam est: quia qui nascuntur, patris non matris familiar sequuntur." But Sande qualifies this general rule: "Similiter cognati vel per fœminam de functo testatori conjuncti huc non spectant, quia familæ

Maclaren, 1 Myl. and K. 27. Elmsley v. Young, 2 ib. 82; Aff. on Appeal, 780.
(a) Voet, lib 36, tit. 1, n. 27. Sande, de Prohib. Alien. p. 3, c. 6, n. 4.
(b) Cod. lib. 6, tit. 38, l. 5.
appellations non continentur. Nisi communis usus loquendi eo in loco, in quo testamentum est conditum diversam interpretationem suadeat." (a)

This term admits of various constructions in the English law. Sometimes it is held to designate the most worthy and oldest person in the family, i.e. the heir. (b) Where a testator devised all his lands, freehold, leasehold, and copyhold, unto his mother, C. A. and her heirs for ever, in the fullest confidence that after her decease she would devise the property to his family. Sir W. Grant, M. R., was of opinion that the effect of this devise was to limit the property to the mother for life, with reversion to the testator’s heir-at-law at his death. (c) And Lord Eldon on appeal confirmed his Honor’s decision. The case being carried by appeal to the House of Lords, it was there held that the mother took an estate in fee, the House not being called upon to pronounce who were the objects of the trust after her decease, and it became unnecessary to discuss the construction of the word family. (d)

It is said (e) to have been decided at the Rolls in 1732, that under a limitation to the family of J. S. the real estate descends to the heir-at-law, the personal estate goes to the next of kin.

The word “family” has sometimes been construed to mean “children.” Thus, where a testator gave the remainder of his estate to be equally divided between “brother L.’s and sister E.’s families,” Sir W. Grant, M. R., decided that the will (which was held to carry real estate) vested the property in the children of the brother and sister. (f)

(a) Sande, de Prohib. Rec. Alien. part 3, c. 6, n. 10.
(c) Wright v. Atkyns, 17 Ves. 255.
(d) Wright v. Atkyns, 19 Ves. 299. Turn. and Russ. 143.
(f) Barnes v. Patch, 8 Ves. 604.
In other instances "family" has been treated as synonymous with relations. Thus a testatrix made her only sister whole and sole executrix to every thing she had for her own life, and desired that at her own death she bequeathed to those of her own family what she had it in her own power to dispose of that was her's, the testatrix's, provided they behaved well to her. Sir W. Grant, M. R., held that the words "her own family," were equivalent to her own relations, observing that the word "family" might, according to the context, have different significations in different wills. (a)

So where a testator bequeathed a leasehold house to his wife for life, with a power of disposing of the same after her decease "to any one of my own family she may think proper," it was held that the word "family" was synonymous with relations; and therefore an appointment to a relation, though not next of kin, was authorized by the power. (b)

Where a testator directed his business to be carried on by his wife and son for the mutual benefit of the family, and devised his property in trust that at his wife's decease the whole of it, as well freehold as personal, should be equally divided among his children; it was held, that the testator, in the words "my family," intended to comprise his wife. (c)

(b) Grant v. Lynam, 4 Russ. 292.
(c) Blackwell v. Bull, 1 Keen, 176.
CHAPTER XII.

THE LAW BY WHICH THE VALIDITY OF THE TESTAMENT IS TO BE DECIDED.

I. The validity of the testament of immoveable property, if it depend on the capacity of the testator or devisee, is determined by the lex loci rei sitae.—Reference to former observations on this subject.—If the property be moveable, the capacity depends on the law of the domicile.—Rights in immoveable property decided by the lex loci rei sitae, and in moveables by the law of the domicile.—Effect of a change of domicile where the laws of the former and acquired domicile differ from each other.

II. A testament in which the testator has complied with the forms prescribed by the lex loci actus will be valid to pass property situated in a country where different forms may be required.—Qualification of this doctrine.—The law of England and of the United States requires a will of real property in England and the States, to be passed with the formalities required by the Statute of Frauds.—Rule applies to testaments of moveables.—English cases.—Testator not obliged to adopt the forms prescribed by the lex loci actus, but may use those of the situs, if the devise be of immoveables, and of the domicile, if moveables.

III. Expressions in the testament presumed to be used in the sense in which they are understood in the place of the testator’s domicile.

I. It has been perceived, that the capacity to make, and the capacity to take under a testament, the rights conferred by it, the forms and solemnities with which it is to be made, and the construction it should receive, are subjects on which there is considerable diversity amongst the systems of jurisprudence which this work embraces.

When the law of the place in which the testament was
made differs from that of the place of the testator's domicile, or from that of the place of the situs of the property, on all or some of these subjects, it becomes necessary to ascertain which of these conflicting laws ought to be invoked in the adjudication on the validity of the testament.

In treating of the alienations of real property by act inter vivos, it has been stated as a conclusion, sanctioned by the authority of jurists and of judicial decisions, and most consistent with admitted principles, that the capacity to make and to take under the alienation was governed by the law of the actual situs of the property, if it were immoveable, and by that of the domicile, if it were moveable. It is admitted by all jurists, that the transfer of, and title to real property, must be regulated by the lex loci rei sitae, that a law which prohibits its alienation is a real law, and must, in whatever place the alienation is attempted, prevent the acquisition of any title. It necessarily follows from that admission, that the character and effect of the law must be the same, whether its prohibition has relation to the quality of the property itself, or to the person of the owner; or whether the prohibition be general and absolute, or partial and qualified, or existing only sub modo. It is a quality impressed on the property no less when the property is prohibited to be alienated under particular circumstances, than when it is prohibited to be alienated under any circumstances, or when it is prohibited to be alienated by and to persons standing in certain relations to each other, or by persons who are under a certain age, or who are in any situation, which by the law precludes them from making or taking under the alienation.

There can be no distinction in this respect between an alienation by act inter vivos, and that by testament, if the validity of the title under it depends on the capacity of the person to make it. The observations by which in the preceding parts of this work it has been submitted
that the *lex loci rei sitae* must determine whether the alienation by act *inter vivos* is valid in respect of the capacity of the person to make it, are equally applicable, when the question regards the law which should decide whether the testamentary disposition is valid in respect of the capacity of the testator or devisee.

It has been seen in a former part of this work, that there is a class of eminent jurists who maintain, that when the capacity or incapacity is dependent on the *status* of the person, the law of the domicile which gives that *status* extends even to property situated in another country.

Rodenburg, who is to be included in the number of those who hold that opinion, does not, it seems, adopt it when the question regards the capacity or incapacity to make a testament: (a) "Sed, quid si nostras testetur anno ætatis decimo quarto, sortieturne effectum dispositio in rebus, quæ alterius regionis solo inhaerant, in quà major ad testandum desideratur ætas? Sit dubitandi ratio, quod de personarum ætate ac capacitate lata lex in personam concepta esse videatur, adeoque ad quæcunque producenda territaria. Verum contra reale statutum esse inde dixeris, quod in statum ac conditionem personæ non sit scriptum, sed expressim directum in rerum alienationes aut alterationes, et quidem per solam testamenti speciem, adeoque circumscriptivi ad istum alienationis actum, cujusmodi statuta realia esse traditum sepius: et vel inde in proposito conspicere est, quod immo personæ statu, quæ nullâ ex parte tutelæ subducitur, aucto-s-state tutoris non spectante minoris testationes, tribuatur nostratibus hoc testamenti factio, adeoque cum status non turbetur, lex personalis dici nequeat." (b)

Merlin also admits in the passage which has been before cited, that if the law importing a prohibition to make

(b) Rodenb. de Jure, c. 5, tit. 2, p. 75.
a testament before the person had attained a certain age, is *general*, and has no relation to the *status* of major
ty, it is a real law, and must govern the disposition by testament of inmoveable property situated in the
country where such law exists.

The difficulty of adopting such a distinction arises from the consequences to which it leads, for it seems to im
p ort that if the law of the *situs* prohibits the alienation by a
*minor*, the question whether he is a minor, or in other
words, whether he is competent to make a testament, is
to be determined, not by that law, but by the law of his
domicile. But if the law had prohibited an alienation by a
person who had not attained the age of twenty-one
or twenty-five years, or any other age which was pre
scribed by the law as the age of majority, the law of the
*situs* would prevail, and the competence of the person
would depend on his having attained that age.

But without further pursuing the inquiry which has
already been made in the former volume, it may be con
sidered that the opinions of Dumoulin, Burgundus,
Peckius, J. and P. Voet, and the decision reported by
Stockmans, afford authority sufficient to justify the con
clusion, that the capacity to alienate by testament, is that
which is established by the law of the country, in which
the inmoveable property is situated, and by that of the
domicile when the testamentary disposition regards
moveable property. *(a)*

In *fictione juris*, the *situs* of moveable property is the
place of the testator's domicile, and therefore if the
validity of a testament in respect of its disposition of im
moveable property would be governed by the law of the
country in which that property was actually situated, the
validity of the testament, as it regards the disposition of
moveable property, would be decided according to the

*(a)* Ante, vol. 1, p. 112, et seq. and the authorities there cited. Peckius,
de *Test. Conj.* lib. 4, c. 28, n. 7, et seq. Dumoulin, ad *Cod. lib.* 1, tit. 1,
law of the testator’s domicile. The capacity to make the testament and to take under it must be governed by that law. Thus, J. Voet, with reference to the conflicting laws of different states, as to the age which conferred a capacity to make a testament, says, “Dicendum videtur, in his omnibus quantum ad mobilias spectandum unicè esse domicilii legem; quippe quà solà regi mobilias ubicunque sita, adstruxi, adeoque, Hollandum annos quattuordecim egressum, et in sacris paternis adhuc constitutum, rectè testari de mobilibus, utcunque non in Hollandiâ, sed vel Ultrajecti, vel in Frisiâ, vel in loco alio testamenta non admittente, sitis.” (a) In this opinion there seems to be the concurrence of all foreign jurists. (b) The decisions of the English and American courts are in conformity with it.

If the person at the time he made his will had attained the age which rendered him competent according to the laws of that place to make it, but he afterwards acquired a domicile in another place, the laws of which required that he should attain a more advanced age before he could exercise the power of testing, and he should die in the latter place, the will previously made would become, by the change of domicile, invalid, because the testator must possess the capacity to test both at the time of making his will, and at the time of his death. Nor will the testament become valid, if he should survive the period when by the laws of that place he was competent to test. (c)

(a) Voet, lib. 28, tit. 1, n. 44.
(c) Voet, lib. 28, tit. 3, n. 13.
If the party competent, according to the law of the country where he made his will, although incompetent according to that of the country to which he had transferred his domicile, should return to the former country, and there resume his domicile, and retain it at the time of his death as his actual domicile, the will would be restored to the validity it possessed at the time it was made. (a)

Jurists concur in the opinion, that the rights which the testament confers must be determined in respect of immovable property by the lex loci rei sitae, and of moveable by the law of the testator’s domicile. (b)

This rule extends to those rights which are the legal consequences of the manner and terms in which the institution, devise, or bequest may be made.

The jus accrescendi under a testament, depends on its being conferred or refused by the law of the situs, if the property be immovable, and by that of the domicile, if it be moveable: “Si in loco domiciliis defuncti sit locus juri ad crescendi; prædia nonnulla sita sint in ea provinciâ ubi cessat jus ad crescendi: utrum domicilium spectabimus, an situm prædiorum? Situm prædiorum: utique si de successione intestati agatur.” (c)

So it has been decided that the question, whether a legacy bequeathed to a person who died in the lifetime of a testatrix who was domiciled in England had lapsed, was to be determined by the law of England, and not by that of Scotland, where the testament was made. (d)

II. The law which requires that certain forms and solemnities should be observed in making testaments, as it thus imposes a qualified prohibition on the alienation of the property by not permitting it to be made unless

(a) Voet, ib.
(b) P. Voet, de Stat. sect. 9, c. 1, n. 4 and 8. Rodenb. de Jure, Quod Or. c. 3, sit. 1.
(d) Anstruther v. Chalmer, 2 Sim. 1.
those forms are complied with, would seem to be a real law, to which the owner of property situated in the country where it prevails ought to conform.

Burgundus maintains this opinion: "Si quidem solemnitates testamenti sunt quaedam qualitas bonis ipeis impressa ad quam tenetur respicere quisquis in bonis aliquid alterat ....... nam si ex solemni testamento nascatur jus in ipsâ re, quomodo id potest præstare alterius regionis consuetudo, quæ alienis fundis alterationis necessitatem imponere non potest; hoc enim esset jus dicere extra territorium, cui impune non paretur."(a)

But there can be no doubt that the greater number of jurists adopt in its fullest extent the maxim "locus regit actum," and that a testament which adopts the forms prescribed by the law of the place in which it is made is valid to pass immoveable property wherever it is situated.

Cujacius was of opinion that the testament would be valid if made according to the forms prescribed by the law of the testator's domicile. (b)

Rodenburg has stated the prevalence of this opinion: "Si de solemnibus quaeratur, ea jampridem in foro ac pulpito prevaluit opinio, aspectandæ sint loci cujusque leges, ubi actus conficitur. Quare sicubi ex more loci solemniter ordinatum fuerit testamentum, valiturum illud, ubicunque oportuerit exequi. Unde et solemni Lutetianæ Curiae arresto pronuntiatum fuit secundum testamentum quod viator ac præteriens alius confecisset suo more pagi, in quo decubuerat, ut maximè longè alia testamenti solemnia lex domicilii situsque bonorum postulassent. Consentiunt et aliorum judicatæ res Expyll. nec alius dicendum tradunt, ut maximè major in loco domicilii, quam ubi actus confectus esset, decidaretur solemnitas. Atque hæc opinio diu scholas

(a) Tr. 6. 1 Boullenois, Tr. des Stat. ch. 3, obs. 21.
in tranquililitate tenuit, donec tandem perpaucis ire libuit in alia omnia. Fecere id Cujac. et Burgundus qui sua opinionis animosior ceteris assertor testatorum astringit ad formam locorum singularum, ubi bona sita sunt. Verum tanti rationes eorum non sunt, ut à sententiâ commun, tot rerum judicatarum et calculorum autoritate suffultâ, cogamur facere divertium.” (a)

Dumoulin maintains the same opinion: “Aut statutum loquitur de his, quæ concernunt nudam ordinationem vel solemnita tem actus, et semper inspictur statutum vel consuetudo loci, ubi actus celebratur, sive in contractibus, sive in judiciis, sive in testamentis, sive in instrumentis aliis conficiendis. Ita quod testamentum factum coram duobus testibus, in locis, ubi non requiritur major solemnitas, valet ubique. Idem in omni alio actu.” (b)

The same jurist, in his Commentary on the 6th Book of the Codex, repeats the same opinion, and holds that a testament made at Venice, where two witnesses only are required, would be valid, although by the law of the testator’s domicile a greater number of witnesses was required. The decision reported by Sande, and the opinion of that jurist and of Peckius, P. Voet, and J. Voet, confirm this doctrine. (c)

Christineus admits the prevalence of this opinion, and that in Belgium it ceased to be adopted, in consequence of the edict of 1611, Art. 13, by which it was expressly ordained, that the law of the situs should be observed, and not that of the domicile: “Si dès lieux de la résidence des testateurs et de la situation de leurs biens (porte-t-il), il y a diversité de coutumes pour le

(b) Dumoulin, ad Cod. lib. 1, tit. 1, tom. 3, p. 554.
regard de ses dispositions de dernière volonté, nous ordonnons qu’en tant que touche la qualité desdits biens, si on ne peut disposer, en quel âge, et avec quelle forme et solemnité, on suivra les coutumes et usances de ladite situation.” (a)

From the privilege which is granted to ambassadors, of making their testaments, not according to the lex loci actus, but that of their domicile, and from the permission granted by the King of France to the adherents of James II., who followed him to that kingdom, of retaining the forms authorized by the law of England, it must be necessarily inferred that the law by which the validity of their testaments in respect of their forms and solemnities would have been determined, was that of the place in which they were made. (b)

It may however also be inferred, from the language of the jurists who assert the general rule that, in their opinion, it would yield to a law in loco rei sitae, which requires that the disposition by testament of property situated there shall be made in conformity with its own law, and in exclusion of the law of any other place.

Rodenburg states this qualification. (c)

It is constantly urged by Christinæus. Vinnius, after expressing his concurrence in the opinion that the lex loci actus is to be adopted, says, “Planè, si lex expressè testatores sequi jubeat jus loci, in quo bona sita sunt,


(c) Rodenburg, de Jure, Quod, tit. 3, c. 3, n. 1.
aliquud dicendum est. Talis est constitutio Principum Brabantiae emissa anno 1611." (a)

In the jurisprudence of Spain, Holland, and France, and of the greater number of the states of Europe, if the testament be made with the forms prescribed by the law of the place where it was executed, it will be valid, and will effectually dispose of property situated in another country where the law prescribes different forms. This doctrine is in some states established by positive law. In Spain the law prescribes the forms of those testaments only which are made in that country. In other states the doctrine has been so firmly established by judicial decisions, no less than by the opinions of jurists, that it has become the established law. J. Voet, after having referred to the decision in Sande in which it was adopted, says, "Ita in praxi haec Belgis, Germanis, Hispanis, Gallis, aliisque placuisse, auctores cujusque gentis testantur," and he then enumerates the various jurists who, in treating of the law of Belgium, Holland, Germany, Spain, and France, have stated it to be adopted in the jurisprudence of those states. Consult. Juriscons. Holl. part 2, con. 163, 189, et part 3, vol. 2, consil. 15, n. 4, et consil. 133, n. 1. J. Someren, de Jure Noverc. c. 7, n. 1. A. Wesel, ad Novell. Const. Ultraj. art. 1. n. 12, 13. J. Coren, obs. 23, n. 18, 19, 20. A. Gaill, lib. 2, obs. 123. Mynsingerus, cent. 4, obs. 82, n. 3, et cent. 5, obs. 20, n. 4, et seq. MAVIUS, ad Jus Rub. part 2, tit. 1, art 16, et de Arrestitis, c. 20, n. 5. Carpzovius, Pract. Crimin. part 2, quest. 54, n. 51. Choppinus, de Moribus Parisiens. lib. 2, tit. 4, n. 2. Barry de Success. lib. 1, tit. 1, n. 46. (b)

The Code Civil had authorized Frenchmen in a foreign country to make their testamentary dispositions by act

under private signature in manner prescribed by Article 970, or by authentic act, and the forms used in the place where such act should be passed. (a) The law of the 14th of July, 1819, also allows a stranger to dispose by olographe testament of his immovable property situated in France, although the law of his own country did not admit of this form of testament. (b)

The Louisiana code gives effect to testaments made in foreign countries, or in the states and other territories of the union, if they be clothed with all the formalities prescribed for the validity of wills in the place where they have been respectively made. (c)

In Spain, the forms and solemnities prescribed by its law would seem to be wholly applicable to testaments made in that kingdom. Its jurisprudence distinctly recognized the validity of a testament made according to the forms prescribed by the lex loci actus. (d) It has been observed that the order in council which rendered the execution of testaments more simple, is confined to those made in the colony of Trinidad. It was obviously unnecessary to extend it to testaments made out of the colony, since by the law of Spain they would be valid if executed according to the formalities of the lex loci actus. (e)

The concurrent opinions of the jurists of Holland, and the uniform decisions of its courts, have established as its law that in determining on the validity of the testament in respect of the forms in which it is made, lex loci regit actum. (f)

By the jurisprudence of England and the United States, a will devising lands in England or in the States,

(a) Art. 999.
(b) Duranton, liv. 3, tit. 2, Sect. 4, § 4.
(c) Art. 1589.
(d) Gomez, in l. 3, Taur. n. 20, et seq. L. 12, tit. 18, lib. 10, Nov. Recop.
(e) Order in Council, June 8th, 1816.
(f) Voet, lib. 1, tit. 5, n. 13.
if the solemnities prescribed by the Statute of Frauds have not been observed, would be ineffectual to pass those lands. (a)

This doctrine is fully warranted by the qualification which has been given by jurists to the rule *lex loci regit actum*.

The Statute of Frauds, as regards real property situated in England and in the States of America, "est lex quae expressè testatores jubet jus loci sequi in quo bona sita sunt."

It may be said that the jurisprudence which allows a testament executed according to the solemnities prescribed by the *lex loci actus* to affect real property situated in the country where that jurisprudence prevails, does not depart from the general principle that the *lex loci rei sitae* must determine whether the instrument is sufficient to dispose of real property. The difference between that jurisprudence and the doctrine of England and the United States, is, that the effect of the latter is to require a particular form for the execution, whether it be made in England or in any other country, that is, it makes no provision for a will made in a foreign country, but the terms of its enactment are so comprehensive as to include all wills in whatever country they are made, if they affect real property in England. In the other systems of jurisprudence, it is a part of the *lex loci rei sitae* that its immoveable property should pass by a testament executed with certain formalities, if it be made in the country where the property is situated, but that if it be made in another country, it may be executed

with other solemnities, that is, with the solemnities required by the law of that country.

The jurists whose opinions have been cited in support of the rule that the testament is valid if the testator has complied with the forms and solemnities prescribed by the law of the place in which it was made, apply it to a testament of moveable as well as of immovable property. (a) The decisions of the courts of England on the validity of testimonials of personal estate made abroad are few. The two most important are on the testaments of the Duchess of Kingston and of Bernes. The former was resident in Paris: she obtained letters patent from the King of France, which gave her the same power of devising as she would have had in England. Although she died in France, she had not relinquished her English domicile. She made her testament in Paris. It was clearly null under the coutume. But she had observed the forms required by the Statute of Frauds, and the will was valid according to the law of England. It was the opinion of M. Turgot, (b) an advocate of France, and his opinion was confirmed by the Court of Probate, that the testament, although made in Paris, was valid. This opinion proceeds on a principle which is admitted by jurists, that although a will made with the solemnities of the lex loci actus may be valid, yet if it were made with the solemnities of the locus rei sitae in respect of immovables, and the locus domicilii in respect of movable property, it would also be valid.

In Bernes's will it appeared that, although an Irishman by birth, he had acquired a domicile in Madeira. He made a will and several codicils in that island, some of which were not executed with the solemnities required by the law of Portugal, but with those formalities which would satisfy the law of England. The decision given

(a) See the authorities above cited.
(b) Coll. Jur. vol. 1, p. 323.
by Sir John Nicholl that the latter codicils were valid, and that it was competent to have executed them in the manner which would be consonant to the law of England, was reversed by the delegates, and they were deemed invalid. Bernes in this case had no longer a domicile in Ireland. His domicile was in Portugal. It was necessary to establish that fact to distinguish the case from that of the Duchess of Kingston. If he had still retained his domicile in Ireland, the codicils would, upon the principles referred to, and which will be presently more fully stated, have been valid.

In neither of these cases did the question arise on a testament made with the solemnities required by the lex loci actus, although deficient in those required by the law of the domicile. (a)

In another case the testator was an Englishman by birth, and although he had been for many years residing in France, it did not appear that he had abandoned his English domicile. He came to England, and during his residence there made his will, which was a valid testamentary disposition in respect of forms and solemnities according to the law of England. It was contended that it ought not to be admitted to probate, because it was not made in the manner required by the law of France. Here the court adopted the lex loci actus, but from the report of the case, the learned judge dwells so much on circumstances founded on the testator’s domicile of origin, that it would be perhaps not correct to describe the decision as warranting the conclusion, that if the testator had not been an Englishman his will made in England, would have been valid. (b)

In Nasmyth’s case, (c) the testator was domiciled in Scotland, and his will was made and found there. He died in England in transitu. The Court of Pro-

(a) Stanby v. Bernes, 3 Hagg. 373.
(b) Curley v. Thornton, 2 Adams, 6.
(c) Nasmyth’s case cited there, ib. p. 25.
bate in England, held itself bound to defer to the law of Scotland.

In giving effect to a testament made with the solemnities prescribed by the lex loci actus, jurists do not deny it to a testament made according to the forms required by the lex loci rei sitae if it be immovable, or the lex loci domicilii if it be personal property, which is the subject of the disposition: "Proinde si quis eo, quod ad testandum expeditius suâ causâ comparatum est, noluerit uti, quod ei fortè promptius sit componere suprema ad loci leges cui bona subjaceant, quo minus testamentum ejus valiturum sit, non video." (a) P. and J. Voet adopt this opinion. (b)

III. The law of the place of domicile in many cases affords the rule of construction, when the testator has used expressions which are either ambiguous or of different significations in different countries. Thus, if a testator does not institute his heirs by name, but by the description of those who would succeed to his estate in case he had died intestate, and the rules of succession where his real or immovable property is situated, are different from those which prevail in the place of his domicile, or in that in which he made his will, or in that where the judicial tribunal is which adjudicates on the will, the laws of succession which prevail in the place of his domicile, are those which would be adopted. And the more general opinion is, that even with respect to the succession to real or immovable property, the laws of succession in the place of domicile, and not those in loco rei sitae prevail. (c)

The ground on which this rule rests is that as it

(a) Rodenb. de Jure, ch. 3, tit. 2, p. 45.
becomes necessary to ascertain the sense in which the
testator has used the expression, and what laws of suc-
cession he contemplated, it is presumed that they were
those of the country in which he was domiciled, because it
must be supposed he was familiar with those laws. There
are grounds for presuming he was acquainted with them,
but there exist no grounds for presuming him to be ac-
quainted with any other laws of succession.

In affixing the sense in which he has used certain
words, terms, or phrases, he is presumed to have adopted
that which prevailed in the place of his domicile. (a)

It has been sometimes said, that they ought to be un-
derstood in the sense in which they are accustomed to
be used in the place where the will or contract was
made. (b) But it would be impossible to consider this
as a general rule, for the residence of the party in the
place may have been for so short a time as to negative
the presumption that he was even acquainted with that
sense.

A testator was domiciled in Jamaica, in which place he
made his will, and the devise was in these words: "I
give, devise, and bequeath one moiety of the rents,
issues, and profits of my estate named Islington and
Cove's Penn, in the parish of St. Mary, to be divided
equally amongst my grandchildren. The other moiety
of the rents, issues, and profits of my said estate and
Penn I give, devise, and bequeath to my son, &c." Ac-
cording to the import of the words "my estate," as
they are understood and used in Jamaica, not only the
land, but the works, buildings, utensils, slaves, cattle,
and stock on the plantation would be included. The
court put this construction on the devise. (c)

The legal effect of the expression, "lawful heirs,"

(a) Sande, Decis. Fris. lib. 4, tit. 5, def. 8. Mattheas. de Legatis. lib. 2,
(c) Stewart v. Garnett, 3 Sim. 298. 2 Preston on Est. 175. Lushington
v. Sewell, 1 Sim. 465.
will not be controlled by words which import an equality of distribution amongst the heirs, but those words will be understood as referring to the equality which is consistent with, and recognized by that law which the testator is presumed to have invoked. The institution of heirs was thus expressed: "Fratrum et sororum filios ac nepotes heredes legitimos ex aquis partibus." (a)

If the whole inheritance were to be divided amongst those heirs in equal parts, the qualification of legitimus heres would be disregarded, because, according to the order of succession established by law, the grandsons of one brother succeeding with the sons of another do not take per capita, but per stirpes. The equality, therefore, to be observed in the distribution, and which must be presumed to have been that contemplated by the testator, is that which the law admits, namely, an equality between the stirpes, and not between the individuals. (b)

A case arose in the court at Brabant of a father domiciled at Brabant, who had, in the institution of his son, desired him to allow that which he had left him to go to his lawful children. It was decided that the grandfather's estate would devolve on those children only who would take according to the law of Brabant in the case of intestacy, namely, the children of the first, to the exclusion of those of a second marriage. (c)

Under an institution by the description of "brothers," brothers of the whole blood only will take, if according to the law in the place of the lex loci domicili, the children of the father's or mother's side only are excluded from the succession. (d)

If a testator institute as his heirs those whom he calls

(a) Voet, lib. 28, tit. 5, n. 17.
(b) Neostad, Decis. 33.
(c) Stockmans, Curiae Brab. Decis. 27.
proximi, without using any expression pointing to those who would by law succeed to him in case of intestacy, and he leaves no children, it is doubtful who are entitled to the succession, whether those who would take according to the law of the place of his domicile, or those who were really and naturally the nearest to the testator in blood, although according to that law they could not be his heirs. Thus if the testator were domiciled in a country where the relations of the deceased mother succeed in preference to the surviving father, the latter is the nearest in blood to the deceased, although he is not nearest in the order of succession.

It seems that the term proximus would receive its natural signification, and consequently the father as the nearest in blood would succeed, and not the descendant in the maternal line. (a)

But it is said that this construction is made to depend on the degree in which the law of succession deviates from the natural sense of the word proximus. And where in cases of intestacy some of the nearest are admitted to the succession with some more remote in blood, the construction would be according to the legal sense. If therefore a testator instituting his wife as his heir, should direct that the inheritance after his death should revert to the nearest, then according to the jus Scabinicum, the father would be entitled to one half, and all the brothers to the other half. (b)

If the testator has called to the succession those who are nearest to him in case of intestacy, recourse must be had, not to the laws of the different countries in which his immoveable property is situated, to decide who are the persons entitled to succeed, but to the lex loci

(a) Voet, lib. 28, tit. 5, n. 19, and lib. 36, tit. 1, n. 25. Someren, de Repres. c. 6.
(b) Ib. Sande, Decis. Fris. lib. 4, tit. 5, def. 6.
domicilii. And then it may happen that those would succeed who will not be the nearest in blood. (a)

In a bequest of a pecuniary legacy, where the will affords no direct evidence of the currency in which the testator intended it to be paid, his greater familiarity with the currency of the country in which he is domiciled than with that of any other place, justifies the presumption that he has in view that currency when he expresses no other currency in which his bequest is to be paid.

The father of a family who was domiciled in a village in Peyrouse, in Italy, was on a visit to Ancona on business. He made his will in the latter place, and gave a legacy to one of his daughters of five hundred florins. Florins were of less value at Ancona than at Peyrouse, and the question raised was whether the legacy should be paid according to the value of the florins at Ancona or at Peyrouse, and it was determined it ought to be paid according to the value at Peyrouse, the place of the testator's domicile. (b)

Where a legacy consists of a certain number of modii of corn, Hertius says that the modii ought to be according to the measure of the place of the testator's domicile, and not according to that of the place where the testament was made. (c)

So if a testator having lands in different places devise a thousand acres without any other expression, such a devise must be understood according to the measurement prevailing in the place of his domicile. (d)

The decisions of the English courts in the construction


(b) Boull. Tr. des Stat. obs. 46, p. 503.

(c) Hertius, de Coll. Leg. sect. 6, § 3.

(d) Du Moulin, ad Cod. de Stat. vol. 3, p. 554.
of bequests proceeded on a similar principle. If a testator resident in Jamaica gave all his legacies generally, they must be paid in Jamaica money, nor would the residence of the legatees in England be a ground for any distinction. The residence of the person devising must decide it. And Lord Macclesfield expressed the same opinion. "If (said he) a man by will made in England give a legacy of £80, 'it must be intended English money.'" (a)

The ground for the application of this rule is still stronger where the testator gives several legacies expressly to be paid in sterling or English money, and others indeterminate as to the fund. In such a case, where the will was made in Ireland, it was determined that they should be discharged in the currency of Ireland. (b)

A testator domiciled in the Island of Antigua, made his will there, and gave to his sister the interest of £1000 sterling for life, and the capital at her death between the plaintiffs. He then bequeathed to the children of Mrs. G. and to the children of Mrs. L. (both of them then dead) the interest of £1500 for life, and it was decided that the legacy given in sterling money should be paid in sterling money, and that bequeathed generally be paid in Antigua currency. (c)

The circumstance that such legacy is to be paid out of real property, situated in a country where the currency differs from that which prevails in the place of the testator's domicile, does not of itself vary the rule. Thus where the testator lived with his wife in England, and by will made in England devised his lands in Ireland to a trustee, who also lived in England, for five hundred years, in trust out of the rents and profits, to pay £80 per annum to his wife for life, it was held that the will

(a) Saunders v. Drake, 2 Atk. 465.
(b) Pierson v. Garnett, 2 Bro. C. C. 39, 47.
(c) Malcolm v. Martin, 3 Bro. C. C. 50.
being made in England, and the husband and wife and trustee, all living in England, and this being a provision for a wife too, the £80 per annum should be intended £80 per annum of that country where the will was made. (a)

Where the legatee resides in another country than that in which the testator was domiciled, or in which he made his will, a question arises whether the expense of remitting the legacy is to be borne by the legatee or by the testator’s estate. In the naked case of a charge on lands situated in Ireland, as the owner of the lands is not obliged to tender the money at any place except upon the lands, the expense of remitting it to England must be borne by the legatee. (b) But if from any other circumstances, it can be inferred to have been the intention of the testator that the legacy should be paid in England, then the legatee is entitled to receive it without any deduction for the expense of remittance. (c)

(b) Lansadowne v. Lansadowne, 2 Bligh, 95.
CHAPTER XIII.

THE ACCEPTANCE OR RENUNCIATION OF THE SUCCESSION.

I. The aditio or acceptance of the succession required by the Civil Law, the Jurisprudence of Holland and Spain, the Coutumes of Paris and Normandy, and the Code Civil.—Aditio under the Civil Law.—How made.—Who are competent to aditio.—In cases of minors.—The adition must be of the whole, and not a part of the succession.—Service of heir by the Law of Scotland.

II. Gestio pro herede.—General rules.—Acts which amount to.—Scotland.

III. Assus deliberandi under the Civil Law.—Presumptions from the silence of the heir.—The act of deliberation by the Law of Holland.—The Law of Spain.—The present practice in Trinidad.—The time prescribed by the Ordinance of 1667.—Code Civil.—Scotland.

IV. Benefit of inventory under the Civil Law.—Inventory how made.—Under the Civil Law, and the Law of Spain, no preference to the heir who entered without benefit of inventory, but it is given by the Law of Holland.—Qualified preference under the Coutumes of Paris and Normandy.—No such preference under the Code Civil, nor Law of Scotland.—During the time for making inventory heir cannot be sued.—Effects to the heir from the benefit of inventory.—Consequences of his entering without benefit of inventory.—The Coutumes of Paris and Normandy, and Code Civil.—Entering under benefit of inventory by the law of Scotland.—Form.—Effect of.

V. Renunciation.—By whom competent.—Cannot be made after aditio or gestio. Power of heir under the Civil Law, and the Laws of Holland and Spain, by repudiating the inheritance to prejudice his creditors.—The remedy provided by the Coutumes of Paris, Normandy, and Code Civil.—Under the Law of Holland, husband might renounce a succession which had devolved on the wife.—Manner of making the renunciation.—Effects of.—When, notwithstanding renunciation, the heir may afterwards aditio.

VI. The preceding titles form no part of the law of England, or of the United States.—Executor de son tort.

VII. The law by which the preceding subjects are regulated, when the succession is situated in different countries.

I. When the distinction in the Civil Law between heredes sui, and necessarii, and extranei, was abolished,
and all were at liberty to abstain from accepting the
inheritance, it became a rule under that jurisprudence,
as well as under the law of Holland and Spain,
that the succession when it opened by the death of
the testator or intestate, did not instanter vest in the
heir (a)

It has been already observed, that in the coutumes of
Paris and Normandy, and by the law of Spain, an
opposite principle prevailed, namely, le mort saisit le
vif; mortuus saisit vivum. This seisin was a mere fiction
of law. It required no purpose or intention on the
part of the ancestor to transmit, or on the part of the
heir to receive the succession; nay, it took effect con-
trary to the purpose or intention of the ancestor, as was
the case when his disheison of his heir was declared
null and void. As regarded the heir it took effect,
although he was ignorant of the succession having de-
veloped on him, it continued until he had renounced the
succession, and his renunciation, when it was made, had
relation to the opening of the succession, and he was
considered to have renounced from that time. He was
deemed to be seised, not only of the possession of the
estate of the deceased, but he might institute a suit in
respect of it, before he had obtained corporeal pos-
session. (b)

The title of the heir to the property which was the
subject of the succession was so completely acquired,
that although he were ignorant of its acquisition, it was
transmissible to his heirs. (c)

(a) Inst. lib. 2, tit 19, § 2. Dig. lib. 29, tit. 2, l. 57. Van der Keessel,
Thea. 182. H. Grotius, Manud. lib. 2, § ult. Sande, de Eff. c. 2, n. 22, and
Decis. lib. 4, tit. 12, def. 3. Valla, de Reb. dub. Tr. 6, n. 13. Vinnius, ad
Inst. lib. 2, tit. 19. Groenewegg, ad Dig. lib. 38, tit. 16, l. 14. Voe, lib. 29,
tit. 2, n. 1, 5.

(b) Poquet de Livonière, Règles du droit Français, liv. 3, ch. 1, § 3.
Duparc-Poullain, sur l’art. 538 de la Cout. de Bretagne, tom. 3, p. 468.
Lebrun, des Success. liv. 3, ch. 1, n. 1, 40. Richer, de la Mort Civile, liv. 3,
ch. 2, sect. 1, p. 213. 1 Domat, part 2, liv. 1, sect. 1, et seq.; liv. 3, tit. 1,
sect. 10.

(c) Ib.
ADITIO OR ACCEPTANCE.

It became necessary, under the civil law, and the Jurisprudence of Holland and Spain, that there should be an actual acceptance by the heir of the inheritance. And although, under the coutumes of Paris and Normandy, and the Code Civil, he was seised as heir from the death of the ancestor, "le mort saisit le vif," yet the rule "Il ne se porte héritier qui ne veut" rendered it equally necessary that he should express his intention to accept the succession, and assume the quality of heir.

The acceptance is either express or tacit. In the civil law, if it be express, it is called "aditio hereditatis," and if it be tacit, "gestio pro herede." The two descriptions are frequently used without discrimination to denote the same act, the acceptance of the inheritance.

The same distinction between an express and tacit acceptance is adopted by the coutumes of Paris and Normandy, and the Code Civil, but whether the acceptance be express or tacit, it is denoted by the term acceptation.

The adition or acceptation is express, when the person competent to take the succession as heir, expressly assumes the title or quality of heir, with the declared intention of enjoying the inheritance, and of subjecting himself to the obligations which are incident to it. (a) It would not follow that adition had taken place, or that the acceptation was express, because the party had described himself as heir, for that description might designate him as competent or entitled to take the inheritance, and not as having actually taken, or as intending to take it, and incur the liabilities which it imposed on him. (b)

The coutume of Paris, after stating the rule "Il ne se porte héritier qui ne veut," (c) proceeds to state what

(a) Inst. lib. 2, tit. 19, § 7. Vinn. ad h. lib. and tit. Dig. lib. 29, tit. 2, l. 20. Vost. ad h. lib. and tit. n. 3.
(b) Toullier, liv. 3, tit. 1, Des Success. n. 325.
(c) Coutume of Paris, 1 Dupless. art. 316.
shall constitute an acceptance of the succession: "Et neanmoins si aucun prend et appréhende les biens d'un défunt, ou partie d'iceux, quelle qu'elle soit, sans avoir autre qualité ou droit de prendre lesdits biens ou partie, il fait acte d'héritier, et s'oblige en ce faisant à payer les dettes du défunt. Et supposé qu'il lui fût dû aucune chose par le défunt, il le doit demander, et se pourvoir par justice: Autrement s'il prend de son autorité, il fait acte d'héritier." (a)

According to the coutume of Normandy, "Le mort saisit le vif sans aucun ministère de fait, et doit le plus prochain habile à succéder étant majeur déclarer en justice, dans les quarante jours après la succession échue, s'il entend y renoncer; autrement s'il a recueilli aucune chose, ou fait acte qu'il ne puisse sans nom et qualité d'héritier, il sera tenu et obligé à toutes les dettes; et où l'héritier sera mineur, le tuteur doit renoncer ou accepter dans ledit tems en la forme que dessus par l'avis des parens." (b)

The inheritance cannot be acquired: "nisi voluntate et destinatione animi: eum autem animum, qui apertâ testatione declarat, dici adire, qui facto aliquo, dici pro hæredes gerere." (c)

Perezius, in his definition of aditio, says, "Adire dicitur hæreditatem qui declarat verbis, nutu aut simili aliquo indicio, se velle esse hæredem." (d)

It does not appear that the civil law, or the laws of Spain or Holland, prescribed any form or solemnity with which this declaration should be made.

Basnage, in his commentary on the Coutume of Normandy, thus defines the two modes of accepting the inheritance: "L'acceptation d'une succession se fait en deux manières, à savoir en déclarant verbalement ou par

(b) Cout. de Norm. art. 235, p. 316.
(c) Vinn. Inst. lib. 2, tit. 19, n. 4, p. 410.
(d) Ib. Peres. ad Cod. lib. 6, tit 30, n. 19. Gaill, obs. 128, p. 553.
écrit que l’on se porte héritier, ou en faisant quelqu’acte qui ne peut se soutenir sans la qualité d’héritier.” (a)

Duplessis, in treating of the coutumes of Paris on Successions, describes these two modes: “Expressément par déclaration qui se fait en justice, ou pardevant notaires, en quelque acte, ou bien tacitement, quand on a fait acte d’héritier, ce qui engage irrévocablement.” (b)

The Code Civil adopts a similar distinction: “L’acceptation peut être expresse ou tacite: elle est expresse, quand on prend le titre ou la qualité d’héritier dans un acte authentique ou privé; elle est tacite, quand l’héritier fait un acte qui suppose nécessairement son intention d’accepter, et qu’il n’aurait droit de faire qu’en sa qualité d’héritier.” (c)

All who are capable of consenting are competent to accept the inheritance, either by aditio or gestio pro haredo.

If the heir be a minor, or if he be subjected to a curator, the inheritance is adiated for him by his tutor or curator, but in the name of the heir, according to the civil law: according to that of Holland, in the name of the tutor or curator without any act on the part of such heir. (d)

An inheritance devolving on a married woman, is adiated by her husband for her as her curator. Her consent for such adiation is not required, and he may adiate it even against her will. According to the law of Holland she cannot herself adiate it. (e)

To render the adition by any person effectual, the in-

(a) Art. 235, p. 354.
(b) 1 Dupless. c. 3, p. 233. Pothier, Introd. au tit. 17, des Droits de Success. art. 2.
(c) Art. 778.
(d) Cod. lib. 6, tit. 30, l. 5. Groeneweg. ad Cod. h. lib. and tit. and l. H. Grotius, Manud. ad Jurisp. Holl. lib. 2, c. 21, n. 2. Voet, lib. 29, tit. 2, n. 9.
heritance must have devolved on him: "Ita demum pro hærede gerendo acquirit hæreditatem, si jam sit ei delata." If he takes by institution under a will, or ab intestato, the testator or intestate must have died: "Neminem pro hærede gerere posse, vivo eo, cujus in bonis gerendum sit." (a) If he takes by substitution the previously instituted heir must have died. If he be instituted subject to a condition precedent, that condition must have taken effect. (b)

Unless he succeeds jure sanguinis, he must know that it has devolved on him. He cannot effectually adiate the inheritance if he supposes the testator to be living, although in fact the latter be dead: "Hæres institutus, si putet testatorem vivere, quamvis jam defunctus sit: adire hæreditatem non potest." (c) If he be ignorant whether his institution is absolute, or whether it be subject to a condition, or if it were subject to a condition, and he had performed that which really was, but which he did not at the time know to be a condition, his adiation would be equally ineffectual: "Sed et si scit, se hæredem institutum, sed utrum purè, an sub conditione, ignoret, non poterit adire hæreditatem, licet purè hæres institutus sit: et sub conditione, licet paruerit conditioni." (d) His adiation would be ineffectual, if he believed the will by which he was instituted was void. If he were ignorant of the title by which the inheritance had devolved on him, as if he were instituted heir in wills made by the same testator, and doubted whether the latter was not void, he could not adiate under either will.

But the adiation is not deemed ineffectual, because the heir is ignorant of the part of the inheritance to which he is instituted, if he adiates in respect of an uncertain, and not a certain part. (e)

The adiation must be absolute. It cannot be on the

(a) Dig. lib. 29, tit. 2, l. 27. Voet, ad h. lib. and tit. n. 11, 12.
(b) Voet, ib.
(c) Dig. lib. 29, tit. 2, l. 32.
(d) Dig. ib. § 1.
(e) Voet, ib. n. 13.
ADITIO OR ACCEPTANCE.

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condition, that the inheritance proves to be solvent or beneficia(l. 6a)

If an heir be instituted to one part of an estate on a condition precedent with the substitution of another person if that condition did not happen, whilst the condition is pending he can adiate only that part to which no condition was annexed.

If he be a sole heir instituted to the whole inheritance, he must adiate as to the whole, for he cannot accept part, and renounce the remainder of the inheritance. By adiating part, he is deemed to have adiated the whole: "Qui totam hæreditatem adquirere potest, is pro parte eam scindendo adire non potest. Sed et si quis ex pluribus partibus in ejusdem hæreditate institutus sit, non potest quasdam partes repudiare, quasdam adgnoscere." (b)

The heir who succeeds, either under the will, or from the intestacy of his father to a greater share than his legitim, cannot retain the latter, and reject the succession. By possessing the property of his deceased father, even for the purpose of satisfying his legitim, he necessarily has intermeddled with that property, and thereby made himself heir to the whole succession which had devolved on him. (c)

The adition must correspond with the extent of the inheritance which has devolved on the heir. If he be instituted to part only, he must adiate as to part only so long as his co-heir is deliberating whether he will accept his part or so long as a condition precedent annexed to the other part is pending and unperformed. (d)


(c) Voet, ib. n. 15. Fach. in Controv. lib. 4, c. 65, and lib. 6, c. 56.

(d) Voet, lib. 29, tit. 2, n. 15. Dig. lib. 5, tit. 4, l. 2. Gomez, Var. Res. lib. 1, c. 2, n. 15.
It seems that when the succession is not transmitted by testament, but ab intestato to immovable property, if it be situated in different places in which different laws prevail respecting the order of succession, as well as the liabilities which are incurred by the heir, the property situated in one country may be adiated, whilst that which is situated in another may be rejected. (a)

Thus, where the intestate was domiciled in Flanders, but had real property situated in Hainault, the heir might adiate the succession to the real estate in the latter, and renounce the succession to the personal property in Flanders, and thus relieve himself from the payment of the intestate’s debts, because in Hainault the heir is not liable to the debts of the deceased if he does not intermeddle with his personal estate. (a)

The inheritance, unless it has been adiated by the heir, is not transmissible to any other heirs, but those who can claim jure sanguinis, but the jus adeundi is capable of transmission to heirs by institution as well as to those whom the law calls to the succession. (b) But even the jus adeundi is not transmissible to any other heirs than descendants, if the ancestor had died in ignorance that the inheritance had devolved on him. (c)

The Code Civil provides, that when the person on whom the succession devolved dies without having accepted or repudiated it, the right of accepting or repudiating it passes to his heirs. (d)

The adiation at whatever time it is made, has relation to the testator’s death, from which time the heir is considered to have succeeded to the deceased, and acquired all his rights as heir. (e) He has thus acquired all the rights of the deceased, which were not ex-

(a) Voet, lib. n. 17. (b) Cod. lib. 6, tit. 30, l. 5.
(e) Voet, lib. 29, tit. 2, n. 18.
tinguished by his death, the dominium of all the property which constitutes the inheritance, and every species of property and right from which the deceased, at the time of his death, could derive any present or future benefit.

The law of Scotland does not adopt the maxim mor-tuus saisit vivum. The heir, therefore, before he can have an active title to his ancestor's rights, must enter by service and retour. The person entitled to enter heir to a deceased ancestor, is, before his actual entry, designated "apparent heir," though that appellation is sometimes used to denote an eldest son, even before the father's decease. (a) The brief for serving him contains a command to the judge to whom it is directed to try the validity of the claimant's title by an inquest. (b) When the inquest is assembled, the apparent heir produces to them his claim as heir, together with the brief obtained by him. In deciding on the points of the brief, the inquest may proceed, not only on the evidence offered by the claimant, but on their knowledge of any two of them, for they are considered both as judges and witnesses. If it appear to the inquest that the claim is proved or verified, they serve the claimant, i.e., they declare him heir to the deceased by a sentence or service, which must be attested by the judge. (c) The service of heir is general or special. A general service in its most proper signification, is competent only to the heir at law, and has no relation to any special subject, for it is not intended to carry any proper feudal right of lands, but merely to establish a title in him who serves to every heritable subject belonging to the deceased which requires no seisin, as reversionary, servitudes, &c., and to every personal right which had not been perfected by seisin in favour of the

(a) Ersk. b. 3, tit. 8, § 54. (b) Ib. § 59.
(c) Ib. § 60.
ancestor, as heritable bonds, dispositions, &c., and consequently to procuratories of resignation, and precepts of seisin which had not been executed. A special service is, on the contrary, calculated for perfecting the heir's title to special subjects in which the ancestor died vest and seised. (a)

II. When the heir, with the intention of adiating the succession, intermeddles with any effects which form, or which he believes to form part of it, he is said *gerere pro hærede*: "Pro hærede gerere videtur is, qui aliquid facit quasi hæres." (b)

Whether the act which has been done be such as may be deemed *gestio pro hærede* depends not so much on the act itself, as on the intention with which the act has been done: "Pro hærede gerere non esse facti quam animi." The question is, "non tam quid facerit quam quid voluerit hæres, non tam factum quam animus hæredis." (c)

Of those acts which may be adduced against him as evidence from which his acceptance of the inheritance may be inferred, some establish it as a necessary inference. Of this description are those acts which could not be done otherwise than *nomine et jure hæredis*. There are others which may admit of such an explanation as would rebut that inference; of this description are those acts which may be done either "jure ettitulo hæredis, vel etiam sine jure et titulo hæredis;" that is, they may be done by him on whom the inheritance has devolved, either in his own name or as heir. Again, acts of ownership are to be distinguished from acts having for their objects the safe custody or preservation of the property. Again, the acts of the *heir* may have no other object than that of ascertaining the extent of the inheritance. The time when those acts are done may be

(a) Ersk. ib. § 63.
(b) Dig. lib. 29, tit. 2, l. 20.
(c) Ib. Voet, lib. 29, tit. 2, n. 5.
very important in deciding whether they are done with
the intention of accepting the inheritance. (a)

If the act be such as could not have been done by
him otherwise than in the name, and by his right as
heir, there can be no difficulty in considering it as done
by him as heir, and as being *gestio pro hærede*, as where
a legacy is given on the condition of paying £100 to
the heir, and the latter accepts that sum when it is
tendered to him by the legatee. His disposition by gift,
sale, loan, or pledge of any part of the succession, sub-
mitting to a judgment against him as heir without ap-
pealing from it; his institution of an action for the di-
vision of the succession; permitting the division to take
place; commencing an action for the recovery of debts
owing to the succession; entering into a compromise
touching the succession; presenting his *petitio hæreditatis*,
or manumitting the slaves of the deceased, are some of
the many other acts which establish his *gestio pro hærede*,
and fix him with the acceptance of the inheritance. (b)

If being interrogated in a suit, to the question whether
he was heir, he answered in the affirmative, this is *gestio
pro hærede* as between him and the person who interro-
gated him, but not as between him and others. (c)

If the acts be such that they might have been done by
him, either as heir or as a stranger, without the name
or right as heir, it is to be considered whether in doing
them he intermeddled with, or used the property of the
deceased. If he has not, they will not constitute a *gestio
pro hærede*. Of this description is the giving orders
for, and causing to be performed the funeral obsequies
of the deceased, because any stranger might discharge
this office of piety and respect, and the law sanctions it

(a) Voet, ib. Freyhaus v. Cramer, 1 Knapp’s Cas. 107.
(b) Dig. lib. 29, tit. 2, l. 20, § 4; lib. 10, tit. 2, l. 36; lib. 2, tit. 15, l. 14.
lib. 6, c. 58. Voet, lib. 29, tit. 2, n. 5.
(c) Dig. lib. 11, tit. 1, l. 12, l. 22. Voet, ib.
by permitting the expence which has been incurred to be first defrayed. (a)

But if he has done those acts in respect to the estate of the deceased which he could do even without the name or right of heir, the presumption is that he has done it in that character: "unusquisque ea quæ pro se vel pro alio agere potest, magis suo quam alieno nomine fecisse credendum est." (b)

The use, or even the possession of effects which are, or which he believes to be part of the inheritance; his continuance for a considerable time in the house in which the deceased died, although the party may be his son or wife; the loan or sale of any of the effects; payment, with or without suit, to any of the creditors, or offers to set off any debt; the demand of any debt owing to the estate; the receipt of the profits of any part of the real estate; altering the cultivation; repairing or altering the buildings; cutting down timber, are some of the many acts which afford *prima facie* evidence of his behaving as heir, and fix him with the acceptance of the succession. (c)

It is incumbent on the creditors to prove the acts which import *gestio pro haerede*, or acceptance of the succession; but having proved the acts, it rests with the heir to adduce those circumstances which explain or qualify them, and negative the inference that they were done with the intention of accepting the succession. (d)


(b) Dig. lib. 46, tit. 3, l. 4. Voet, lib. 29, tit. 2, n. 7.


(d) Ib. Gaill, lib. 2, obs. 128.
GESTIO PRO HÆREDE.

It is negatived if the heir prove that before he did these acts he made protestation that they were done from motives of piety, or for the purpose of preserving the property, or that he had in view the instituted heir, or the heir ab intestato, or that they were done by him as an agent; or that he had entered on the concerns of the succession under a different right than that of heir; or that he had caused the effects to be sold because they were of a perishable nature; or that he acted under error, believing that he was dealing with his own property, and unconscious that the inheritance had devolved, or that he had some other just cause for retaining the effects of the deceased, independent of the title of heir. (a)

When the husband is instituted by the wife as her heir, he would not be considered to have behaved or acted as heir, by remaining longer in the house in which she died, and possessing himself of her effects, but it would be necessary that he should declare his intention of taking possession of her inheritance, and thus begin to possess as her heir property which he had previously possessed in right of his wife, and as her curator. (b)

And so, if the wife, being instituted heir by her husband, should after his death continue to use his effects in the house in which he died in the same manner as she had been accustomed to do in his lifetime, she would not be considered to have adiated the inheritance. (c)

A person is not considered to have behaved as heir, because he declines the payment of a debt he owed the deceased, unless he declines in respect of his right as heir, and with the view of extinguishing the debt by confusion. (d)

(a) Ib. Dig. lib. 29, tit. 2, l. 20. Voet, ib. n. 6, 7.
(b) Neostad. Cur. Sup. decis. 86.
(d) Ib.
If he should receive from the heir who was substituted, or who would have been entitled to succeed in case there had been an intestacy, a sum of money to relinquish the inheritance to which he had been instituted, he is not considered *gessisse pro hærede*, because by that act he demonstrates his intention not to accept it. (a) But a contrary opinion was maintained by Le Maitre. (b)

The Code Civil has adopted the latter opinion: “La donation, vente ou transport que fait de ses droits successifs un des cohéritiers, soit à un étranger, soit à tous ses cohéritiers soit quelques-uns d’eux, emporte de sa part acceptance de la succession. Il en est de même de la renonciation, même gratuite, que fait un des héritiers au profit d’un ou de plusieurs de ses cohéritiers. De la renonciation qu’il fait même au profit de tous ses cohéritiers indistinctement, lorsqu’il reçoit le prix de sa renonciation.” (c)

These general rules are adopted in the coutumes of Paris and Normandy. (d)

In the article of the coutume of Paris it will be seen that the intromission with any part of the effects, quelle qu’elle soit, is an acceptance of the inheritance.

In addition to the preceding article of the Code Civil which has been cited, it is expressly declared by articles 779, 782, and 783, “Les actes purement conservatoires, de surveillance et d’administration provisoire, ne sont pas des actes d’adiation d’héritéité, si l’on n’y a pas pris le titre ou la qualité d’héritier.” “Si ces héritiers ne sont pas


(c) Art. 780. Toullier, des Success. liv. 3, tit. 1, c. 5, n. 328.

d'accord pour accepter ou pour répudier la succession, elle doit être acceptée sous bénéfice d'invéntaire." (a) "Le majeur ne peut attaquer l'acceptation expresse ou tacite qu'il a faite d'une succession, que dans le cas où cette acceptation aurait été la suite d'un dol pratiqué envers lui : il ne peut jamais réclamer sous prétexte de lésion, excepté seulement dans le cas où la succession se trouverait absorbée ou diminuée de plus de moitié par la découverte d'un testament inconnu au moment de l'acceptation." (b)

By the law of Scotland, an heir, although he can have no active title to his ancestor's estate, without subjecting himself to his debts, may become liable for the ancestor's debts, without having a right to his estate, by doing certain acts which the law has declared to infer a passive title. The two most considerable passive titles proper to heritage are, gestio pro hærede, which is an universal one, and præceptio hæreditatis, which is limited. Gestio pro hærede, or behaviour as heir, is a passive title, by which an apparent heir becomes liable for the whole of his ancestor's debts, arising from his so behaving himself with regard to the heritage of the deceased, as none other than an heir legally served has a right to do. (c)

Gestio pro hærede is inferred most frequently by the heir's inmixing after the death of the ancestor, either by himself, his tenants, stewards, or others in his behalf, with any part of the lands or other heritable subjects, to which he himself might have completed an active title by service, e. g. with the rents of the ancestor's lands; notwithstanding the lands had been adjudged from the ancestor during his life, if either the legal of the adjudication was yet current at the time of the heir's inmixtion, or if the ancestor died seised, and in the possession of the lands. (d)

(a) Art. 779, 782.  (b) Art. 783.  (c) Erskine, b. 3, tit. 8, § 82.
(d) Stair, Feb. 21st, 1663, Hamilton, Dict. 9655.

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But if the adjudger were infeft, and in possession when the ancestor died, the passive title is excluded. (a)

A grant by the heir of a lease of the ancestor's estate, or his possession of lands of which the ancestor had a lease not expired at his decease, infers behaviour. The husband's intermeddling with the rents of the estate in which the wife was apparent heir, ought in equity to subject him to this passive title, for though he himself is not the heir, yet as the law gives him the sole management of his wife's estate, all possession had by him in her name ought to bring him under the like penalties with herself, had she been the possessor. (b)

It is inferred by the heir's intermeddling with the writings or title-deeds of his ancestor's estate.

The more modern doctrine of the Courts is not to act with the same strictness as formerly in inferring the passive title. (c)

Where the heir possessed himself of the charter chest, which is nomen universitatis, his animus gerendi was presumed, and therefore he was subjected to the passive title; (d) but if he carried off from the repositories of the deceased only particular deeds granted in his own favour, or where from his making no use of the writings, or from other favourable circumstances there appeared no intention of behaving, he was absolved. (e)

It is also inferred by the heir making over to a third

(a) Stair, July 11th, 1671, Maxwell, Dict. 5306.
(b) Fount. Dec. 17th, 1703, Linthill, Dict. 9679.
party any subject belonging to his ancestor, to which he himself might have succeeded as heir, or by consenting to the conveyance thereof made by another, (a) or by granting discharges of rents or of debts due to the ancestor. But the simple renunciation by the heir of all claim to the succession in favour of the heir male or of provision infers no passive title, although he should have received a valuable consideration for granting it, because no right which might have been otherwise competent to creditors is either transmitted or extinguished by such renunciation, and they are in no worse condition than before. (b)

The passive title of gestio is excluded, if the subject intermeddled with was truly no part of the estate left by the deceased. Thus, an heir immixing with the heirship moveables of his ancestor, who died at the hour after his single escheat was gifted and the gift declared, infers no passive title, because these moveables belonged after declaration, not to the deceased, but to the donatary, to whom alone the heir was accountable, and not to the creditors. (c) *A fortiori*, it is excluded, if the possession by the heir can be ascribed to a disposition, gift, or other singular title in himself, *e.g.* if he has im-mixed with the ancestor's heirship moveables, as donatary to his escheat. (d)

To prevent a fraudulent practice which was sometimes resorted to of a pretended adjudication and sale, and subsequent purchase, the Court of Session interposed by act of sederrunt, (e) and subjected heirs who should possess upon adjudications, that had been led on their own

(a) Dario, Feb. 10th, 1642, Johnston, Dict. 9692. Stair, July 30th, 1672, Fowlis, Dict. 9711.
(c) Stair, Dec. 23rd, 1674, Seaton, Dict. 5397.
(d) Ib. Feb. 10th, 1676, Grant, Dict. 9763.
(e) Feb. 28th, 1662.
bond, to a passive title. The legislature afterwards passed an act, (a) by which it was enacted, that if an heir, without being served, should possess any part of his ancestor's estate, or purchase any right affecting it otherwise than as highest bidder at a judicial sale, such possession or purchase should be deemed behaviour as heir.

Notwithstanding certain decisions to the contrary, it is held, that a purchase made by an apparent heir while the ancestor lived, and possession assumed thereupon before his death, excluded all ground of challenge upon this statute, although the purchaser continued in the possession after his death. (b)

Behaviour is also excluded where the subject intermeddled with by the heir is inconsiderable, if there be no circumstances from which his intention to defraud the creditors of the deceased can be presumed. (c) But on the other hand, intromissions, however small, subject the heir to the passive title, where an animus of im-mixing appears. (d)

The heir's voluntary payment of his ancestor's debts is not to be construed against him into behaviour, for a stranger, as well as an heir, may lawfully pay what is due by another. (e)

Nor does the purchasing of briefs by the heir to enter infer behaviour, although it signifies a present purpose or intention to serve him, because any man may alter his resolution before it be put in execution; (f) nor an apparent heir's assuming his ancestor's title of honour, nor the exercising any office of high dignity hereditary to the family which carries with it no pecuniary interest, and is extra commercium, and enjoyed by the heir

(a) 1695, c. 24.  (b) M'Neil, July 29th, 1759, Dict. 9752.
(c) Durie, Nov. 6th, 1622, L. Dundas, Dict. 9658.
(d) Hadd. March 8th, 1610, Baillie, Dict. 9658.
(e) Durie, Jan. 26th, 1628, Comm. of Dunkeld, Dict. 3502.
(f) Stair, June 28th, 1670, Elcis, Dict. 9668. Ersk. b. 3, tit. 8, § 86.
without representation. Yet the exercise of any hereditary office of profit which may be bought and sold, and consequently adudgeable, may be justly deemed to infer this passive title. (a)

Where an heir has intromitted at the request of creditors, and as trustee for their benefit, and with notice that no use is to be made of it but for them, he has been held not liable on the passive titles. (b)

Making up a title erroneously, for the mere purpose of redisposing a trust estate, has been held not to infer representation. (c) Making up a title by general service, but taking nothing by it, does not infer a passive title. (d)

Vitiious intromission is purged by confirmation before action, or within year and day as executor, (e) not as executor-creditor merely. (f)

The pleading of a defence in an action brought as against an heir, imports a passive title; but only as to that debt. (g)

The representation inferred from a charge to enter heir unanswered, is limited to that particular occasion. (h)

III. Heirs were frequently deterred from adiating an inheritance in consequence of the personal responsibility they incurred to the creditors and legatees of the deceased.


(b) Walker, Dec. 4th, 1827, 6 S. and D. 204.

(c) Ayton, July 7th, 1784, Dict. 9732.

(d) Earl of Fife, March 7th, 1828, 6 S. and D. 698.


(h) Ersk. b. 3, tit. 8, § 93.
To encourage their acceptance of successions, and afford them protection, a certain space of time was allowed them for deliberating and ascertaining whether it would be for their benefit to accept or renounce the succession. This is the *jus deliberandi* of the civil law, and which retains all the substantial properties, without the forms and solemnities of the old *jus cretionis*, which was abolished.

The testator might in his testament prescribe the time, within which the heir must decide whether he will adiate the succession, and if the latter neglects to adiate within that time, the succession devolves on the person next entitled by substitution, or if there be no substitution, on the heir *ab intestato*.

If the testator had prescribed no time, and those who claim as heirs by institution, or as legatees, or creditors called on the heir to declare his intention, the pretor granted him one hundred days, and it was not unusual for him to extend it, on the heir's shewing a reasonable cause for further delay. At length in all cases, and without the necessity of an application, the heir was entitled to the space of a year for deliberating whether he would adiate the inheritance. (a)

Justinian afterwards limited the period which the pretor could grant to nine months; but he reserved to the prince the power of granting a year. (b)

If there are several heirs to succeed by substitution, the time which is taken by the heir first in the order of succession does not run against the next or substituted heir, nor against the heir *ab intestato*, if there should be a substituted heir, for the *tempus deliberandi* accompanies the inheritance until there be found the heir who will adiate it. (c)

When the heir has allowed the time to elapse without

(a) Dig. lib. 28, tit. 8, l. 1, § 1, 2; l. 2, 3, 4. Cod. lib. 6, tit. 30, l. 9, l. 19. Perez. Cod. lib. 6, tit. 30.
(c) Dig. lib. 28, tit. 8, l. 10; lib. 29, tit. 2, l. 69. Perez. ib. n. 6, 7. Voet, lib. 28, tit. 8, n. 3.
declaring his intention but has remained silent, if he has deliberated at the instance of the substituted heir, or the heirs ab intestato, he will be presumed to have renounced the inheritance, and the substitute or heir ab intestato will then become entitled. But if he had deliberated at the instance of the legatees or creditors, he will be presumed from his silence to have entered on the inheritance. The rule "silentium adversus eum quem mentem explicare debuerat interpretamur," applies. If he is urged by the heirs substitute or ab intestato, it is to be presumed to be for their benefit and against his own interest that he should renounce it. But if he be urged by the creditors and legatees, it is presumed that it is for their interest and against himself he should adiate, in order that there should be a person from whom they might recover their debts or legacies. (a)

When the heir is a minor, the jus deliberandi may be exercised by his tutor or guardian. (b)

As a legacy may be given on such a condition as might render it doubtful whether it would be beneficial to the legatee to accept it, he is also permitted to deliberate. (c)

The heir, by taking the tempus deliberandi, is entitled to the inspection of the books, papers, accounts, &c. of the deceased, in whatever person's possession they may be. (d)

During the period allowed for deliberation, the heir is restrained from making any alienation of the property unless he obtains permission on account of the articles being perishable, or if money be indispensably required for the preservation of the estate, nor can he

(a) Cod. lib. 6, tit. 30, l. 22, § 14. Peres. ib. Voet, ib. n. 3.
(b) Peres. in Cod. lib. 6, tit. 30, n. 3.
(c) Dig. lib. 36, tit. 1, l. 30; l. 71; lib. 34, tit. 5, l. 15. Voet, ib. n. 4.
(d) Dig. lib. 28, tit. 8, l. 5; lib. 29, tit. 2, l. 28.
bring any action as heir. The creditors may obtain the appointment of a curator to take possession of the property until it is ascertained whether he will adiate the succession. (a)

The surviving husband or wife is bound by the law of Holland to furnish the heirs of the deceased with an inventory of the estate, in order that they may deliberate on the acceptance of the succession. (b)

One of the necessary consequences of the heir obtaining time to deliberate is, that he is deprived of the power of alienation, and the creditors are let into possession of the estate. (c)

If the heir after the expiration of the tempus deliberandi does not renounce the inheritance, he is considered to have taken possession, and he becomes personally liable in solidum to all the creditors of the deceased. (d)

If the heir, who has not adiated nor renounced the succession after he knows it had devolved on him should die within a year, but not otherwise, his jus deliberandi is transmissible to his heirs.

The foundation of this right of transmission rests on the presumed deliberation of the deceased heir, but there is no ground for this presumption if he were ignorant that the inheritance had devolved on him.

Although the deceased has not entered on the possession, yet he must not have renounced the succession, for if he has renounced it, there is nothing which he has to transmit to his heirs. His heirs can derive no greater advantage than he himself possessed.

The heir must have died within the year from the time

(a) Dig. lib. 38, tit. 8, l. 5, § 1; l. 6, 9; lib. 29, tit. 3, l. 20. Voet, lib. 28, tit. 8, n. 6.

(b) Voet, lib. 28, tit. 8, n. 6. Resp. Jurisc. Holl. part 1, cons. 136. Someren, de Jure Nov. c. 7, n. 1, 2. (c) ib.

when he first knew that the inheritance had devolved on him. The right of transmission ceases after the expiration of the year. (a)

If the heir has either taken possession of the inheritance, or acted as heir, he cannot obtain the power of deliberating. He who has once become the heir, cannot afterwards cease to be heir. (b)

In Holland, the heir before he determines whether he will enter on the succession, takes out a judicial act, called an act of deliberation or non-prejudice. (c)

Its effect prevents those necessary acts done by him to ascertain the solvency of the estate from being construed as an acte hereditaire, or of acceptance, unless the acts were of such a nature as to alter or confound the property of the testator, and destroy it entirely; as for example, the making payments after passing this act. Further, the operation of this act continues no longer than the creditors are content to wait, since they have the right to compel the heir to accept or repudiate the inheritance. (d)

The law of Spain affords the heir a space of time for deliberating whether he would accept the inheritance, and it would seem the sovereign might grant a year for this purpose. (e)

In Trinidad, certain rules have been adopted by the Court of First Instance of Civil Jurisdiction, for the purpose of compelling the testamentary executor to declare his acceptance, or renunciation of the executorship. The testamentary executor is required within one month after the decease of the testator, or within

(a) Perez. ad Cod. lib. 6, tit. 30, n. 6, 7. Sande, ib.
(b) Voet, lib. 28, tit. 8, n. 8.
(d) Van der Linden, p. 150.
(e) L. 1, 2, tit. 6, Part. 6.
one month after he has notice of the decease of the testator, and of his appointment as executor, to make application to the said court by petition, with a duly certified copy of the will annexed thereto, praying for the inventory and appraisement of the property of the testator, setting forth the time and place of his death, and the place in which the property is situated, and nominating in such petition some person as appraiser in his behalf; and in default thereof, the court, upon the petition of any party interested under the will, causes the person so making default to be summoned to declare his acceptance or renunciation of the executorship. If he appears and declares to accept thereof, he must proceed within seven days after acceptance to make application to the court in manner thereinbefore directed; unless he shews good and sufficient cause to the contrary, to be adjudged by the court; and in default thereof, he is subject and liable to all costs incurred by his neglect. But in case no such executor is named in the will, or being named therein is absent from the island, or being present neglects to appear, or renounces the execution of the will, or after acceptance fails to proceed within seven days as directed, the court appoints some person as albacea dativo, who proceeds within seven days after his appointment in the manner directed, or shews good cause to the contrary to be judged of by the court. (a)

In all cases of persons dying intestate who have heirs resident within the jurisdiction, application is to be made by such heirs to the Court of First Instance of Civil Jurisdiction, for the inventory and appraisement of the property of the deceased, within such time and in such manner, and subject to the same penalties, forfeitures, and damages as in the rules are directed with

(a) Rules and Orders of the Court of First Instance, March 22nd, 1823, cl. 2.
respect to executors or persons charged with the exec-
ution of the will of any deceased testator; and to all
other penalties provided against heirs entering into the
possession of the property of their ancestors without
inventory. But if no such heir shall be resident within
the jurisdiction, or being such, shall fail to proceed as
thereinbefore directed, the court upon the report of the
decease of any such intestate, directs the inventory and
appraisement of his property to be proceeded in, in such
manner as may appear to it most conducive to the
interest of any parties who may be entitled to it. (a)

No time for deliberating by the heir was prescribed,
by the coutumes of Paris or of Normandy. The heir
presumptive might, at the instance of the creditors of
the deceased, or by legatees or relations of the de-
ceased competent to succeed, be compelled to assume
the quality of heir. He obtained a delay of forty days
reckoned from the period when the inventory was
made.

The ordinance of 1667, gives him a delay of three
months from the opening of the succession to make an
inventory, and forty days after to deliberate. If he has
completed the inventory before the three months have
elapsed, the forty days for deliberation will run from
the day when it was completed. Thus, if the ancestor
died on the 1st of January, the heir has until the 1st of
April to make the inventory, and from thence forty days,
including the 11th of May to deliberate; and on the
12th of May the prescribed time will have expired.
If the inventory be completed before the 1st of April,
for instance, on the 20th of March, the delay of forty
days will begin to run from that day and including
the 30th of April, the prescribed time will have expired

(a) Rules and Orders of the Court of First Instance, March 22nd, 1823,
c. 7.
on the 1st of May. The court has authority on just grounds to extend the time. (a)

The Code Civil has given the same time. (b)

By the law of Scotland, the heir is allowed a year to deliberate whether he will decline the responsibility of accepting the succession. It is computed from the ancestor's death, or from the heir's own birth if posthumous; (c) and the term will not be prolonged on account of the distance of the place in which the ancestor dies. (d) If the apparent heir should die during the annus deliberandi, the next heir has the privilege of his own annus deliberandi from the death of the former. (e) During the annus deliberandi, the heir is not bound to answer in any action, in the defence whereof he must speak as heir, (f) except in relation to the widow's jointure. (g) But this privilege of deliberating is lost; 1st. By service as heir; 2nd. By passive representation; (h) and it will not stop an action of judicial sale. (i)

The heir must deal equally with his creditors in this matter, and the law will aid them in accomplishing that object. (k)

The heir is entitled to raise an action for exhibition of all deeds or obligations by which the state of the

(b) Art. 795, 797. Toullier, des Success. liv. 3, tit. 1, c. 5, n. 364.
(c) Erakine, b. 3, tit. 8, § 54. Summers, Dec. 23rd, 1757, Dict. 6882.
Henderson, Nov. 14th, 1783, Dict. 5992, 2 Hailes, 999.
(d) Henderson, Nov. 14th, 1783, Dict. 5992.
(f) Erak. ib. § 55. Stewart, Feb. 25th, 1749, Dict. 6881.
(g) Pitcairn, Dec. 4th, 1708, Dict. 6876.
(i) Campbell, Nov. 19th, 1708, Dict. 6877.
(k) Summers, Dec. 23rd, 1757, Dict. 6882. McIntosh, July 1st, 1829, 7 S. and D.
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deceased's estate may be explained, and so for all deeds relative to the predecessor's land or estate, or debts owing by him, (a) but he cannot call generally for all deeds, debts, &c. which may be hurtful or profitable to the heir. (b)

This action is not, in point of time, limited to the annus deliberandi, but may be raised any time before service. (c)

IV. Notwithstanding the precaution of the heir in endeavouring to ascertain the solvency of the estate before he adiated, yet as debts might subsequently appear, of which he was previously ignorant, he was by his adiation exposed to a personal liability to an extent greatly exceeding the value of the inheritance. (d)

As an effectual remedy, a law of Justinian allowed the heir to adiate the succession under the benefit of inventory, and thus limit his liability to the amount of the estate included in the inventory: "Ut in tantum hæreditatis creditoribus teneatur, in quantum res substantiae ad eum devoluetæ valeant." (e)

The benefit of inventory belongs to the heir, notwithstanding he may have previously obtained the tempus deliberandi. (f)

The inventory was to be made within a prescribed time, which however in cases of necessity might be prolonged. It was made in the presence of a notary; its contents were supported by the testimony of credible witnesses. The creditors were convened to superintend

(b) Heron, Nov. 30th, 1756, Dict. 4019.
(c) Niabet, July 1st, 1626, Dict. 3982. M'Farlane, Jan. 12th, 1779, Dict. 3991, 2 Hailes, 815.
(d) Inst. lib. 2, tit. 19, § 6. Cod. lib. 6, tit. 30, l. 22.
(f) Voet, ib. n. 13.
the manner in which it was made. It was signed by the heir, or if he could not write, by the notary. (a)

The benefit of inventory was granted only by the States General in Holland. (b)

Before the colonies of Demerara, Berbice, Ceylon, and the Cape of Good Hope formed part of the British dominions, it was issued by the court of Holland. It is now granted by the king in council, on the report of the Lords’ Committee for hearing appeals from the plantations.

Heirs by institution, no less than those \textit{ab intestato}, are entitled to the writ of benefit of inventory. (c)

Those who have already intermeddled with the effects of the deceased, or in any other manner acted as heirs cannot obtain it, but they are considered simply as heirs, and bound to pay all the debts of the inheritance. (d)

The heir who entered simply did not in the civil law exclude another heir in equal degree who entered under the benefit of inventory. (e)

But in the jurisprudence of Holland and of other countries, if before the confirmation of the writ a descendant more remote would accept the inheritance without the benefit of inventory, the nearest heir, or the heir by institution, cannot obtain the writ. (f) He must

(a) Cod. lib. 6, tit. 30, l. 22, § 2, 3, 11. Lauterb. disp. 91, de Hered. n. 14, 15. Novell, 1, l. 2, § 1. Ritterhus, \textit{ad hanc} Novell. p. 6, l. 8, n. 35.
(c) Voet, lib. 28, tit. 8, n. 13, 14.
therefore relinquish the succession, or accept it without
the benefit of inventory. Thus, in Holland and Zealand,
even the children of the deceased might be excluded, if
the more distant heir offered to enter on the inheritance
without the benefit of inventory. (a)

According to the coutume of Paris, the heir who enters
simply will not exclude the heir who enters under
benefit of inventory in the direct line, but he will exclude
the latter in the collateral line. (b)

In Holland, it has been decided that such an offer by
the husband, unless he be related by blood to his wife,
cannot exclude the wife's heir. (c)

When the more remote heir would exclude the nearer
heir by offering to enter on the succession simply and
without benefit of inventory, he must make the offer
before the writ of benefit of inventory has been con-
firmed. (d)

The Code Civil treats the benefit of inventory as a
right to which the heir instituted or legatee is entitled,
and no preference is given to a more remote heir, who
will enter simply as heir. (e) No such distinction is ad-
mitted in the law of Spain or of Scotland.

It is competent for the person who has obtained the
writ to renounce it when he finds that its acceptance is
attended with difficulty.

Although a testator cannot by any directions in his
will prejudice the right of the creditors to a full and
correct inventory of his estate in every case in which an
heir enters under benefit of inventory, yet he may
declare that if the person whom he institutes will not

(a) Ib.
(b) 1 Dupless. 232, Coutume Paris, art. 341, 343. Coutume Norm.
art. 90, 1 Bannage, 134.
(d) Ib.
(e) Duranton, liv. 3, tit. 1, c. 5, § 3, des Success. n. 9.
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accept the succession otherwise than under inventory, it shall pass to another. (a)

The inventory ought to contain every thing which is found among the testator's estate and effects, whether moveable or immovable, whether it be the absolute property of the testator or that of another which was in his possession at the time of his death on deposit, loan, pledge or mortgage. (b)

If the heir dolō malō excluded from the inventory any part of the testator's property, he forfeited double its amount, and was deprived of the Falcidian deduction. (c)

After he has commenced, and until he has completed the inventory, the creditors of the deceased cannot institute any suit against him, nor execute a judgment obtained against the deceased in his lifetime. (d) But the owner of property which was in the possession of the deceased at the time of his death, may during the period the heir is completing the inventory proceed against him for its recovery. (e) The heir may also be compelled to continue a suit commenced in the lifetime of the deceased, and pending at the time of his death. (f)

The heir is himself at liberty whilst he is making the inventory to institute proceedings against the debtors of the deceased, who may be approaching to insolvent circumstances. (g)

If any creditors opposed the confirmation of the writ, other creditors whose demands were liquidated might

(a) Voet, lib. 28, tit. 8, n. 15. Peres. Cod. lib. 6, tit. 30, n. 18. Ritterah. ad Novell, p. 6, c. 8, n. 6. Fab. Cod. lib. 6, tit. 11, def. 43.
(c) Dig. lib. 5, tit. 30, l. 22, § 10. Dig. lib. 35, tit. 2, l. 24, and lib. 34, tit. 9, l. 6. Voet, lib. 38, tit. 8, n. 16.
(e) Ib. Fab. Cod. lib. 6, tit. 11, def. 28, in notis. Fach. Controv. lib. 6, c. 27.
(f) Voet, lib. 5, tit. 1, n. 32.
(g) Peres. Cod. lib. 6, tit. 30, n. 11. Boer. decis. 53, 4. n. Voet, lib. 28, tit. 8, n. 17.
petition before its confirmation for satisfaction of their demands, on giving security to restore that which they received, if other demands should thereafter prove preferable to theirs. (a)

The effects resulting from the inventory when completed are:

1st. The heir is not responsible to any of the creditors, whatever might be the nature of their demands, beyond the amount of the inventory, and no part of his own property is liable to them.

If any part of his own property were put up to sale with that of the deceased, he could enter his opposition to the sale as if he had not been heir. But if any part of the heir's property had been alienated by the deceased in his lifetime, the heir must make good the act of the ancestor, and his only relief is to indemnify himself by retaining its value out of the ancestor's estate. (b)

2ndly. If the heir under the benefit of inventory having been the surety of the testator were proceeded against in solidum by the creditor, and paid the debt, he became himself a creditor on the estate of the testator for the amount so paid, and there was no confusion. (c)

3rdly. He was enabled to sell, and by delivering to the purchaser the dominium in the property of the ancestor, the purchaser was not answerable to any creditor by mortgage, nor was he bound to restore the property which had been sold. (d)

4thly. He was not bound to observe the priority or privileged nature of the creditors' demands, but he might either from the money found in the testator's possession at his death, or from the price obtained by the sale of any of his property, safely pay the first creditor who applied; and when he had exhausted the whole estate, he

(a) Voet, lib. 28, tit. 8, n. 20. Wassenaar, Pract. Jud. c. 15, n. 41, 42, 43.
(b) Peres. ib. n. 11. (c) Peres. ib. Voet, lib. 28, tit. 8, n. 18.
(d) Voet, ib. n. 19.

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was no further liable to any other creditors who might subsequently come forward. (a)

The edict of Charles V., 19th May, 1554, art. 40, ordained, that the payment of liquidated debts should not be postponed on account of unliquidated debts, provided the creditors, on receiving the payment of them, gave security to refund in case preferable demands should afterwards appear. (b)

The heir might deliver any part of the subjects of succession in payment of a debt whenever there was no cash of the deceased, or no purchasers found for those articles which were saleable by the heir. (c)

The law of Holland does not give this privilege, but requires that every part of the estate should be sold by public auction. (d)

If any part of the testator's effects had perished, the loss would fall on the heir, if he had not entered under the benefit of inventory; but having entered under it, the loss falls on the creditors and legatees. (e)

He is entitled to retain, in preference to any other claims, the necessary expenses incurred by him in the funeral of the deceased, in recording the will, making the inventory, and prosecuting and defending suits instituted on behalf of, or against the testator's estate, and in resisting an unjust opposition to the confirmation of the writ of benefit of inventory. (f)

Confusion does not take place if the heir be debtor to, or the creditor of the deceased. The heir cannot

(a) Voet, ib. n. 20. Peres. ib.


(d) Groesenweg. ad Cod. lib. 8, tit. 43. Peres. ad Cod. lib. 6, tit. 30, n. 11. Voet, lib. 28, eft. 8, n. 22.


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deduct from the estate any debt which is owing to him, but he comes in pro rata with the other creditors, but he retains his priority, if his demand is secured by hypothec, or is privileged. (a)

If possession be taken of the inheritance otherwise than under the benefit of inventory, not only is the heir bound to pay all the debts of the testator, however inadequate the estate may be for that purpose, but he cannot deduct his Falcidian portion from the legacies, nor can he retain his legitima portio. The presumption is that the inheritance is sufficient for all these claims. (b)

It seems also, that the wife being instituted heir by her husband, would be deprived of her dotal portion if she neglected to enter under the benefit of inventory. (c)

In the nature of the inventory, in the effects which result from it if it be correctly made, and the consequences which result from the heir entering on the succession without the benefit of inventory, in the exemptions which he enjoys, and the rights which he may exercise during the period which elapses before he has made it, the coutumes of Paris and Normandy adopt the principles which have been stated. (d)

The Code Civil does not permit the heir to sell the moveables of the succession, without the intervention of a public officer at auction, and after the accustomed notices have been fixed, and publications made. If he produce them in their natural state, he is only responsible for such depreciation or deterioration as has been caused by his negligence. (e) He cannot sell the immovable except under legal process.

(b) Voet, lib. 23, tit. 8, n. 27.
(c) Matth. de Success. disp. 16, thea. 12. Peckius, de Test. Conj. l. 1, c. 36.
(d) Fothier, Tr. des Success. c. 3, s. 3. art. 2. Ferriere, Trad. des Inst. liv. 2, tit. 19, § 6, tom. 3, p. 199.
(e) Code Civil, art. 805.
Where there are opposing creditors, the beneficiary heir cannot pay, but in the order and manner regulated by the judge. But if there be no opposing creditors, he is to pay the creditors and legatees as they come forward. (a)

The non-opposing creditors who do not come forward until after passing the account and payment of the balance, have no remedy but against the legatees.

In both cases the remedy is prescribed by the lapse of three years, reckoning from the day of passing the account, and payment of the balance. (b)

The law of Scotland allows the heir to limit his responsibility by serving heir cum beneficio inventarui, i.e. with reference to an inventory of the amount and value of the estate lodged with the sheriff-clerk of the shire where the lands lie. But the inventory must for this purpose be lodged with the sheriff-clerk, and recorded within a year from the ancestor's death, or from the birth of a posthumous child; (c) or if the first heir has died in apparentcy, the next heir may claim the benefit, provided he give in the inventory within a year after the succession opens upon him. (d)

The form is in no respect different from an ordinary service, except in being qualified by the words cum beneficio inventarui, and in there being a particular inventory given up, on oath, and recorded, of all the predecessor's lands, houses, and heritable rights of all kinds, which the heir means to take up. (e)

The requisites of this form of service are, 1. That a full and particular inventory of the heritable estate, signed by the heir before witnesses, and sworn to as correct before the service proceeds, be lodged with the sheriff's clerk of every shire in which the lands lie; or

(a) Art. 808.
(b) Art. 809.
(c) Act. 1695, c. 24. Erskine, b. 3, tit. 8, § 66.
(d) Bruce, Feb. 1, 1704, Dict. 5339.
(e) See 5 Bell's Forms, 557. 1 Juridical Styles, 401.
of the shire where the deceased died, if the subject do not require sasine. (a) 2. That this must be done, and before the service, the inventory must be signed by the sheriff, and recorded in his books, within the annus deliberrandi, or at least within a year after the succession opens to the heir serving; yet the Court has allowed the inventory to be recorded after the year when the heir had been abroad, reserving all objections. (b) 3. That within forty days after the expiration of the year the inventory shall be recorded in the Books of Session, in a particular record kept for the purpose. 4. That the lodging of this inventory infers, of itself, no passive title, provided it be not followed up by service. 5. Service may proceed at any time after the inventory is recorded.

If the apparent heir who enters cum beneficio inventarii have any intromission with the defunct's heritable estate or any part thereof, otherwise than necessary intromission for custody and preservation before his giving in, recording, and extracting the said inventory in manner aforesaid, or if he fraudulently omit anything out of the said inventory, that is which he shall be found to have intromitted with, or possessed, then and in either of these cases, he shall lose the benefit of the inventory, and be universally liable as if entered heir without inventory. But if any thing be omitted without fraud, and be not in the mean time affected by diligence at the instance of a creditor, he has liberty, as soon as he comes to the knowledge thereof, and within forty days thereafter, to make an eik of the same to the said inventory, which eik is to be made and subscribed, given in and recorded in the same manner with the principal inventory. It has been held that a factor


may in the absence of the heir make up the inventory. (a)

The effects of the service with benefit of inventory, are 1. To make the heirs personally liable for debts of the deceased to the extent of the inventory, and not to make those debts burthens on the lands, as on a trust estate: or to bring in the creditors, pari passu, (b) or to entitle the heir to satisfy any creditor on demand. 2. To limit the demands of creditors against the heir to the amount of the inventory. 3. To entitle the heir to dispose of the estate as he pleases, if not prevented by diligence. 4. To impose on the heir the duty of a trustee to account for the estate in the inventory. The creditors may insist on having the estate itself given up to them, and the heir may prevent an adjudication, by offering to convey the lands to the adjudger: (c) and they are entitled to have the estate, with any improvements which the heir may have made. (d)

V. The repudiation or renunciation of the succession may be made, “non tantum verbis sed etiam re et alio quovis indicio voluntatis.” (e)

The Code Civil does not presume a renunciation. It can only be made before the registrar of the tribunal of first instance of the district where the succession has opened. (f)

Those capable of adiating are also capable of re-

(a) Paton, July 24th, 1785, Dict. 4071.
(b) Gordon, July 22nd, 1741, Dict. 5352. Scott, July 4, 1724, Dict. 5336.
(c) Lord Ormiston, Jan. 11th, 1711, Dict. 5334.
(e) Cod. lib. 6, tit. 31. Peres. ad Cod. h. lib. and tit. n. 2. Dig. lib. 99, tit. 2, l. 95.
(f) Code Civil, art. 784. Toullier, liv. 3, tit. 1, c. 5, n. 338.
nouncing the inheritance: "Is potest repudiare qui et acquirere potest." (a)

If those on whom it has devolved are minors or under curatorship, it is made by the tutors or curators: "Nolle adire hæreditatem non videtur qui non potest adire," (b) for "Ejus est nolle qui potest velle."

Those of full age who either aditione, or gestione pro hærede, have accepted the inheritance, can never afterwards renounce it: "Semel hæres nunquam desinit esse hæres," is a rule which admits of very few exceptions. (c)

It cannot be renounced before it is capable of being adiated: "Quod quis, si velit, habere non potest; id repudiare non potest." (d) The renunciation cannot take place until the inheritance has devolved on him.

By the law of Holland, a widow, after having declared her intention to abide by the will of her deceased husband, if she finds that she cannot derive under it those bequests she expected, is not precluded from resorting to her dotal contract, and enforcing her claims under it, because it cannot be supposed she would have rejected the latter, but under the expectation of deriving greater benefit under the will. (e)

Although the succession may be renounced by the guardian for his ward, yet it seems that if any part consists of immoveable property, such renunciation could not be made without the previous authority of the court. (f)

(a) Dig. ib. 1. 16.
(c) Cod. lib. 6, tit. 31, l. 4. Inst. lib. 2, tit. 19, § 5.
(d) Dig. lib. 50, tit. 17, l. 174. Voet, ib. Pothier, ib. Toullier, ib.
(f) Voet, ib. n. 34.
According to the civil law, and the laws of Holland and Spain, it was in the power of the heir by repudiating the succession to prejudice his creditors: "Non alienat qui duntaxat omittit possessionem." (a)

The coutume of Normandy has expressly provided against such a fraud by giving the creditors the power of accepting the succession: "Avenant que le debiteur renonce, ou ne veuille accepter la succession qui lui est echue, ses creanciers pourront se faire subroger en souli eu et droit pour l'accepter, et être paiex sur la dite succes-sion jusqu'à la concurrence de leur dû selon l'ordre de priorité et posteriorité, et s'il reste aucune chose, les dettes paiées, il reviendra aux autres heritiers plus prochains après celui qui a renoncé." (b)

Although there is no such provision in the coutume of Paris, yet the decisions have adopted the article in the coutume of Normandy. (c)

It will be observed that this substitution of creditors for the incoming heir does not extend to those who become creditors after the renunciation. (d)

The Code Civil has adopted a similar provision: "Les creanciers de celui qui renonce au prejudice de leurs droits, peuvent se faire autoriser en justice à accepter la succession du chef de leur debiteur en son lieu et place. Dans ce cas, la renonciation n'est annulee qu'en faveur des creanciers, et jusqu'à concurrence seulement de leurs creances: elle ne l'est pas au profit de l'héritier qui a renonce." (e)

By the law of Holland, the husband might without the consent and against the will of his wife renounce a succession which had devolved on her, however ad-

(b) 1 Bamage, p. 442, art. 278.
(c) 1 Bamage, p. 443. 1 Dupless. p. 726.
(d) Ib. (e) Art. 788.
vantageous the succession might have been, and however injurious therefore to her might be its renunciation. She could have no redress against him or his estate, unless it could be proved that the renunciation was made in fraud of her. (a)

Although the inheritance must have devolved on the heir before his renunciation in order that it might be effectual, and therefore, if it were made before the performance of that condition or event which was precedent to his right, it would be inoperative, yet he may declare that he will renounce the succession in the event of its devolving on him by the performance of the condition, or the happening of the event. If he apprehends the estate to be insolvent, it may then become secured to the creditors by the appointment of curators to take charge of it. (b)

The renunciation may be also made by agreement, pendente conditio. (c)

Neither the civil law nor the jurisprudence of Holland required that the renunciation should be made in any formal or solemn manner.

The coutume of Normandy required that it should be made publicly in court, and, on the oath of the party, that he had neither directly nor indirectly converted to his own use, or embezzled any part of the effects. (d) Under the coutume of Paris, it was to be made by an act before a public notary, or before a judge. (e)

By the Code Civil: "La renonciation à une succession ne se présume pas: elle ne peut plus être faite qu'au greffe du tribunal de première instance dans

(a) Rodenburg de Marit. Potest. tit. 2, c. 3, n. 15, 10. Voet, lib. 29, tit. 2, n. 34.
(b) Voet, ib. n. 35.
(c) Vinnius, De Pactis, c. 18, n. 5.
(d) Art. 235, Merville, p. 349.
l'arrondissement duquel la succession s'est ouverte sur un registre particulier tenu à cet effet." (a)

By the renunciation the heir escapes the burthen of the testator's debts. If it has been made, he cannot afterwards adiate, unless where it has been made under circumstances similar to those which would entitle him to relief against any other act, or unless the inheritance has devolved on him by different titles, as under a will, and also ab intestato. In that case, although he may have renounced the succession under the will, he may afterwards adiate it ab intestato. But if the heir by institution, who was also the heir whom the law in case of intestacy called to the succession, renounced the inheritance as devolving on him ab intestato, and at the same time was aware that he had also been instituted heir, he would be considered to have renounced the inheritance under both titles. But if he were ignorant that he had been instituted, his renunciation would not prejudice his right under the testament, because he has never renounced that title, nor that ab intestato, because the inheritance ab intestato had not yet devolved on him. (b)

If a person instituted heir by a prior will, which was valid, and also by a subsequent will which was invalid, but which he believed to be valid, should renounce the inheritance under the latter, it seems he would not be precluded from adiating the inheritance which had devolved on him under the prior valid will. (c)

By renunciation the heir, if he be the son of the deceased, loses all the rights of primogeniture which the law had conferred on him. But neither the son nor a stranger will by renunciation lose any bequest exclusive and independent of the inheritance, and which is to be paid

(a) Art. 784.
(b) Dig. lib. 29, tit. 2, l. 17, § 1 ; l. 70, 77. Voet, lib. 29, tit. 2, n. 37. Pothier, Tr. des Success. c. 3, § 4.
(c) Voet, ib.
before the division of the inheritance. He is not considered by renouncing the inheritance to have renounced also the bequest, unless where the testator has expressed his intention that he should not enjoy the one unless he also accepted the other. (a)

When a testator has instituted several heirs, and substituted them to each other by _fidei-commissum_, in case any should die without children, and one of those renounces the part to which he had been instituted, he may afterwards, when the condition happens which gives effect to the substitution, take that part to which he was substituted under the _fidei-commissum_. (b)

When a daughter in her father’s lifetime having received her dowry, renounces the succession to his estate, and the son on being instituted heir is charged with a _fidei-commissum_ to restore it to his brothers and sisters, the renunciation made by the daughter in her father’s lifetime will not prevent her from claiming the part which she has renounced. (c)

By the law of Scotland the heir by renouncing the succession might relieve himself from the obligations he would otherwise incur. A renunciation was admitted _rebus integris_ though the decree and charge were sixteen years before, (d) and even though there was a comprising on a decree suspended, which was declared to stand, and the apparent heir’s person and proper estate were only freed. (e)

A renunciation to be heir was not admitted with this quality, excepting to the renouncer certain lands whereunto he was appointed to be infest by his father’s contract

Sande, Decis. Fris. lib. 4, cit. 4, def. 7. Matth. de Success. disp. 9, n. 22.
Van Leeuwen, Cons. For. lib. 3, c. 8, n. 11.

(c) Faber, Cod. lib. 2, tit. 3, def. 23. Voet, lib. 29, tit. 2, n. 38. Wesel,
de Conn. Soc. tr. 2, c. 6, n. 123.

(e) Oliphant, Dec. 11th, 1657.
of marriage, and whereupon inhibition was used before contracting of the charger's debt, to the effect he might enter heir to those lands. (a) But in the like case the apparent heir was suffered to renounce to be heir to his goodsire, except as to those lands which his goodsire had disposed to his father in his contract of marriage, and became bound to infest him therein, whereupon inhibition was used, which the Lords found a singular title consistent with the renunciation of the heritage ex titulo universalis, and he was bound to make over the price to mortgage creditors who had given notice of their claims. (b)

He is bound, if the creditors or other persons interested require it, to give good and responsible security for the value of the moveable property comprised in the inventory, and for that part of the price of the immovables not made over to the mortgage creditors.

In default of giving such surety, the moveables are to be sold, and their price is to be laid by as well as that part of the immovables not made over, or to be applied in payment of the charges upon the succession. (b)

VI. The preceding subjects in this chapter form no part of the jurisprudence of England, or of any of the colonies, except those which retain the law of Holland, France, or Spain, and they are not admitted into the jurisprudence of any of the states of America, except Louisiana. The Code Civil of that state has adopted the rules of the Code Civil of France. (c)

By the law of England and the United States, a person may by his intromission with the personal estate of the deceased become, as he is called, an executor de son tort. He is said to be an executor de son tort when he takes upon himself the office of executor by intrusion, not being so constituted by the deceased, nor for want

(a) Ogilvie, Jan. 23rd, 1627.
(c) Louisiana Code, art. 1007 to 1024.
of such constitution substituted by the ecclesiastical court to administer. (a)

He incurs this character and its consequences whenever he intermeddles with the goods of the deceased, or does any other act characteristic of the office of executor. (b)

But if he locks up the goods for preservation, (c) directs the funeral in a manner suitable to the estate which is left, and defrays the expences of such funeral himself, or out of the effects of the deceased, (d) makes an inventory of his property, (e) feeds his cattle, (f) repairs his houses, or provides necessaries for his children, (g) he does not become an executor de son tort, for these are offices merely of kindness and charity. (h)

An executor de son tort, if he pleads properly, is not liable beyond the extent of the goods which he has so wrongfully administered. (i)

Therefore in an action by the creditor of the deceased under a plea of plene administravit, he is not charged beyond the assets which came to his hands. (j) And in support of this plea, he may give in evidence the payment by himself of just debts, which have exhausted such assets. (k) So he may give in evidence, under the


(b) Stokes v. Porter, Dyer, 167, a.

(c) Godolph. part 2, c. 8. Wentw. c. 14, 325, 14th ed.


Harrison v. Rowley, 4 Ves. 216.

(e) Godolph. ib. (f) ib.

(h) Swinb. part 6, s. 22. Bac. Ab. tit. Ex. b. 3. 1 Tall. 40.


(j) Dyer, 166, b. in marg. 1 Saund. 265, n. 2, to Osborne v. Rogers.

Hooper v. Summersett, Wightw. 91.

same plea, that he has delivered the assets to the rightful executor or administrator before action brought. (a)

But it is no defence under a plea of *plene administravit*, or a special plea, that after an action brought, and before plea pleaded, the defendant delivered over the assets to the rightful executor or administrator. (b)

Nor can an executor *de son tort* give in evidence, under *plene administravit*, or specially plead a retainer for his own debt. (c) And it will make no difference, though the debt due to the executor *de son tort* be of a superior degree to that of the creditor who brings the action against him. (d) Nor though the rightful executor or administrator has assented to such retainer. (e)

Yet if an executor *de son tort*, afterwards even *pendente lite* obtain administration, he may retain; for it legalizes those acts which were tortious at the time. (f) And therefore, if subsequently to the replication that he is executor *de son tort* he obtains administration, he may rejoin that fact by way of plea *puis darrein continuance*, for it is consistent with the retainer in the plea. (g)

VII. The title by succession to moveable estate being governed by the law of the testator's domicile, and to immoveable property by that of its situs, the obligation imposed on the heir of adiating or accepting the succession for the purpose of perfecting his right, and investing him with the active title of heir, would be dependant on the laws which respectively regulate the succession to these two species of property.


(d) Curtis v. Vernon, 3 T. R. 587. Ibid.

(e) Ibid.


RENUNCIATION.

The immoveable part of the succession may be situated in different countries, and the laws may differ on each of the subjects comprised in this chapter. It is assumed by J. Voet, that when the succession is in different countries, the heir may adiate that which is in one country, and repudiate that which is in another: "Denique, quia moribus hodiernis tot separatae intelliguntur hereditates, quot locis separatis, diverso jure circasia successionem ab intestato utentibus, immobilia defuncti sita sunt, quoties non ex testamento sed ab intestato defertur successio, nihil vetat secundum Burgundum, (a) unius loci intuitu adire, estratione alterius loci repudiare hereditatem, dum forte in uno loco magis, in altero minus ad exsvolvendum defuncti esse alienum heres ex aditione obligatus efficitur; atque adeo, si defunctus in Flandria domicilium, in Hannonia fundos habuerit, integrum heredi fore Hannonicorum fundorum successionem admittere, et hereditati mobilium in Flandria renunciare, eaque via seris alieni onus subter fugere, cui in Hannonia nemo obstringitur, qui mobilia non attigerit. Quemadmodum ex adverso novum hodie non est, ut quis necessitate tantum pro parte hereditatem adeat, licet ex asse à defuncto heres scriptus sit, dum lex situs plurium immobilium ad defunctum pertinentium testamenti factionem reprobavit, solamque admisit legitimorum successionem. Sed et si jus representationis in una regione latius esse extendat, quam in altera, facile contingit, eos, qui gradus remotioris sunt, concurrere cum proximioribus ad immobilia unius loci, vel etiam ad mobilia ex lege domicilii, à quibus ratione rerum alibi sitarum, ubi angustiori graduum numero representatio adstricta est, in universum exclusi sunt, uti hec latius in materia successionis ab intestato erunt." (b)

The acts of an instituted heir or devisee, if they are done in a country where the deceased was domiciled at

(a) Burgund. ad Cons. Fland. tract. 2, n. 17.
(b) Voet, lib. 29, tit. 2, n. 17.
the time of his death, and where also part of his moveable property was situated, and where he had afterwards proved the will, would, it seems, be considered with reference to the law of that country, and if they would not according to that law, constitute a gestio pro haerede, they could not be held to have that effect in any country, although the laws of the latter would give them that effect.

The Earl of Findlater being domiciled in Saxony, by a deed of settlement executed in the Scotch form, conveyed his property of every description, consisting chiefly of Scotch heritable estates, to a near relation resident in Scotland, whom he also named his sole executor, reserving power to alter and to burden the succession with debts and legacies. This power was exercised by the grantor, making first a donation mortis causae of his moveable, and afterwards a donation inter vivos of his immovable property abroad, free of all debts and obligations whatever, in favour of a stranger, to whom besides he bequeathed large sums by deeds, conceived in the Scotch form, as burdens on the succession in Scotland. The donee having pursued the representative under the general settlement for payment of the legacies, and various sums appearing to be vouched under the hand of the deceased, the Court found that the defence arising from the conduct of the pursued in taking possession of the whole of the testator's papers contained in his private repositories at the time of his death, without judicial authority, and without inventory or witnesses, must be judged of according to the law of the foreign country where the act was committed. The act inferred no vicious intromission by the law of Saxony, and therefore the Court of Session refused to treat it as such, although it would have been so by the law of Scotland. (a)

It is the opinion of jurists that the law of the country

(a) Fischer v. Earl of Seafield, F. C. May 24th, 1822.
in which the benefit of inventory was granted, and the inventory made, must determine whether it be effectual to limit the responsibility of the heir. (a) But this opinion must be understood to apply to that part of the succession which is moveable. Generally, with respect to immovable property, where the entry with benefit of inventory is a proceeding less local than that in Scotland, it would seem that it is in all cases requisite to obtain it from the country where the immovable property is situated.

CHAPTER XIV.

SEPARATION OF THE ANCESTOR'S ESTATE FROM THAT OF THE HEIR.

Right of separation to creditors of the ancestor and legatees under his will. —By judicial authority. —Systems of jurisprudence which adopt it. —Effect of a sale or mortgage of the ancestor's estate before separation. —Right continues when the succession has devolved on the heir of the deceased heir. —Creditors having demanded separation, and failed in obtaining payment, may resort to heir's estate. —Effect of novation by heir of creditors' demand against the ancestor. —Right of separation does not belong to creditors of heir. —The creditors at whose instance separation is granted obtain the benefit of it. —The manner in which the preference of the ancestor's creditors is secured by the law of Scotland.

In England and the United States they enjoy their preference, and it is secured to them by the ample means which the equitable jurisdiction of a Court of Chancery affords for that purpose.

The creditors of the ancestor and the legatees under his will are entitled to have his estate applied to the payment of their demands before the creditors of the heir can take any interest in it. To secure to them the full enjoyment of this right, and prevent its being defeated by the estate of the deceased being mixed up with that of the heir, they are entitled to obtain a separation of the estate of the ancestor from that of the heir. Such separation takes place under the authority of a judicial tribunal: "Solet separatio permitti creditoribus ex his causis, ut putà debito rem quis Seium habuit, hic decessit: hæres ei extitit Titius: hic non est solvendo, patitur bonum venditionem: creditores Seii dicunt bona Seii
sufficere sibi, creditorum Titii contentos esse debere bonis. Titii, et sic quasi duorum fieri bonorum venditionem; fieri enim potest, ut Seius quidem solvendo fuerit, potuertique satis creditoribus suis, vel ita semel, et si non in assem, in aliquid tamen satisfacere: admissis autem commixtisque creditoribus Titii, minus sint consecuturi, quia ille non est solvendo, aut minus consequantur, quia plures sunt. Hic est igitur æquissimum, creditorum Seii desiderantes separationem audiri, impetrareque à praetore, ut separatim quantum cujusque creditoribus præstetur.” (a) “Est jurisdictio tenor promptissimus, indemnitatissique remedium edicto praetoris creditoribus hæreditarii demonstratum, ut quoties separationem bonorum postulant causâ cognitâ, impetrant.” (b)

“Quoties hæreditis bona solvendo non sunt, non solum creditorum testatoris, sed etiam eos quibus legatum fuerit, impetrare bonorum possessionem æquum est; ita ut, cùm creditoribus solidum acquisitum fuerit; legatariis vel solidum, vel portio quaeratur.” (c)

This remedy is adopted in the jurisprudence of Holland and Spain, by the coutumes of Paris and Normandy, and the Code Civil. (d)

A creditor or a legatee, whose right depends on a condition, which has not yet happened, or is suspended by a term which is not yet come, may, notwithstanding, demand the separation for his security: “Creditoribus qui ex die, vel sub conditione debentur, et propter hoc nondum pecuniam petere possunt, æque separatio debetur, quoniam et ipsis cautione communi consuletur.” (e)

If, before the separation was demanded, the heir without the intention of defrauding the creditors had alienated

(a) Dig. lib. 42, tit. 6, l. 1, § 1.  
(b) Cod. lib. 7, tit. 72, l. 2.  
(c) Dig. ib. l. 6.  
(e) Dig. ib. l. 4.
any part of the succession, whether moveable or immoveable, or even the whole succession, the creditors of the deceased could not demand the separation of what had been alienated. For the heir who in that quality had the dominium of the property possessed the power to dispose of it. But if the proceeds of the sale still remained in his hands the right would attach on them. (a) But the alienation of the immoveables would be of no prejudice to the creditors of the deceased, who had mortgages on them, and they might enforce their mortgages and their privileges, if they had any, against the possessors, in the same manner as they might have done, if the deceased had made the alienation: "Ab hærede venditæ hæreditate, separatio frustra desiderabitur: utique si nulla fraudis incurrat suspicio. Nam quæ bonæ fide medio tempore per hæredem gesta sunt, rata conservari solent." (b)

If the heir had pawned or mortgaged moveables or immoveables belonging to the succession, before the separation was demanded, the creditors of the deceased might nevertheless obtain a separation of the property thus pledged. For the right of separation continues so long as the property belongs to the heir, and that engagement does not divest him of it: "Sciendum est autem, etiamsi obligata res esse proponatur ab hærede jure pignoris vel hypothecae, attamen, si hæreditaria fuit, jure separationis hypothecario creditorì potiorem esse eum qui separationem impetravit. Et ita Severus et Antoninus rescripserunt." (c)

If the succession pass from the heir to his heir, and from him again to his successors, and so down to other heirs successively, so that the first succession, and those which followed, are confounded together in the hands of the heirs to whom they descend, the creditors of each

(a) Voss, ib. n. 4. Brunnenman, ad Pand. lib. 42, tit. 6, l. 2.
(b) Dig. ib. l. 2.
(c) Dig. ib. l. 1, § 3.
succession will follow the property belonging to it, from one heir to the other, and may demand a separation of it: “Secundum haec videamus, si Primus Secundum hæredem scripsit, Secundum Tertium, et Tertii bona veneant; qui creditores possint separationem impetrare? Et putem, si quidem Primi creditores petant, utique audiendos et adversus Secundi et adversus Tertii creditores; si vero Secundi creditores petant, adversus Tertii utique eos impetrare posse.” (a)

If a creditor who has demanded the separation, has not been able to procure payment from the estate of the deceased, he still retains his right against the heir. But the creditors of the heir will be preferred before him, if their demand be prior to his acceptance of the succession: “Sed in quolibet alio creditore, qui separationem impetravit, probati commodius est, ut si solidum ex hæreditate servari non possit, ita demum aliquid ex bonis hæredis ferat, si proprii creditores hæredis fuerint dimissi.” (b)

If one of the co-heirs be creditor to the deceased, he may demand the separation against the creditors of the others, except only as to the portion of his debt, which he himself ought to bear.

If a creditor of the deceased novates his debt, and contents himself with the obligation of the heir, he cannot demand the separation of the estate of the deceased. For he has ceased to be a creditor of the deceased, and has become the creditor of the heir: “Illud sciemdem est eos demum creditores posse impetrare separationem, qui non novandi animo ab hærede stipulati sunt. Cæterum, si cum hoc animo securi sunt, amiserunt separationis commodum.” (c)

The creditors of the heir were not allowed to obtain the separation: “Ex contrario autem creditores Titii

(a) Dig. ib. l. 1, § 8.
(c) Dig. ib. l. 1, § 10. Voet, ib. Code Civil, art. 879.
non impetrabunt separationem, nam licet aliqui adjiciendo sibi creditorem, creditoris sui facere deteriorem conditionem. At qui igitur adiit hereditatem debitoris mei, non faciet meam deteriorem conditionem adeundo: quæ licet mihi separationem impetrare; suos vero creditores oneravit, dum adiit hereditatem quæ solvendo non est: nec potuerunt creditores ejus separationem impetrare." (a)

Some of the most eminent French jurists supported by arrêts of the courts in France, considered that the right to a separation of the estate belonged to the creditors of the heir as well as to those of the ancestor. (b)

The Code Civil has rejected this opinion, and expressly withholds from the creditors of the heir the liberty of demanding separation of the estates against creditors of a succession. (c)

Those creditors only, at whose instance the separation is obtained, derive the benefit from it, i.e., obtain a preference over the heir’s creditors by receiving from the estate of the deceased so much as would have been their share, if all the creditors had concurred in the separation: “Quæsitum est, si forte sint plures creditores, quidam seuti hæredem, quidam non seuti; et hi qui hæredem seuti non sunt, impetraverint separationem: an eos secum admittant, qui seuti sunt? Et putem, nihil eis prodesse: hos enim cum creditoribus hæredis numerandos.” (d) The shares of the latter will in consequence of their not having concurred in it become united with the heir’s estate, and they will be paid rateably with his creditors. (e)

(a) Dig. lib. 42, tit. 6, l. 1, § 2. Faber, Cod. lib. 7, tit. 32, def. 15. Matth. de Auct. lib. 1, c. 20, n. 21. Voet, lib. 42, tit. 5, n. 3.


(c) Art. 881.

(d) Dig. lib. 42, tit. 6, l. 1, § 16. (e) Voet, lib. 42, tit. 5, n. 3, 4.
This privilege cannot be exercised after a lapse of five years from the adiation of the inheritance, even "si sit res integra."

The Code Civil limits the period so far as the separation relates to moveables to three years, but allows it to take place in regard to immoveables so long as they are in the hands of the heir. If there has been a bond fide sale by him it cannot be exercised, but if the price is still unpaid, the separation may take place in respect of the proceeds. (a)

The law of Scotland has, by legislative provision, secured to the creditors upon the estate, heritable or moveable of the ancestor, that preference over those of his successor entering as heir, which was afforded by the separation under the civil law. But this is limited to a certain term, within which the creditor must complete his diligence for attaching the estate.

The creditors of the ancestor are for a time protected against voluntary deeds of the heir, and against the diligence of the heir's creditors.

The creditors of the defunct are preferred to the creditors of the appearand heir in time coming as to the defunct's estate, providing that the defunct's creditors do diligence against the appearand heir, and the real estate belonging to the defunct, within the space of three years after the defunct's death. (b)

In the construction of this act, it has been held; 1st. That the three years are not to be understood of anni utiles, but continui, and that the maxim contra non valentem agere, non currit præscriptio has no place; (c) 2nd. That under the term apparent heir, a nomination substitute in a bond is comprehended so as to give to the creditors of the institute the statutory

(b) Act 1661, c. 24. 1 Bell's Com. 729.
(c) Paterson, Dec. 19th, 1678, Dict. 3126.
preference over those of the substitute; (a) 3rd. That the rule applies to all heritage descending to the heir, whether 
'sud natura', or by destination; (b) 4th. That the term "appearand heirs" does not confine the remedy to cases where the heir has not made up his titles; (c) 5th. That "doing diligence" means completing the diligence. (d) A judicial sale at the instance of the apparent heir, will secure the preference to the creditors of the ancestors. (e) Sequestration also is sufficient, if the ancestor's creditors have proved their debts under it within the three years. (f)

The creditors of the defunct doing diligence to affect the moveable estate within a year and day of the debtor's decease, are always preferred to the diligence of the creditors of the nearest of kin. (g) This is grounded on the common law, (h) and where the executor has confirmed, he is trustee for the creditors of the deceased, and they have preference on the funds so long as they are distinguishable. (i)

No right or disposition made by the apparent heir so far as may prejudice his predecessor's creditors is valid, unless made and granted a full year after the defunct's death. (k)

In the construction of this statute it is held, 1st, That it comprehends all conveyances made by the heir

(a) Graham, Feb. 9th, 1711, Dict. 3128.
(b) M'Kay, Feb. 15th, 1783, Dict. 3137.
(c) Erak. b. 3, tit. 9, § 102. Kerr, June 17th, 1712, Dict. 690.
(f) M'Lachlan, ut supra. (g) Act. 1661, c. 24.
(h) Stair, b. 3, tit. 8, § 71. Erak. b. 3, tit. 9, § 43, 46. 1 Bell's Com. 797. 2 ib. 89.
(k) Act 1661, c. 24.
whether entered as heir or not; (a) 2ndly, Not only conveyances to the creditors of the heir, but onerous deeds to third parties are prohibited by this statute; (b) 3rdly, A conveyance to the ancestor’s creditors generally will be good, (c) but not it seems to one in preference to others of that class; (d) 4thly, The ancestor’s creditors are those whom the law intended to protect, and they have the right to challenge, while the creditors of the heir can claim no participation; and 5thly, It is not necessary that the ancestor’s creditors should do diligence within the three years, in order to exclude the creditors of the heir. (e)

In the administration of the estate of an ancestor, the Courts of Chancery in England and the Colonies, and the Courts of the United States, possess ample means for securing to the creditors of the ancestor the application of his estate to the payment of their demands, in preference to those of the creditors of the heir or devisee.

(a) Magistrates of Ayr, June 14th, 1780, Dict. 3135
(b) Taylor, Nov. 26th, 1747, Dict. 3128, 3133. Magistrates of Ayr, ut wupra.
(c) Ersk. ib. § 102.
(d) 1 Bell’s Comm. 736.
(e) Bell, Feb. 26th, 1773, Dict. 3134. Taylor, Nov. 26th, 1747, Dict. 3128.
CHAPTER XV.

OF THE LIABILITY OF THE HEIR OR DEVISEE, AND OF
THE DESCENDED OR DEVISED PROPERTY TO THE PAY-
MENT OF THE ANCESTOR'S DEBTS.

It will have been seen that under the several systems of
jurisprudence which are here considered, except in that of
England, of those British possessions which do not retain
the law of Holland, Spain, or France, and of the several
states of America, except Louisiana, the heir *ab intestato*
or by institution becomes by his acceptance of the suc-
cession liable to the creditors of the deceased, either to
the extent only of the property which he inherited, if
he has entered with benefit of inventory, or to the full
extent of all the debts owing by the deceased, however
much they may exceed the value of that property, if he
has not entered with benefit of inventory.

The property itself is also liable to the creditors, and
it is in their power, instead of enforcing their demands
against the heir personally, to secure its exclusive appli-
cation to the payment of their demands, by causing it
to be separated from his property.

By the law of England, the whole property of the
ancestor is made liable to his creditors, but the heir,
devisee, or executor, is liable only to the extent of the
assets of the ancestor which he has received.

When the succession by operation of law on an in-
testacy has devolved on or been transmitted by testament to several persons, and the liability incurred by the acceptance is sustained by several co-heirs, there are various modes by which that liability may be divided between them.

Each of the heirs may be liable to the creditor for that proportion of his demand which corresponds with the share he takes in the inheritance, or any one heir may be liable in solidum to the extent of that share, and entitled to be reimbursed by his co-heirs the amount he has paid of the debts beyond his proportion. Again, the share of the heir in the inheritance which is to determine the proportion of debts to be paid by him, may be estimated either by the part of the inheritance he takes, as a moiety, or third or fourth, or by the value which his share bears to the whole inheritance. Again, the heir may be liable in respect of every description of property to which he has succeeded, or in respect of one description only, as of the moveables or acquêts, which may be solely liable, whilst in respect of biens propres he may be exempt from any liability to the debts, or the distinction in this respect may only consist in rendering one description liable before the other can be taken. The liability of the one and the exemption of the other description of property, or the primary applicability of the one, may prevail as well against creditors as between the co-heirs themselves, or it may be recognized only as between the latter, and entitle them to contribution or indemnity from each other, where the proceedings of the creditors have interfered with that exemption.

Again, when the creditors have been paid their demands, and the co-heirs ab intestato, or by institution or devise are to divide what remains of the succession amongst themselves, according to the respective interests which they take by law or by the dispositions of the testator, there are certain rights which they have against each other. They are entitled in certain cases to have
that which any of them may have received in the ancestor's lifetime, and which the law presumes to have been an advancement on account, or in anticipation of their shares in his succession, collated or brought into the general mass of the estate.

Some of the instituted heirs or devisees may be bound, as the condition on which alone they can take that which has been devised to them, to relinquish an interest which they would have enjoyed independently of the testament. The law will not allow them to admit the testament in part and reject it in part, whenever it appears that the bequest to them was made by the testator on the condition express or implied that the whole testament should take effect.

The rules by which this equity is governed form the doctrine known in the law of England as that of election, and in the law of Scotland as that of approbate and reprobate.

There is great discrepancy between the several systems of jurisprudence now considered on these various modifications and qualifications of the liability of heirs.

It is intended in the following sections of this chapter to state, 1st, The nature and extent of the liability of the co-heirs to the creditors and to each other, in respect of the debts of the deceased; 2ndly, Of the collation which they are bound to make; 3rdly, Of the cases in which they are prevented from claiming under and in opposition to the testament; 4thly, It is proposed to state the law by which the obligations and rights of the heirs are to be decided, when there arises a conflict between the laws of the domicile and situs on either of these subjects.
SECTION I.

OF THE LIABILITY OF THE HEIRS TO CREDITORS AND TO EACH OTHER.

I. Under the civil law, and the law of Holland and Spain, coheirs liable *pro ratâ parte quod quisque hæres est.*—Under the customs of Paris and Normandy and the Code Civil, *pro ratâ emolumenti.*—Cases in which each may be liable in *solidum,* as in hypothecary actions, &c.—When the share of liability is affected by the nature of the property.

II. Heir’s liability under the law of Scotland.—Of heirs portioners.—Heirs tailsie.—Heirs of marriage.—Heirs substituted in a bond.—Order in which different classes of heirs to be sued. Personal estate equally liable with the heritable.—Whether the debts be heritable or moveable.—The heir and executor entitled to relief from each other, when the former pays a moveable, and the latter an heritable debt.

III. In England heir or devisee in respect of real estate, and executor in respect of personalty, liable only to creditors to the extent of the property of the deceased which has come to their possession.—Lands are now assets for the payment of the ancestor’s simple contract debts, as well as debts by specialty.—Personal estate primary fund for payment of debts.

IV. Colonies in which rules similar to those in England prevail respecting the liability of heirs and devisees, and the applicability of real and personal estate.—Similar rules in the states of America, except Louisiana.

I. Under the civil law, each of the coheirs bears his burthen of the ancestor’s debts *pro ratâ* in respect of that part of the succession to which he is heir *pro ratâ parte quod quisque hæres est,* and not *pro ratâ emolumenti,* or according to its value compared with that of the part to which his coheir had succeeded. " *Sit explorati juris, hæreditaria onera ad scriptos hæredes pro portionibus hæreditariis, non pro modo emolumenti pertinere.*" (a)

In this respect it is immaterial whether the ancestor institutes the heirs to equal or unequal shares, and gives a prælegatum to one or more of them, or whether he makes a division of his inheritance, but the parts assigned do not correspond with it. Thus if one be instituted to a moiety or fourth, he will pay a moiety or a fourth of the debts, although his beneficial interest in the subjects of the succession may be greater or less. So a testator having two estates of very unequal value, institutes A. and B., without saying in what proportions, but directs that A. shall have one, and B. the other estate, the law considers each to be the heir to a moiety of the estate, but to give effect to the testament of the testator, each takes the estate thereby assigned him, and yet the one who has received the most valuable of the estates will pay only a moiety of the debts: (a) "Pone duos esse hæredes institutos, unum ex fundo Corneliano alterum ex fundo Libiano: et fundorum alterum, quidem facere do dramem bonorum, alterum quadrantonem. Erunt quidem hæredes ex sequis partibus, quasi sine partibus instituti, veruntamen officio judiciis tenebuntur, ut unicuique eorum fundus, qui relictus est, adjudicetur vel attribuatur. Unde scio quæsitum, æris alieni onus pro quà parte agnoscere debet? Et refert Papinianus, cujus sententiam ipse quoque probavi, pro hæreditariis partibus eos agnoscare æs alienum debere, hoc est, pro semisse: fundos etenim vice præceptionis accipiendos." (b)

This assignment by the testator to A. of the more valuable estate is deemed a preference in his favour, and as between him and his co-heirs is not liable to the testator's debts. (c)

When the right of primogeniture entitles the heir to a larger share of the inheritance, as a moiety, whilst the

(a) Dig. lib. 28, tit. 5, l. 35; l. 9, §. 13, lib. 31, tit. 2, l. 77, § 8. Cod. lib. 4, tit. 39, l. 9. Lamb. Goria, Advers. tr. 2, c. 2. Voet, ib. n. 20.
(b) Dig. lib. 28, tit. 5, l. 35, §. 1.
(c) Brunnenman, ad Cod. lib. 4, tit 2, l. 1. Fab. Cod. lib. 3, tit. 25, def. 6.
other children take only a third, he must contribute to the debts of the deceased according to that proportion. \(a\)

But if it entitled him only to some singular subject in the succession, as a feud, the advantage which he thus derives is deemed a *prelegatum*, and not a share of the succession, and he would contribute *pro ratâ* according to the share to which he had succeeded with his co-heirs. \(b\)

Thus if a feud were mortgaged by the last possessor for a debt which he had contracted, and the mortgagee proceeded against his eldest son to enforce its payment, the latter having paid the debt is entitled to resort to his co-heirs for contribution according to their shares of the succession. \(b\)

It would be otherwise if the charge had been created by a preceding ancestor, and the feud had devolved on the heir subject to such charge. In the latter case, the feudal successor must alone discharge it, and has no right to contribution from his co-heirs. \(c\)

The division of the debts amongst the co-heirs *pro ratâ* *parte quid quisque hæres est* is the general rule, but there are some cases in which it is made *pro ratâ* *emolumenti*; and there are also some cases in which the division does not take place, but the creditor may proceed in *solidum* against one of the co-heirs.

It may happen that the person on whom the personal estate has devolved does not succeed to the real


estate, because the testator has instituted another person
heir to it; or if it be a case of intestacy, the two descrip-
tions of property, according to the law of succession by
which they are respectively governed, may devolve on
different persons.

2. It may happen that the inheritance may consist of
real property situated in different countries, and the
heirs ab intestato who may be entitled to succeed to the
real property in one country, may have no right, or not
the same right of succession to that situated in another
country.

3. The property derived ex parte paternâ may de-
scend on the heir ex parte paternâ, to the exclusion of
those ex parte maternâ; or the heirs ex parte paternâ may
be excluded, and those ex parte maternâ alone entitled
to succeed to property derived ex parte maternâ.

In each of these cases, if the law by which the succe-
sion is regulated makes no express provision, it has been
considered by many jurists that the share of the heir in
respect of which he is personally liable to the creditor,
should be estimated not pro parte hereditariâ, but rations
emolumenti. (a)

Coren reports a decision by the Supreme Court in
Holland, in which it was held that the heirs succeeding
in Holland, according to the law of that country were
liable to the debts of the ancestor, “pro eâ parte quà
quisque corum ex lege Hollandicâ” was heir, although
some, but not all of them had succeeded as heirs to
real property situated in another country where the
law did not call the same persons to the succession as
were called by the law of Holland. There were several
special circumstances in the case, and a different deci-

(a) Tiraquell. de Jure Primog. Quest. 35, n. 28, 29. D’Argentr. ad
Brit. art. 216, 219, gloss. 7, 8. Mornac. lib. 5, tit. 1, l. 50. Burgund. ad
Cons. Fland. Tr. 2, n. 17; Tr. 13, n. 34. L. Goris, Advers. Tr. 2, c. 4, 5.
tit. 16, art. 35. Someren, de Repress. c. 8, 12, 13, 14. Valla, de Reb. Dub.
Tr. 6, n. 4.
sion; Voet says, "sequior visa fuisset Curiae Provinciali atque ipsius etiam Hollandiae Ordinibus," but he forbears to express his opinion whether the decision independently of those circumstances merits approbation. (a)

The coutume of Paris adopted this principle only when there was an equality in the shares of the heirs: "Les héritiers d’un defunt en pareil degré, tant en meublés qu’immeubles, sont tenus personnellement de payer et acquitter les dettes de la succession, chacun pour telle part et portion qu’ils sont héritiers d’iceluy defunt, quand ils succédent également." (b)

But if there were any inequality in their shares in consequence of their succeeding to different species of property, they were liable pro ratione emolumenti: "et quand ils succédent les uns aux meubles, acquêts et conquêts, les autres aux propres; ou qu’ils sont donataires ou légataires universels, ils sont tenus entr’eux contribuer au payement des dettes, chacun pour telle part et portion qu’ils en amendent. En quoi ne sont compris les aînés en ligne directé, lesquels ne sont tenus des dettes personelles en plus que les autres cohéritiers, pour le regard de leur aïnésse." (c)

The same principle is adopted in the coutume of Normandy, (d) and in the Code Civil: "Les cohéritiers contribuent entre eux au paiement des dettes et charges de la succession, chacun dans la proportion de ce qu’il y prend." (e)

The creditors have a personal action against each of the co-heirs in respect of that part for which he is heir, either pro hæreditariâ portione, where that rule is adopted, or pro ratione emolumenti under the

(b) Cout. de Paris, art. 332.
(c) Art. 334, Ferriere, sur l’art, tom. 2, p. 394, et seq. Pothier, Tr. des Success. c. 5, art. 3, § 1, et seq.
(d) Bannage on Art. 364, and Merville, p. 355.
(e) Art. 870, 873, 1009. Toullier, des Success. liv. 3, tit. 1, c. 6, n. 512, et seq.
coutumes of Paris and Normandy, and the Code Civil. If there are three heirs, the creditor brings his action against each for a third, and each creditor can only bring his action against each co-heir for a third of his debt.

When there are creditors by hypothec, they are entitled for the recovery of the subject hypothecated to proceed in solidum against each of the co-heirs who possesses any part of the real estate, subject to their hypothec. (a) Although if they brought their action for the recovery of the debt for which the property was hypothecated, they could only recover from each co-heir, pro portione hereditatis. (b)

The right to proceed in solidum against any one of the co-heirs not only exists in the case of hypothecary creditors, but it frequently happens that the obligation of the ancestor to be performed by the co-heirs does not admit of being divided or performed in parts. A contract to build a house, to deliver a horse, or to give a servitude, &c. is entire and indivisible, and the creditors may proceed against one of the heirs in solidum to enforce its performance. (c)

If however, instead of requiring its specific performance, the creditor seeks damages for its non-performance, the demand becomes divisible, and he can only recover pro eà parte quâ quisque defuncto hæres est. (d)

If the heir has been sued in solidum, and has discharged the whole debt, he is entitled to contribution from his co-heirs. (e)


(b) Ib.

(c) Dig. lib. 45, tit. 1, l. 2, § 1, 2. H. Grotius, Manud. ad Jurisp. Helv. lib. 2, c. 31, n. 17, 18. Someren, de Repres. c. 8, n. 5. Voet, ib. n. 29.

(d) Ib.

An agreement between the co-heirs, or a direction in the will of the testator, that one of them should be chargeable in solidum, did not prejudice the creditors, nor deprive them of their right to proceed against each, nor did it even enable them to proceed against the heir in solidum. Its only effect was to give the other devisees a right to be reimbursed by such devisee for those parts of the debt which they had paid. (a)

The proportion in which coheirs are to contribute to the payment of legacies, as between them and the legatees, may be entirely regulated by the direction of the testator. In the absence of any such direction, each is liable, only "pro eâ parte quà hæres est."

The personal liability of the heir has hitherto been considered with reference to his share in the succession.

It is subject to be varied according to the nature of the property to which he may have succeeded. The heir to that part of the inheritance which is personalty, may be exclusively or primarily liable to the payment of all the debts, whilst the heir in respect of the real estate to which he has succeeded, may be exempted from all or some of the debts, or on the other hand, the latter may be primarily liable to certain debts.

The exclusive or primary applicability of one species of property may affect the creditors, or it may have no relation to them, but merely afford to the co-heirs a right to reimbursement or contribution amongst themselves.

No distinction was made in the civil law or the laws of Spain and Holland between real and personal estate. The heirs to each species of property were equally liable to the payment of the debts of the deceased, and therefore they could not claim either as against the creditors or against each other any relief in consequence

(a) Ib.
of either species of property being applied to the discharge of the debts.

The coutume of Normandy makes a distinction between that which is moveable, propre and acquêt, and also between the heirs to these three species of property, and the liability of the heirs is founded on that distinction. Each description of estate bears its own debts when there are different heirs. The heir to the immovable estate is liable for the immovable debts, to the extent of his interest in the immovable estate, and the heirs to the personal estate contribute to the personal debts according to their interests. This rule only applies when there are different classes of heirs to the succession, as heirs to biens propres, heirs to the moveable, and heirs to the immovable estate. It can only apply therefore to collateral successions, and not to those in the direct line, where there can be only one description of heirs. (a)

No such distinction is made by the coutume of Paris, but the moveable and real estate are equally liable to the debts of the deceased, that is, the heirs are personally liable, according to the value of their interest in the whole succession composed of moveable and real estate, and the heirs to property which is propre, must contribute to debts which may have been contracted in purchasing acquêts, although the heir to the propre may not be heir to the acquêts, and on the other hand, the heir to biens acquêts must contribute to debts even contracted for the annual cultivation of an estate which was propre. The maxim "impensa sunt onera fructuum; fructus non intelliguntur nisi deductis impensis," affords no answer to the creditor, although it entitles the heir who has discharged this debt to reimbursement by the heir to that estate. (b)

The Code Civil admits no distinction founded either on the origin or source from whence the estate proceeds, and the moveable and immovable property is equally subject to the debts of the testator. (a)

II. An heir is in the judgment of the law of Scotland as well as in the civil law "eadem persona cum defuncto," and therefore, after he has acknowledged the succession by service, he represents the deceased not only in his rights, but in his debts and burdens. He is said to be heir **passive**, or to incur a passive title, because by representing the deceased, he is subjected to all his debts and deeds, and must suffer and sustain actions brought against him for paying or performing them. But this passive title to pay the ancestor's debts is not equally extensive against all kinds of heirs, but different degrees of obligation are incurred by the different kinds of heirs in respect of the debts or deeds of their ancestors. Those who enter heirs **titulo universali**, not to any special subject, but to an inheritance considered as an *universitas*, as heirs of line or of conquest, represent the ancestor universally, both **active** and **passive**. As their right is universal, so is their burden. This is also the case of those who are served general heirs male without relation to any special subject, for as that mode of service carries to the heir every right in the ancestor, which by the former investitures was descendible to heirs male, it must also make him liable universally to that ancestor's debts. All these heirs are therefore liable, not only to the value of that succession which has opened to them, but *in solidum* for the whole of the debts, though they should far exceed that value, unless they have entered with benefit of inventory.

When the succession descends on two or more females, who are called heirs portioners, the ancestor's rights are acquired, and his debts are borne **portionibus hæredi-**
tariis.” One of three heirs portioners is subjected to the payment only of a third of every debt due by the deceased, because she is entitled to no more than a third of every right; yet, because they succeed *titulo universalis*, each of them is liable for that third, though it should exceed that which she has obtained or may obtain by the whole succession; and, on the other hand, she is liable for no more than her own third, though the value of her part of the succession should far exceed the whole debt for which the creditor pursued. (a)

It has been said by some of the jurists of Scotland, that heirs who enter in consequence of the proprietor’s destination, *e. g.* heirs of entail or of a marriage, or heirs substituted in a bond, have truly no universal title, and that their service is only intended to transmit a special subject provided by the deceased in their favor, and that as such transmission can confer upon them no farther active title than to that subject, it ought not to make them liable to any passive title beyond its value. (b) But it is admitted by them, that in practice, heirs of tailzie and provision are liable universally in *suo ordine* for the debts of the deceased, and not barely to the extent of the succession. (c)

A service, as heir of tailzie or of a marriage, carries not only the special subject contained in the entail or marriage contract, but every obligation or personal right destined to such heir; who, if he be once served in the special lands, is under no necessity to serve a second time, in order to carry the personal right so destined. (d)

An heir *nominatim* substituted in a bond is liable only in *valorem*, because he is not under any necessity to

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*(b) Bankton, b. 3, tit. 5, § 62, 63.*

*(c) Stair, b. 3, tit. 5, § 13.*

*(d) Ersk. ib. § 51, 75.*
serve heir, in order to take the bond, but is considered merely as a conditional institute in the event of the creditor's death. It can carry no right to the substitute beyond the subjects contained in the bond. An heir, therefore, substituted in a bond, whether moveable or even heritable, ought not to be subjected to an universal passive representation, being on the matter singular successors. As his whole right is limited to the sum contained in the bond, he is liable for the debts of the deceased simply in valorem of that sum. And this doctrine extends to grantees in a disposition omnium bonorum to take effect at the death of the grantor, although such disposition is burthened with his debts, for it is considered as an universal legacy which does not subject the legatee, even after acceptance ultra valorem, and indeed it differs from a legacy but in the name. (a)

An heir of entail, though the deed should contain a prohibitory clause against the contracting of debts, is liable in payment of all the onerous debts contracted by the former heir, unless he has obtained inhibition against him upon that clause, which will secure him against such of those debts as have been contracted posterior to the diligence. Heirs by an entail fenced with irritant and resolutive clauses are liable for no debt contracted by the former heir contrary to the directions of the entail, and heirs of a marriage are subjected to the payment only of the onerous, but not of the gratuitous debts contracted by the father. (b)

Although proper heirs are all at last liable universally for the debts of their ancestor, yet they must be sued in a certain order. Some heirs are liable in the first place, and others not until those primarily liable have been first discussed. Thus in the case of obligations relative to a

(b) Ersk. ib.
particular subject, the heir who succeeds in that subject may be sued without discussing any other heir; for whoever succeeds in a right must be the proper debtor in any burden chargeable on that right. (a)

Thus also in debts with which the debtor's heir male, or any special heir is burdened, the creditor may sue such heir without taking notice of the heir-at-law, and he cannot insist against the heir-at-law till the special heir is first discussed. (b) But in general obligations in which the debtor expresses no intention of charging any special heir or estate, the heir of line is accounted the principal or proper debtor, as he is the heir general by the most universal representation, and so must be first discussed. Next to him the heir of conquest, and then the heir male, because each of them succeeds in a lesser universitas, the first by an act of the law in all the heritable rights which his ancestor had acquired by singular titles, the other by the proprietor's destination in every right which by the investitures descends to heirs male. After these, Stair says (c) that heirs by marriage contract are liable whose propinquity of blood is a ground for subjecting them more directly and immediately than any other heir of provision or tailzie, who may possibly be a stranger to the deceased; but Bankton's opinion that the heir of entail ought to be first discussed appears to be better founded, not only for the reason given by that author, that the heir of a marriage is not only heir, but in some degree creditor to the deceased, but because an heir of entail seems to be subjected by a more universal representation of the deceased than the heir of marriage. (d)

Although the executors succeed only in moveable rights active, and therefore succeed only in moveable debts passive, yet the creditor has his option to pursue

(a) Bankton, b. 3, tit. 5, § 69. Stair, b. 3, tit. 5, § 17. Ersk. ib. § 52.
(b) Feb. 18th, 1668, Blair, Dict. 3571.
(c) B. 3, tit. 5, § 17.
(d) B. 3, tit. 5, § 69. Ersk. ib.
either or both of them, whether the debt be heritable or moveable, and the heir has relief against the executor in so far as he is distressed for moveable debts, and so the executor has relief against the heir of the heritable debts. But the executor is only liable secundum vires inventarii, according to the inventory of the confirmed testament, unless he disorderly intromit with more, but the heirs are liable in solidum, though the debt far exceed the value of the estate, unless they enter under the benefit of inventory. (a)

III. By the law of England the rights of the creditors of the deceased and the liabilities of those on whom either by operation of law on an intestacy, or by testamentary disposition, his real or personal property has devolved, are limited by the extent of the property which has so devolved on them. There are two descriptions of representatives of the deceased against whom the creditors enforce their demands, namely, the heir or devisee, and the executor or administrator; and, says Swinburne, the heir has not to deal with the goods and chattels of the deceased, no more hath the executor to do with the lands, tenements, and hereditaments. The whole personal estate of the deceased, both at law and in equity, vests in the executor or administrator. (b)

The executor or administrator is bound to apply the personal estate in the first place to the payment of the debts of the deceased, and he is responsible to the creditors for the satisfaction of their demands to the extent of the whole personal estate which has devolved on him, without regard to the testator's having by his will directed that a portion of it shall be applied to other purposes. Hence, as a protection to the executor, the law imposes on every legatee, whether general or specific, and whether of chattels real or personal, the

(a) March 7th, 1629, Falconer, Spots. Erskine, b. 3, tit. 9, § 48.
(b) 1 Williams, Exors. 411.
necessity of obtaining the executor's assent to the legacy before his title as legatee can be complete and perfect. (a)

Besides the liability of the executor or administrator in respect of the personal assets in his hands, the heir of the deceased is liable to the extent of the real assets descended for the payment of his ancestor's debts due on bonds, covenants, or other specialties, in cases where the deceased bound himself and his heirs. (b)

But the heir is liable no further than to the value of the land descended, and as soon as he has paid his ancestor's debts to the value of the land he holds the land discharged. (c)

By the common law, the ancestor might have deprived his creditors of this fund for their payment by disposing of the land by his will, for if he devised it, the devisee was in equity, as well as at law, entitled to hold the land free from the claims of the testator's creditors. By the common law also the heir-at-law on whom the land descended might at law frustrate the creditors of his ancestor by selling or alienating the land before the creditors sued him, although in equity it appears he was responsible for the value of the land alienated. (d)

This state of the law has been considerably altered by statutes. (e)

Amongst other provisions land devised is rendered liable to the testator's debts by specialty, in which his heirs are bound, and in cases where the land has descended the heir-at-law is made liable to an action, although he has sold or alienated the property before his ancestor's creditors have brought an action against him, (f)

But the real estate of the deceased was not liable to

(a) 2 Williams, Exors. 843.  
(b) Ib. 1039.  
(c) Ram, on Assets, 225.  
(d) Ib. 214.  
(e) 3 and 4 W. and M. c. 14.  
(f) Ib. 214.  
1 Geo. 3, st. 2, c. 74.  
11 Geo. 4, and  
47 Geo. 3, c. 47.
the simple contract debts of the ancestor, until by a subsequent statute the real estate of a person who was a trader was made assets to be administered in courts of equity for the payment as well of debts on simple contract as on specialty. (a)

At length, by a recent statute, the real estate of all persons, whether traders or not, was made assets for the payment of the simple contract debts of the deceased. It enacts that when any person dies seised of or entitled to any estate or interest in lands, tenements or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, which he has not by his last will charged with or devised subject to the payment of his debts, the same shall be assets to be administered in courts of equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs-at-law, customary heir or heirs, devisee or devisees, of such debtor, shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs-at-law, devisee or devisees of any person or persons who died seised of freehold estates was or were, before the passing of the act, liable to in respect of such freehold estates, at the suit of creditors by specialty in which the heirs were bound. But it provides, that in the administration of assets by courts of equity under and by virtue of the act, all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands. (b)

As between the real and personal representatives of

(a) 47 Geo. 3, st. 2, c. 74.
(b) 3 and 4 Wm. 4, c. 104.
all persons deceased, the personal estate in the hands of the executor or administrator is the primary and natural fund which must be resorted to in the first instance for the payment of debts of every description contracted by the testator or intestate.

But this principle can only regulate the equitable administration of assets, and does not extend to the legal control of the creditor of the deceased, for it is discretionary with him whether he will resort to the personal estate in the hands of the executor, or to the real estate descended or devised. (a)

IV. In all the colonies where the law of France, Spain, or Holland is not retained, and in the states of America, except Louisiana, the creditors of the deceased are entitled to enforce their demands against the whole real and personal estate of the deceased. But the heir, devisee, executor or administrator, can be made responsible to them only to the extent of the estate of the deceased which has come to his possession, power, or control. And whilst it is competent for the creditors to proceed against either species of property, yet as between the real and personal representatives the personal estate is that which is to be primarily applied in payment of the debts of the deceased.

The Civil Code of Louisiana adopts the principles of the Code Civil of France, in the contribution made by the co-heirs to the payment of the debts of the ancestor. (b)

(a) 2 Williams, Exors. 1042.
(b) Louisiana Code, art. 1368, to 1419.
SECTION II.

COLLATION.

I. Under the civil law, the law of Spain and Holland—defined.—Distinguished from impo
tatio.—By whom it is made.—In favour of whom it is made.—In respect of what advances it is made.—Not in respect of donationes simplices.—What are not so considered.—Collation in the succession to fees. —At what time the collation is to be made.—And in what manner.—The obligation to collate may be released by the father.—Implied release.—When the obligation to collate ceases. —How it may be compelled.—Effect of refusal.

II. Coutumes of Paris and Normandy.—Le rapport à succession.—The distinctions between it and the collation by the civil law.

III. Under the Code Civil.

IV. Law of Scotland.—Collation amongst younger children.—By the heir if he would share in the moveable succession.—By what species of heir.—He must be one of the nearest of kin.

V. In England, advancement by the father must be collated and brought into hotchpot.—Fifth section of the Statute of Distributions applies only to actual intestacy.—Under the customs of London and York.

VI. In the Colonies and the United States.

I. Under the civil law, and in those systems of jurisprudence which are founded on it, in order to secure equality in the division of the estate of the deceased ancestor, there is imposed on certain persons who accept the succession to which they are called, the obligation of bringing into the general fund the property, or the value of the property which they have received from him. This is the collatio bonorum of the civil law, which is described to be "Rei propriae in communem hereditatem illatio, ut equalitas servetur." (a) It retains this name in the jurisprudence of Holland and Scotland. In the law of Spain it is called colacion.

Under the coutumes of Paris and Normandy, and the

(a) Vianius, de Collatione, c. 3, § 2.
Code Civil, it is known by the term *le rapport à succession*.

In England, and in the customs of London and York, there exists a similar provision, called bringing into hotchpot.

Collation in the earlier state of the Roman law was very limited in its effects. It was afterwards enlarged and extended, and at length by a law in the Novels it was established that the heirs, whether they succeeded under a testament or *ab intestato* were bound to collate, unless expressly released from doing so by the testator. (a)

Jurists, for the purpose of conveying the most precise definition of *collatio*, have contrasted it with *imputatio*, deduction.

*Collatio*, they say, takes place when that which has been already received from the ancestor is added to the general estate or fund to be divided, and of which the party collating receives an equal share. Thus if the deceased left three children, and his estate amounted to £3000, each child's share would be £1000; but if one of the descendants had in the lifetime of the intestate received £1000, by collating this sum the general estate to be divided will be £4000, and the share of each will be £1333. 6s. 8d. If, however, *imputatio* or deduction, and not *collatio* is to be made, the whole property to be divided being only £3000, and the share of each only £1000, as the sum received and to be set off is equal to that share, there remains nothing more to be received from the estate by him who must make *imputatio*.

Jurists have answered the enquiry in what cases *imputatio* and not *collatio* is to be made, by stating it as a general rule, that when parties succeeding to the inheritance are entitled to share it equally without any preference or distinction, *collatio* and not *imputatio* is

(a) Dig. lib. 37, tit. 6. Cod. lib. 6, tit. 20, l. 17. Vinnius, de Coll. c. 2 Novell 18, c. 6, 7. Lauterbach, ad Pand. lib. 37, tit. 6.
to be made. But when any one of the co-heirs by virtue of some privilege conferred on him by the law of the country has a special or exclusive right to a particular part of the property, *imputatio* and not *collatio* takes place. Thus daughters entitled by the law of Saxony to the *gerada* do not collate it with their brothers. The father, by the law of Saxony, succeeds to the whole personal estate of his deceased wife. The daughters do not collate with the father, but as the latter is bound to make good to the daughter her *legitime*, if it exceeds the amount of the *gerada*, he only makes up the difference, and consequently the *gerada* is deducted from the *legitime*. (a)

*Imputatio* may often take place when *collatio* is not made. Thus gifts derived by bequest are imputed against the *legitime*, yet they are never collated, because collation is made only in respect of gifts received from the ancestor in his lifetime. (b)

Children or grandchildren must collate whatever they have received from their parents or ancestors as a gift, or for their advancement, in order that it may form part of the general estate which is to be divided, and in which they are to share with their co-heirs. (c)

This obligation is derived from and regulated by the enactments of positive law, and it is always competent for the ancestor to release any of the children from it, unless such release would deprive a child of his *legitime*. (d)

The obligation to collate exists when the children succeed to the inheritance not only *ab intestato*, but also under a testament, and notwithstanding their interests under such testament are unequal. It is to be observed

(a) Muller's Prompt. Collatio, n. 6, p. 605.
(b) Strykius, Diss. 11, c. 1, § 9.
(c) Voet, lib. 37, tit. 6, n. 1. Van Leeuwen, Cens. For. lib. 3, c. 13. Someren, de Repres. c. 7.
(d) Muller's Prompt. Collatio, n. 113. Cod. lib. 6, tit. 20, l. 21, 19. Novell. 18, c. 6. Voet, lib. 37, tit. 6, n. 5.
that collation does not take place in succession under a testament, unless the devisees would have succeeded, in case there had been an intestacy.

If a grandfather leaving a son, should institute him heir as to one-half, and his grandsons descended from that son heirs of the other half, the latter are not bound to collate, because they are strangers in respect of the succession to the grandfather's estate. So if a father constituted an illegitimate son jointly with his legitimate son, the former would not be bound to collate. But if the succession were the estate, not of the father but of the mother, the illegitimate child would be bound to collate, if he were capable by the law of the country of succeeding to his mother's estate. (a)

Grandchildren succeeding to the grandfather collate that which they have received from him, and it seems that collation is made when they succeed, not only with brothers, but also with uncles, and without any distinction, whether their father was living or not at the time they received it. (b)

Such grandchildren are bound to collate not merely that which they themselves have received from their grandfather, but that which their parent must have collated, had he been living, even although they should have abstained from adiating his inheritance. (c)

Nor is the grandchild exempted from collating that which his parent, if living, must have collated, because its effect may be to deprive him of his share in the ancestor's estate. Thus a grandfather leaving four sons and a daughter, gave to the latter, on her marriage, 200£. She died, leaving a son, and then the grand-

(b) Cod. lib. 6, tit. 20, l. 19. Matth. de Success. Disp. 17, Th. 4. Voet, lib. 37, tit. 6, n. 3. Vinius, de Collatione, c. 8, 9.
(c) Someren, de Repres. c. 7, n. 2, 4, 6. Carpz. Def. For. part 3, cons. 11, def. 31, 33, 34. Voet, lib. 37, tit. 6, n. 4. Stryk. Diss. 11, c. 2, n. 15. Bruneman, ad Pand. h. lib. and tit. n. 8. Lauterbach, lib 37, tit. 6, n. 9.
father died, leaving an estate of 1000l. The grandson must collate the 200l given to his mother, in order to entitle him to share with his four uncles the estate of his grandfather, although by collating the 200l., and thus constituting an estate of 1,200l., he will in effect only receive 50l. (a)

But if the grandchildren succeeded in their own right per capita, then, as they would not represent their father, they would not be bound to collate that which he had received.

If strangers are entitled to the inheritance with the descendants, no collation takes place by or in favour of either as between them. (b) When that part of the inheritance is withdrawn, to which the strangers are entitled, the descendants amongst themselves, in respect of the share which remains for them, collate, and it is divided amongst them in the same manner as if they had never been joined with strangers. (c)

No collation takes place by or in favour of ascendants or collaterals, and of course not by or in favour of strangers. Thus, if a sister should receive a dowry from her brother, and afterwards succeed to him jointly with her surviving brothers and sisters as heir, she would not be bound to collate the dowry thus received, unless it should be the desire of the testator. (d)

According to the opinion of Grotius, it will be evidence of such desire if the dowry which he had given be inserted by him in an inventory of his estate, and in his


(b) Rhittersh. ad Novel, part 7, c. 22.

(c) Struvian, ad Pand. Exercit. 37, n. 25. Van Leeuwen, Cens. For. part 1, lib. 3, c. 13, n. 12. Voet, lib. 37, tit. 6, n. 6.

testament he refers to such inventory as containing the particulars of his estate. (a)

A person acquiring any part of the estate of the deceased not by the title of heir, but by a particular title as a legatee, or by fidei-commissum is not bound to collate. (b)

In Holland, and in those countries which adopt the communio honorum, a dotal or other gift which a child has received stante matrimonio from the joint estate of the father and mother, must on the termination of the community by the death of either of the conjoints be collated. (c) In those parts of Holland where the jus Scabinicum prevailed, if the father gave a dowry to his daughter out of the joint property of himself and his wife, on the division of the estate with his widow at his death, although she should be the step-mother of the child, the whole dowry must be collated. But where the jus Aedonicum prevails, and the survivor succeeds to the child who dies without issue, it is considered by Voet, that there is ground for contending that one moiety only of the dowry should be collated, and that the collation even of that moiety should be required only in favour of the remaining children of the pre-deceased parent. (d)

When the wife is called to the succession of the husband’s estate, and in consequence of his not having left any children, some relation succeeded as his heir to a feud which the husband had purchased stante matri-

(b) Voet, lib. 37, tit. 6, n. 25.
(d) Voet, lib. 37, tit. 6, n. 7. A. Wesel, ib. n. 31 and 32, and c. 2, n. 197, 198. Christin. ad Leg. Mechl. tit. 16, art. 5, n. 2. Vinnius, de Collatione, c. 8.
monio, such relation is bound to collate one-half of the money which was expended in the purchase. (a)

Collation does not take place for the benefit of the creditors of the deceased, or of any strangers. The property collated is in fact divisible only amongst the co-heirs. (b)

The property received by a child is classed by jurists under the four following heads: 1. Bona Castrensia. 2. Bona Quasi Castrensia. 3. Bona Adventitia. And 4. Bona Profectitia.

1. *Bona Castrensia* are acquisitions made by the son in battle, or gifts or equipments supplied him for his campaign.

2. *Bona Quasi Castrensia* are the son’s acquisitions in the prosecution of the profession or science to which he has devoted himself, as well as those advances or gifts which he has received for the purpose of preparing and qualifying him for it. Of this latter description are the expenses of education and foreign travel, the gift of books, the fees paid on obtaining academical degrees, and the expense incurred in teaching him his trade or calling. No collation takes place in respect of any property which falls under these two heads, unless the parent requires that they should be collated. (c)

If the son for the necessary prosecution of his studies contract a debt in the father’s lifetime, it is considered as due by the father, and payable out of his estate. So a sum which the father has set apart for the necessary education of his son, although not expended in his lifetime, remains impressed with this purpose, and does not form part of his estate. (d)

(c) Dig. lib. 37, tit. 6, l. 1, § 15. Lauterbach, ad h. l. and tit. § 15.
(d) Ib. Voet, ib. n. 14, 15, 23.
The expenses incurred for the son's studies or travels are not exempted from collation, if they are of an amount to diminish the _legitime_ of the other children, or if with reference to the parent's circumstances, and the number of his family, they give to that son an undue proportion of his fortune. (a)

The parent may render advances on this or any other account the subjects of collation, either by expressly directing or by affording evidence of an intention that they should be collated, as by entering them in a book of account, and debiting the son with them. (b) But he cannot compel a child to collate money expended for his necessary aliment, because it is the duty of the parent to supply it. (c)

The parent's statement of the amount of those advances which he requires his son to collate will be proof of it until it is disproved.

The expenses of the son's education and travels will be the subject of collation, if the son were possessed of property of which the father had the possession and management, because the latter is presumed to have made the advance in respect of his administration of the son's property, and not in the relation of parent. (d)

Advances made for the son's education, if they have been squandered by him for other purposes, would not, it seems, be exempted from collation, because the purpose for which they were expended alone confers the exemption. (e)

3. _Bona Adventitia_ are the acquisitions of a child derived by him in any way, and from any service, except from that parent with reference to whose succession the question of collation arises. The _dominium_ or abso-

(a) Ib.  (b) Voet, ib. n. 21. Fachin. Controv. lib. 5, c. 83.
(c) Voet, lib. 37, tit. 6, n. 24.
(e) Vinn. de Coll. c. 13, n. 7. Stryk. Diss. 11, c. 4.
tute property belongs to the child, and is not the subject of collation. (a)

By the civil law, the father is entitled to the usufruct of the property of the child. He enjoyed it until the child ceased to be under his authority. (b)

But by the law of Holland he had no such right. He was only permitted to deduct what he had expended in the maintenance and education of the latter, and was accountable for the surplus to the child. (c)

If the father having himself received the rents and profits, should afterwards give them to the son, the latter would be bound to collate them. It has been said, that if the parent never received, but in the first instance released them, they would not be subject to collation, for they could not be considered as having ever formed part of his estate. (d)

The moderate expenditure incurred by the father for keeping the property in repair, or in raising and receiving the profits, or in any necessary legal proceedings connected with the estate, is not the subject of collation, because the father is bound and presumed to have discharged it out of the usufruct of the estate.

But if his expenditure be such that he could not from its nature and amount be required, or bound to defray it out of the usufruct, it will become a subject for collation.

4. Bona profectitia are those acquisitions which the child has derived from that parent or ancestor in whose succession he claims to participate, but not those which he may have derived from his other parent or ancestor, whether living or previously dead.

(a) Voet, ib. n. 12. Vinnius, ib. Lanterb. ib. n. 11, et seq.
(b) Cod. lib. 6, tit. 60, l. 1, 2; tit. 61, l. 2, 3, 4.
(d) Stryk. Diss. 11, c. 4.
In treating of the gifts made by the parent to the child which are to be collated, it has been a question much controverted, whether that which is called "donatio simplex i. e. non ob causam accepta," is subject to collation. A distinction has been taken by some jurists between gifts to a son who is under the authority of his father, and those to a son who has been emancipated. The latter are to be collated, but the former they say are not to be collated, because as they were invalid and revocable by the father, and could only be valid on the father's death without having revoked them, they are like donations mortis causa which it is admitted never become the subjects of collation. Other jurists are of opinion that such gifts, whether the son be emancipated or not, are to be collated. (a)

But in the opinion of a numerous body of jurists no collation of such gifts takes place, and such may be considered as the doctrine of the civil law. (b)

J. Voet considers that the law of Holland is in conformity with the latter opinion. Groenewegen states that it is a much controverted question, and then proceeds: "Pro instituti mei ratione dixisse sufficiat quod ex polit. Holland. Ordon. art. 29, liberi non tantum dotem et ante nuptias donationem, verum etiam quicquid ad officinam instruendum aut mercaturam faciendum similesve causas à parentibus donationistitulo acceperunt." (c)


Donations *date ob causam*, the dotal gift by the father to his daughter, and the *donatio propter nuptias* to a son on their respective marriages, are to be collated, if they have proceeded from that parent whose succession is in question.

A dowry given by a grandfather to his granddaughter, not on the part of her father, but on her own account, is not liable to collation in any question regarding the inheritance to her father's estate, but if it had been given on account of the father, it would be considered as having been derived from him, and therefore subject to collation. (a)

A dowry given by a brother to the daughter of his brother or sister is not the subject of collation in the division of the father or mother's estate, unless it could be clearly shewn to have been given on the account of the deceased parent. (b)

Not only the dowry which the daughter, or the *donatio propter nuptias* which the son has received, but that which the ancestor has promised them, becomes the subject of collation, so that as to the part to be collated the co-heirs are released from the action to which they were liable. Thus, if a person dies leaving three sons, or two sons and a daughter, having promised to the latter a dowry, or a *donatio propter nuptias* to the son, all are equally liable as heirs to make good the dowry or *donatio*. Hence, the daughter and son could each claim only two-third parts from their co-heirs, and consequently the latter are released from the other third. (c)

A son is not bound to collate the dowry of his wife,

(b) Carps. Def. For. part 3, cons. 11, def. 35. Someren, de Repres. c. 7, n. 16.
(c) Vinnius, de Coll. c. 12, n. 7.
for although stante matrimonio it is in his power, yet it is held to be the property of the wife which will revert to her on his death; and even when it becomes his absolute property by surviving her, it is considered a præcipuvm which he ought to retain in consideration of the marital obligations which he incurred. (a)

According to the civil law, that part only of the dowry was to be collated which could be recovered, if the omission to recover it on the approaching insolvency of the husband be not attributed to the default of the wife. She is excused if being under the authority of her father, she had given him notice, and required him to take measures for its recovery. (b) In Holland, the entire dowry is to be collated, although from the insolvency of her husband she may be unable to recover it. (c)

The money advanced by the parent in providing the feast and festivities on the marriage is not the subject of collation, for it is considered to have been expended by the parent on his own account, and as it is immediately dissipated, the child can never derive any advantage from it. (d) It is otherwise with respect to jewels, dresses, ornaments, &c. given on the marriage, for they remain for the use or profit of the child, and their value is collated. (e)

Advances made by a parent to a child for the support of the family of the latter, or in furnishing him with the means of commencing or continuing his trade or business, as they are made for purposes which prevent the parent from revoking them, are considered not donationes simplices, but as partaking of the character of

(a) Vinnius, de Coll. ib. n. 7.
(b) Novell, 97, c. ult. l. 2. Dig. lib. 37, tit. 7, l. 6.
(c) Voet, lib. 37, tit. 7, n. 2. Groeneweg. ad Cod. lib. 6, tit. 20.
(e) Ib.
dowry or donationes propter nuptias, and are therefore the subjects of collation. (a)

Of the same description are advances made by a father in purchasing for the son an office of profit which is saleable, or transmissible to heirs, or on paying a debt to which the father was liable only as the son’s surety, or a penalty which the son had incurred for an offence. (b)

The son or grandson must collate any debt which he owes his deceased ancestor, to whose estate he succeeds, on whatever account it may have been incurred, and whether the consideration for it was received from the grandfather by the grandson himself, or by his immediate parent, through whom the grandson succeeds by representation. (c)

A gift to a child as a remuneration for some service rendered by him to the parent is not subject to collation. If it be disproportioned to the nature of the service, it becomes a simple gift, and according to the opinions which have been referred to would not become the subject of collation. (d)

A sum advanced by the father in procuring the son’s ransom from captivity is not the subject of collation. (e)

The gains or profits which a son has derived from a sum of money advanced to him by his father for mercantile adventure, if they have been derived not from the labour and industry of the son, but merely from the use of the money, they are profectitia as much as the sum, and are to be collated. But if they have been produced

(b) Ib.
(c) Someren, de Repres. c. 7, n. 2. Voet, ib. n. 15.
(d) Muller’s Prompt. Collatio, n. 17, see n. 66.
(e) Stryk. Diss. 11, c. 4, n. 18.
by the son's labour and exertions, one moiety of them is to be collated. (a)

Not only is the property which the descendant possesses at the death of the ancestor to be collated, but also that which he has only ceased to possess by his own fraud or default. (b) He is not bound to collate that which but for his dolus malus he might have acquired. (c) Nor that which has been acquired after the death of the ancestor. (d) Specific bequests, prelegata, are not to be collated, nor rights of preference or precipuum which are attached to primogeniture. (e)

In the succession to feuds, the person taking the feud is, in certain cases, bound to collate with his brothers and sisters the whole or some part of the price, whether in money or other property, which has been given for its purchase. The obligation to collate exists only when the feud has been acquired by the father himself, and not when it is an ancient feud, nor even when the new feud has been acquired in exchange for an ancient feud, because by this mode of acquiring it, the general estate of the father has not sustained any diminution. If the whole feud descends on one of the brothers by right of primogeniture, he collates with his brothers and sisters the price or value given by his father for it. (f)

If the eldest son succeeds not to the whole but only to two-thirds of the feud, he must collate one-third of its present value, or of the feud itself at his election; for in collateral successions, he who takes the feud is not bound to collate with the heirs of the deceased.

If the ancestor of the deceased had mortgaged the feud, and the latter had discharged the mortgage debt,

(b) Dig. lib. 37, tit. 6, l. 1, § 23, l. 2, § 2.
(c) Ib. l. 1, 23.
(d) Cod. lib. 6, tit. 20, l. 10, 13, 15. Brunnenman, h. l. and tit. l. 10. Rhitterah, ad Novell, p. 5, c. 6, n. 5. Voet, lib. 37, tit. 6, n. 12.
(e) Ib.
(f) Matth. Param. Belg. 8, n. 38.
the successor to the feud must collate the amount which had been expended in discharging it. \( (a) \)

If besides the children, the wife of the deceased be surviving, and the feud has been purchased out of the joint property of the husband and wife, the eldest son taking the feud must collate in favour of the widow one-half the price which had been paid, and the other half with his brothers and sisters. \( (b) \)

The collation by the eldest son succeeding to the feud takes place only in the direct line, and not amongst collaterals; but when the succession is in the collateral line, one-half of the price is to be paid to the widow, whenever the feud had been acquired out of the community of the husband and wife. \( (c) \)

If it be \textit{feudum antiquum} no collation takes place. \( (d) \)

If the feud had been rendered more valuable by improvements made at the expense of the last possessor, and not by means of alluvion or of any other natural cause, the expense, so far as it has made the feud more valuable, is to be collated as between brothers only, and not as between collaterals and others. \( (e) \)

The collation is to be made at the time of the division of the inheritance, and the time of making the division has relation to that of the death of the ancestor, so as to include such property only as subject to collation, which had been acquired in the lifetime of the latter, and for the purpose of charging the party with the value of the property as it existed at that time, or with any price which he had subsequently obtained for it. \( (f) \)

\( (a) \) Math. Parem. Belg. 8, n. 42.

\( (b) \) Ib. n. 44.

\( (c) \) Ib.

\( (d) \) Voet, lib. 37, tit. 6, n. 16.


Either the property itself in its actual state, unless its deterioration is attributable to the fraud or default of the party bound to collate, or its value, is to be brought into the general mass of the succession, or the property may be retained by the party bound to collate, and a deduction made from the share of the latter of equal amount with the property to be collated. It is competent for him to adopt either of these modes. (a)

If collation cannot be made at the time of the division, either because the liability to collate or the amount to be collated is the subject of dispute, the party bound to collate may be compelled to give security. (b)

If a party should die before the collation is made, his heir is also bound to give such security. (c)

If from the poverty of the party he cannot find security, a curator is appointed of his share of the succession, which is applied to make good that which ought to be collated. (d)

When the value is collated, it is that which the property is worth at the time of the death of the testator, and not at the time when it was given, unless indeed its value has been deteriorated by the fraud or default of the party. (e)

By the Placant of Holland of 1580, article 29, if the property which is the subject of collation were not valued at the time of the gift, or if it were valued, it is competent for the party to collate the property itself or its value at the time it was given. It is in his power, therefore, if it has become deteriorated without his fraud or default, to collate the property itself instead of its former value, whilst on the other hand if it had been

(a) Vinnius, de Coll. c. 16, n. 2. Stryk. Diss. 11, c. 5, n. 3, et seq. Huber, Prul. lib. 37, tit. 6, n. 6. Voet, lib. 37, tit. 6, n. 9.
(b) Voet, ib. Stryk. ib. Vinnius, ib.
(c) Ib.
(d) Vinn. de Coll. c. 16, n. 7.
improved by alluvion or any other cause, he might retain the property, and collate its former value. (a)

The interest, rents, or other profits which may have been derived from the property in the lifetime of the parent are not required to be collated. Those, however, which may have been received since his death may be subject to be collated, in consequence of the parties' delay in collating. (b)

Debts to which the property to be collated was subject at the time it came to the son, and which have been discharged by him, are to be deducted from it. (c)

The parent or ancestor may either by his will or codicil, or by any other written instrument, or by any verbal declaration, release his child from the obligation to collate. It is not necessary that he should release it by any particular or express terms; it is sufficient if it can be collected from his language that it was his intention that the child should not collate. (d)

Thus if a parent in dividing his whole estate amongst all his children assign a larger share to those who had before received from him nothing, or less than some other of his children had received from him, and at the same time assign a smaller share to those who previously received from him property which would be the subject of collation, or if instituting all his children equally as his heirs, he gave to those who had not received anything from him a smaller bequest, a specific prælegatum corresponding in amount with that which he had given

(c) Stryk. Diss. 11, c. 5, n. 7. Vinnius, de Coll. c. 7, n. 8; c. 16, n. 12, et seq. Voet, ib.
(d) Vinnius, de Coll. c. 7, n. 7. Carpz. p. 3, c. 11, def. 24. Barry, de Success. lib. 14, tit. 4. Voet, lib. 37, tit. 6, n. 27. Stryk. Diss. 11, c. 6, n. 6, et seq. Lauterh. lib. 37, tit. 6, n. 25.
the others; in either of these cases he is considered as evincing an intention that the property previously given shall not be collated. (a)

But he cannot release the obligation to collate when it would have the effect of prejudicing the legitime of the other children. (b)

The obligation to collate does not arise if the son is disinherited, and acquiesces in his disherison, or if he abstains from the inheritance of him from whom the property to be collated was derived. (c)

But when one of several grandsons entitled to succeed per stirpes renounces the succession to his grandfather's estate, and when consequently his share accrues to his brothers or sisters, the latter, if they accept the succession, must collate with their uncles and those entitled to succeed, whatever the grandson renouncing the succession would have been bound to collate, if he had with the others accepted the succession, (d)

But a child, although he should abstain from the succession, yet if by retaining the dos, or donatio propter nuptias, the other children will be deprived of their legitime out of the father's estate, he must contribute so much of the one or the other as will make up the legitime. (e)

The heir is equally bound to collate whether he adiates the inheritance with or without benefit of inventory. (f)

A contract in the lifetime of the deceased by which the parties agreed to release the obligation to collate was void by the civil law, because it respected a future succession; but it is valid by the law of Holland. Whenever the law permits a future succession to be the subject of contract, there can be no objection to a con-

(a) Ib.
(b) Ib.
(c) Stryk. Diss. 11, c. 6, n. 11. Voet, lib. 37, tit. 6, n. 25.
(d) Someren, de Jure Repraes. c. 7, n. 13. Voet, ib.
(f) Voet, ib.
tract by which the parties may renounce collation, or regulate the extent to which it may be made. (a)

The property collated is added to, and contributes to constitute the general mass of the estate which is to be divided, and in which the heirs participate in the proportions in which they are instituted. (b)

The right to require, and the obligation to make collation, will pass to the heirs of him on whom the right or obligation devolved. (c)

If the person refuse to collate, either as to all or one or more of his co-heirs, all *haereditariae actiones* are withheld from him. His refusal to collate subjects him to an action, and may be insisted on by exception to any action brought by him in respect of his interest in the succession. (d)

II. Collation forms part of the *coutumes* of Paris and Normandy, and of the Code Civil, under the designation of *le rapport à succession*.

Under the *coutume* of Paris it is enforced by prohibiting the parents from conferring on one of the children a greater advantage than they gave to their other children:

"Père et mère ne peuvent par donation faite entre-vifs, par testament et ordonnance de dernière volonté, ou autrement en quelque manière que ce soit, quelconque avantage leurs enfans, venans à leurs successions, l'uns plus que les autres." (e)

It was further enforced by declaring that the same person cannot be both heir and legatee of the same testator: "Aucune ne peut être héritier et legataire d'un defunt ensemble;" although in the collateral line the same person may be both heir and donee by donation *inter vivos*. (f) "Peut toutefois entre-vifs être donataire et héritier en ligne collaterale." (g)

(a) Voet, lib. 37, tit. 6, n. 28. Vinnius, de Coll. c. 17, n. 6.
(b) Vinnius, de Coll. c. 17, n. 3. (c) Stryk. Diss. 11, c. 5, n. 9.
(d) Brunneman, ad Cod. lib. 6, tit. 20. Stryk. c. 5, n. 10.
(e) Cout. de Paris, art. 303. (f) Art. 300. (g) Art. 301.
Again, it provides that all the heirs of the deceased should come equally to the succession of the same deceased, except in the succession to heritages held in fief or franc-aleu noble: "Les enfants héritiers d’un défunt viennent également à la succession d’icelui défunt, fors et excepté des héritages tenus en fief, ou franc-aleu noble, selon la limitation mentionnée au titre des fiefs." (a)

It then expressly requires that all the children coming to the succession shall collate whatever has been given to them or to their children: "Les enfans venans à la succession de père ou mère, doivent rapporter ce qui leur a été donné, pour avec les autres biens de la dite succession, être mis en partage entr’eux ou moins prendre." (b) "Pareillement ce qui a été donné aux enfans de ceux qui sont héritiers, et viennent à la succession de leur père, mère, ou autres ascendants, est sujet à rapport, ou à moins prendre." (c)

The first important distinction between the coutume of Paris and the civil law is, that it requires in the direct succession the collation of bequests by testament as well as of a donatio inter vivos, and even in the succession of collaterals it requires the collation of bequests by testament, although not of donations inter vivos.

In the collation between heirs in the direct line, the expression en manière quelconque subjects to collation all advantages, indirect as well as direct, which the children have received from their parent, or ascendant ancestor. Of this description, and subject to collation, are gifts to a third person which the latter is to restore to the child; the sale by a parent to a child of a property much below its real value, or a transaction or compromise between the father and child on the dealings of the former in his character of tutor, and on which he renders himself a debtor to the child in a larger sum than is actually due from him; a discharge of the son from his account-

(a) Art. 302. (b) Art. 304. (c) Art. 306.
ability to him on his dealings as his agent; an acquaintance for a sum which the son owes, but which was not paid by him to his father, and in short that which is an advantage or benefit to the child, under whatever name and form it may be given, is the subject of collation. (a)

Pothier has added a qualification to the doctrine, which would be deduced from the article itself. He considers that there may be advantages which a child may derive from the act of his parent which would not be the subject of collation: "Rapporter," he says, "signifie remettre à la masse des biens du donateur quelque chose qui en est sorti." (b) Unless, therefore, property received by the child had passed from the parent’s estate, it is not subject to collation. To illustrate this distinction he cites the following cases. A mother is entitled to succeed to the estate of her brother, which consists of fiefs. In order to favour her sons, she renounces the succession, and they therefore succeed to their uncle, and exclude their sisters; and he maintains, in opposition to Le Brun, that the males are not bound to collate the fiefs. A father has an estate devised to him and the son jointly, and he renounces the succession, and the son receives the whole of the share of the father, his share is not the subject of collation. (c)

Sums which the parent has lent to the child, and the debts of the latter which he has discharged, are to be collated. If a parent has lent a sum of money to his son who afterwards becomes a bankrupt, and the creditors of the latter with the father consent to discharge the son on receiving a composition for their demands, the latter is bound to collate the difference between the full amount of the original loan and the sum at which he had compounded with his father and the other creditors. (d)

(a) 2 Ferriere, sur l’Art. 303, p. 301, et seq. Pothier, Tr. des Success. c. 4, art. 2, § 2.
(b) Pothier, ib.
(c) Ib.
(d) Ib.
The heir who with the other co-heirs succeeds to the estate of his parents or other ascendants, must collate that which has been given not only to himself, but to his children. (a)

The construction of these articles has been in conformity with the rules established by the civil law, in exempting from collation those advances which are made for the maintenance, education, &c. of the children. It is to be observed, that a bequest for any of these purposes would be subject to collation. (b)

Such rents of real estate or interest, or other profits of moveable estate, as are received after the succession has opened, but not those received in the parent's lifetime, are subject to collation.

As the collation is to be made to the estate of that person from whom the subject to be collated was received, if dowry has been given by the father as the head of the community, it is presumed to be given by both the conjoints, and therefore one moiety is to be collated to the estate of the father, and the other moiety to that of the mother. (c)

If the real property which the child has received be in his possession at the time of the division, it must be collated in specie, or it may be retained by him if there be in the succession other property, "de pareille valeur et bonté," from which the value of the property to be collated, estimated at the time of the division, may be deducted: "Si le donataire lors du partage a les héritages à lui donnez, en sa possession, il est tenu les rapporter en essence ou espèce, ou moins prendre en autres héritages de la succession de pareille valeur et bonté. Et faisant le dit rapport en espèce, doit être remboursée par ses cohéritiers des impenses utiles et nécessaires. Et si les dits cohéritiers ne veulent rembourser lesdites impenses, en ce cas le donataire est tenu rapporter seulement l'esti-

(a) Art. 306. (b) Pothier, ib. (c) Ib.
mation d'îceux héritages, eu égard au tems que division et partage est fait entre eux ; déduction faite des dites impenses." (a)

The value of personal property as it existed at the time of the donation is collated.

The person to whose share the property collated may fall is regarded as having derived it from his parent as fully and entirely as if it had never belonged to the brother by whom it is collated, and any charge to which the latter might have subjected it, is at an end.

The children might by abstaining from the succession avoid collating that which they had received. The article 303, applies expressly to those who accept the succession, "venans à leur succession." The parent might therefore evade the effect of this law by giving to one child all his moveables and acquêts, and one-fifth of his propres, provided he left sufficient for the legitime of the other children, and that child might retain them, if he renounced the succession. (b)

It is not in the power of the parent to dispense with the obligation to collate. (c)

If real or immovable property has perished without the default of the party, it is not subject to collation. It is otherwise with moveable or personal property, which is to be collated according to its value at the time it was given: "Res sua domino perit," for the donee had acquired the absolute ownership in it. (d)

In the collation which takes place between collateral heirs and heirs in the direct line, there is this distinction, that the former collate only bequests which are made to them by testament, and not donations inter vivos, whilst the latter collate both. (e)

Another distinction is, that amongst heirs in the direct

(a) Art. 305.
(b) 2 Basnage, 234.
(d) 2 Basnage, 244.
(e) Art. 300, 301.
line, collation takes place in respect of that which has been received by the husband, wife, or child of the collating party, as well as by himself, but a collateral heir collates only that which he has himself received.

The true meaning of the rule "aucun ne peut être héritier et legataire" is this, that where there are two or more co-heirs, one of them shall not claim by the title of legatee any part of that property to which he is entitled as an heir, but he must bring his legacy into the general mass, to be distributed between him and his co-heirs. (a) The collation only takes place when the person can take as heir the property which is bequeathed. A person may be called to the succession of the estate of the deceased by the law of one country, but not by that of the country in which the property bequeathed to him is situated. In the latter case, he claims the property bequeathed to him as a stranger, and is not bound to collate it. Thus, where the deceased, who left brothers and a nephew, had property situated at Orleans, where representation is admitted, and also at Blois, where it is not admitted, the nephew who with the brother of the deceased succeed as heirs to the property at Orleans, may also be a legatee of the property at Blois, because he was not the heir of the latter property. (b)

It seems, that if a person be called to the succession in two countries, he may accept the inheritance as to the property situated in one country, and renounce it as to that which was situated in another country. (c)

Again, a person heir to the propres of the father may receive as a legacy the moveables and acquêts, and the heir to the propres of the mother may receive as a legacy the propres paternels.

The doctrine of collation under the coutume of Normandy is to be found in the following articles: "Père

(a) Poth. Tr. de Success. c. 4, art. 3.  
(b) Poth. ib. § 2.  
(c) Poth. ib.
et mère par leur testament ne peuvent donner de leurs meubles à l’un de leurs enfans plus qu’à l’autre.” (a) “Et quant aux autres personnes qui n’ont enfans, ils pourront donner à leurs héritiers ou autres personnes telle part de leurs meubles que bon leur semblera.” (b)

“Personne âgée de vingt ans accomplis peut donner la tierce partie de son héritage et biens immeubles, soient acquêts, conquêts ou propres, à qui bon lui semble, par donation entre-vifs, à la charge de contribuer à ce que doit le donateur lors de la donation, pourvu que le donataire ne soit héritier immédiat du donateur ou descendant de lui en ligne directé.” (c)

“Neanmoins si le donateur n’a qu’un héritier seul, il lui peut donner tout son héritage et biens immeubles.” (d)

“Et s’il y a plusieurs héritiers, il leur peut donner à tous ensemble, mais ne peut vantager l’un plus que l’autre, comme il a été dit ci-dessus.” (e)

“Le père et la mère ne peuvent avantager l’un de leurs enfans plus que l’autre, soit de meubles ou d’héritage, pource que toutes donations faites par le père ou mère à leurs enfans, sont réputées comme avancement d’hooirie, reservé le tiers de Caux.” (f)

The coutume of Normandy like that of Paris, prohibited the parent from giving directly or indirectly to one of his children or descendants, either by testament or donation inter vivos, a greater share of his property or a greater benefit than he gave or bequeathed to the others. But it was more effectual than that of the coutume of Paris, because it did not admit of the child’s retaining that which he received, if he abstained from the succession. The article 434 adds to the prohibition the following declaration: “Toutes donations faites par les père ou mère à leurs enfans sont réputées comme avancement d’hooirie.” But the article 434 has been held to

(a) Cout. Normand. art. 424.  (b) Art. 425.  (c) Art. 431.
extend to the succession of collaterals, as well as of heirs in the direct line, and in this respect it is distinguished from the 303rd article of the coutume of Paris, which did not require that collateral heirs should collate gifts made to them by the testator in his lifetime.

It is competent for the ancestor to prefer any one of his collateral heirs by a donatio inter vivos of moveables. But with respect to his immovable property, he cannot make a gift to one of the co-heirs. (a)

In other respects, the coutume of Normandy, in the rules deduced from these articles, corresponds with that of Paris.

III. Under the Code Civil, every heir collateral, direct or beneficiary, or the representative of either, is bound to collate the gift which he has received.

This obligation is imposed on him who joins to the character of donee that of heir to the donor, or the character of heir to that of being the representative of the donee.

Although the donee might not have been the heir presumptive at the time of the donation, yet if he become the heir at the opening of the succession he must collate, unless the donor had dispensed with his collating it. (b)

Collation takes place only between co-heirs in the case of intestacy, and not between heirs instituted by the ancestor or legatees, or donees. Neither the collation nor reduction of donations inter vivos takes place in favour of the creditors of the succession or of legatees, but the creditors of one of the heirs may compel the collation due to him by any of the co-heirs. (c)

It is only when the heir comes to the succession by representation and not in his own right, that he must collate a donation made to his father. Titius makes a donation to his uncle Caius of the farm C. Caius dies,

(a) 2 Bynagage, 223. (b) Art. 843, 846. (c) Art. 857.
and his son Seius comes to the succession, in which he finds this farm. Titius then dies, leaving Seius, his cousin-german, and two other cousins-german his heirs. As Seius succeeds in his own right, and not by representation, he is not bound to collate the property which had been given to his father. (a)

Seius, after having made a gift to his father Caius, dies without children, brother or sister, and his succession devolves on his ascendants. The gift being very considerable, Caius the father, in order to retain it, renounces the succession. Titius, the grandfather of the deceased, thus succeeding to the estate in his own right, is not obliged to collate in favour of the maternal grandfathers. (a)

If the husband alone, and not jointly with the wife, gives a dowry to the child out of the community and die, and the widow accept the community, the collation is made of one moiety to the succession of the father, and of the other moiety to that of the mother. If she renounce the community, the whole is collated to the father's estate. If the husband being donor survive, and the heirs of the wife accept the community, the child collates a moiety in favour of her brothers and sisters in the succession of the mother, and the other moiety to that of the father. (b)

A legatee, who is at the time an heir ab intestato, cannot in the quality of legatee take advantage of any collation which in the quality of heir he obliges his co-heirs to make. (c)

The general expression in art. 843 must be restrained to indirect donations, which are prohibited. Indirect donations disguised under the form of an onerous contract are subject to collation. (d)

A bona fide partnership formed between the deceased and one of his heirs is one of those conventions, the profits

(a) Toullier, des Success. tit. 1, c. 6, n. 460. (b) Ib. n. 464.
(c) Ib. n. 465. (d) Ib. n. 474.
of which are not subject to collation. (a) But it must have been formed without fraud, that is, it must not contain any prohibited advantage, and the conditions by which it is formed must be regulated by some authentic act. It would be a prohibited advantage, if he were admitted to share in the profits without being subject to the loss. (b)

The donor may dispense with the obligation, either by declaring that the gift is not to be collated, or by expressing that it is made as addition and par preciput hors part. This declaration may be made either in the act which contains the gift, or by any subsequent act, or by will. (c)

Even if the gift or bequest has been made par preciput, or with a dispensation of collation, the heir can only retain la quotité disponible, the excess must be collated.

The heir renouncing the succession may retain a donation, or claim a legacy to the amount of that proportion. (d)

Donations not made to the heir personally are presumed to have been made par preciput and hors part, unless the donor has expressed a contrary intention, and therefore if they are made to his wife or child, they are not subject to collation. (e)

The profits which the heir may receive from conventions passed with the deceased are not the subject of collation, if when they are made, they do not afford any indirect advantage. (f)

The Code annuls indirect donations disguised under a fidei-commissum, when their object is to confer an advantage on a person incapable of taking; but if the person was not incapable of taking, they are as valid as direct donations, provided they do not degenerate into substitutions. They are subject only to reduction, when

(a) Code Civil, art. 854. (b) Art. 1840. Toullier, ib. n. 477.
(c) Art. 843, 844, 919. (d) Art. 845.
(e) Toullier, ib. n. 476. (f) Art. 853.
and so far only as they exceed \textit{la quotité disponible}. In fact, the law presumes the obligation to collate them is dispensed with. \((a)\)

IV. The law of Scotland has adopted the doctrine of collation. \((b)\)

Every provision given by the father to the child, not only the tocher or other provisions granted in his or her marriage contract, or in separate bonds, but all sums actually advanced by the father to the child, or for his behoof, though without any writing signed by the receiver, obliging himself to account, are subject to collation. \((c)\) But neither the expense of such education as is suitable to the child's quality or fortune, nor inconsiderable presents made to him by the father, are to be collated. \((d)\)

Collation is excluded where it appears evidently to have been the granter's intention that the child should have the provision as a \textit{præcipuum} over and above his share of the \textit{legitime}. Thus, a clause in a bond of provision by a father that the child notwithstanding that provision should have at his death an equal share of his goods with his other children, is the clearest indication of his intention that the provision should not be collated. \((e)\)

A clause declaring that the child shall continue a bairn in the house, implies in the opinion of Lord Stair, a prohibition to collate, \((f)\) and it was so adjudged. \((g)\) But a father's declaration in the bond of provision that the child is to continue in his family, and consequently to be entitled to a share of the \textit{legitime}, seems in the opinion of Erskine to be but slight evidence of his pur-

\((a)\) Art. 847, 848, 849, 844. Toullier, ib.

\((b)\) Erskine, b. 3, tit. 9, § 24.


\((d)\) Ersk. ib.

\((e)\) Feb. 9th and 18th, 1631,Corsan, Dict. 12,849, 2367.

\((f)\) Stair, b. 3, tit. 8, § 45, 46.

\((g)\) Beg, Nov. 18th, 1737, Dict. 2379.
pose that the child is not to collate, for collation is admitted only among those who are entitled to a *legitime*. (a)

A child cannot be compelled to collate a bond of provision granted to him by his father on death-bed, for although the father cannot by a death-bed deed diminish the *legitime* to the prejudice of any of his children, yet he may dispose of his dead's part *etiam in articulo mortis*, and if he can bequeath it to a stranger, *a fortiori* to his own child. Upon a similar ground, a legacy by a husband to his wife was presumed to have been granted wholly out of the dead's part, and so not imputable towards satisfying her *jus relictæ*. (b)

Where a land estate or an heritable right is provided to a younger child, he is not bound to collate it, for the subject of the *legitime* is not impaired by such provision, since the fund out of which the *legitime* is due does not arise from heritable rights. (c)

As this species of collation is introduced in order that equal justice may be done to all who have a right in the *legitime*, it does not affect the rights of third parties. Hence a widow cannot be compelled to collate legacies or donations given to her by her husband, and thereby to increase the *legitime*; nor on the other hand are children *in familias* obliged to collate their provisions with the widow in order to increase the *jus relictæ*. (d)

When the estate of the deceased consists partly of heritage, and partly of moveable, the proper heir in heritage has no share of the moveable estate, if there be others as near in degree to the deceased as himself. Thus, in the line of descendants, the eldest son takes the whole heritage, and all the other children, whether sons or daughters, divide the moveable estate among them *per capita*. So also in the collateral line, that brother who as heir-at-law is entitled to the whole

(a) Erak. ib. (b) Ib. Stair, Jan. 12th, 1681, Trotter, Dict. 2375. (c) Duke of Buccleuch, Dict. 2369. (d) Erak. ib. § 25.
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heritage, is excluded by his other brothers and sisters from any share of the moveable succession. But if the heritable estate of the deceased should be so inconsiderable in proportion to the moveable, that it is the interest of the heir to renounce his exclusive claim to the heritage, and avail himself of his right as one of the next of kin to participate in the moveable estate, the law allows him to collate or communicate the heritage with the other next of kin, who in their turn must collate the executry with him, so that the whole estate, heritable and moveable, belonging to the deceased, is thrown into one mass, and distributed by equal parts among all of them. (a)

But the heir must be like the other claimants, one of the nearest of kin. Where he is not as well as they amongst the nearest of kin, there is of course no room for collation. For the heir would not otherwise have the slightest claim to any part of the executry, and it is only where by renouncing he can place himself in the same situation as the others, that the right exists. (b)

Where an heir of provision, or even of a strict entail, is alioqui successurus as well as next of kin, it has been seen that he is bound to collate in order to entitle him to a share of the moveables, although the succession to the heritage be under the conditions of an entail. (c)

In the early case of Murray v. Murray, (d) it was held that even where the heir had acquired part of the real property per pecationem hereditatis, he was bound to collate it in order to qualify him to draw a share of the moveables. But a contrary principle obtained where the conveyance during the ancestor's life had been made to one of two heirs-portioners, as this showed an

(a) Erskine, b. 3, tit. 9, § 3.
(d) July 23rd, 1678, Dict. 2374.
intention to favour that party, whereas, in the other case, the
ancestor had merely placed the party beforehand in the situation
which the law ab intestato would have given him. 

V. In England the Statute of Distributions provides,
that no child of the intestate, except his heir-at-law, who
shall have any estate in land by the settlement of the
intestate, or who shall be advanced by the intestate in
his lifetime by pecuniary portions equal to the distribu-
tive shares of the other children, shall participate with
them in the surplus, but if the estate so given to such
child by way of advancement be not equivalent to their
shares, then that such part of the surplus as will make it
so, shall be allotted to him or her. 

The statute, unlike the provision of the civil law and
of the other Codes which have been referred to, applies
exclusively to an advancement made by the father. If
it were made by a mother, and she died intestate, leaving
many children, the child advanced does not bring what
he received from his mother into hotch-pot. This was
decided on the principle, that the statute was grounded
on the custom of London, which never affected a widow’s
personal estate, and that the act seems to include those
alone within the clause of hotch-pot, who are capable
of having a wife as well as children, which must be
husbands only. 

The provision in the statute applies only to the case
of actual intestacy, and where there is an executor, and
consequently a complete will, though the executor may
be declared a trustee for the next of kin, they take as if
the residue had been actually given to them. Therefore
a child advanced by his father in his life, or provided
for in the will, cannot be called on to bring his share
into hotch-pot. 

(a) Riccarta, Nov. 19th, 1790, Dict. 2378.
(b) Sect. 5. 2 Bl. Comm. 516.  (c) Bolt v. Frederick, 2 P. Wms. 357.
(d) Sir W. Grant, in Walton v. Walton, 14 Ves. 324. 2 P. Wms. 440, 445.
See Vachell v. Jeffereys, Pr. Ch. 170.
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If a child who has received any advancement from his father die in his father's lifetime leaving children, such children are not admitted to their father's distributive share, unless they bring in his advancement, since as his representatives they can have no better claim than he would have had if living. (a)

A child advanced in part brings in his advancement only among the other children, for no benefit accrues from it to the widow. (b)

The statute extends not only to lands, freehold and copyhold, settled on a younger child by the father, but also to charges upon land for such child, rents, and reversions. (c)

But land devised by the father to a younger child is not to be so considered, for a provision to be brought into hotch-pot must be such as is made by an act in the intestate's lifetime, and not by will. (d)

If the younger son takes the land by a particular custom, as borough English, he is not bound to collate it. (e)

Although the heir-at-law does not abate in respect of the land which comes to him by descent or otherwise from the intestate, yet if he has had any advancement from his father out of his personal estate, he abates for it in the same manner as the other children. (f)

Co-heiresses also, it seems, bring in such advancement, not being land, as they may have respectively received from their father before they are entitled to their distributive share. (g)

(a) Proud v. Turner, 2 P. Wms. 560.
(c) Sir J. Jekyll, 2 P. Wms. 441.
(g) 4 Burn, E. L. 397. Toller, 879. 2 Williams's Exors. 915, et seq.
It is not requisite to constitute an advancement, that the provision should take effect in the father's lifetime. (a)

An annuity given in the father's lifetime to commence after his death, becomes when that event happens equally an advancement.

A portion even while contingent, being capable of valuation, may, it seems, be brought into hotch-pot. (b)

Where a father makes a provision for a son on his marriage, all the limitations in such settlement to the wife and children of such son must be considered as part of that advancement, and it is not the son's estate for life only that ought to be valued and brought into hotch-pot. (c)

A father had lent the sum of £10,000 to his son to assist him in forming a partnership in the business of a sugar refiner, and took his promissory note for the repayment of that sum on demand. It appeared that it was in consequence of the urgent desire of the intestate that the son engaged in the business, and that finding it was a losing concern, he became desirous of retiring from it, but that the father urged him to continue it, that at the earnest entreaty of the intestate he with much reluctance continued the business and sustained heavy losses in it. The father on his death-bed caused the promissory note to be burned, and died intestate. Sir John Leach, M. R. held, that, although the circumstances under which the note had been destroyed amounted to an equitable release of the debt, yet that the sum which remained due upon it must be considered an advancement to the son. (d)

If any of the children of an intestate, being a freeman of London, or domiciled within the province of York,

(a) 3 P. Wms. 445.
(b) 2 P. Wms. 442, 449. Tollem, 378.
(c) Weyland v. Weyland, 2 Atk. 635.
(d) Gilbert v. Wetherell, 2 Sim. and Stu. 254.
are advanced by the father in his lifetime to the full extent of their distributive share under the custom, they are entitled by the custom to no further dividend. \(a\)

Therefore, if all the children, or an only child, have been fully advanced, the custom will then have been satisfied, and the intestate will be considered in the same view as if he had left no children. \(b\) And his whole personal property, if he left no wife, will be distributed according to the statute. \(c\)

But such advancement will be in satisfaction merely of a child’s share by the custom, and not of his distributive share under the statute, to the whole of which he will be entitled without regard to what he has received from his father. \(d\)

If one of several children be fully advanced, the effect is to remove that child entirely out of the way, and to increase the shares of the others, and not the dead man’s part. \(e\)

If any of the children have been advanced partially, they must bring their portion into hotch-pot before they can derive any advantage from the custom. But such partial advancement, like a full advancement, shall be brought into hotch-pot with the orphanage part only.

Therefore, the children who have been partially advanced shall bring their portion into hotch-pot with the other brothers and sisters only, and not with the widow. If the intestate has in part advanced his only child, such child does not bring in his advancement, for there is none to claim with him of equal degree. \(f\)

\(a\) Cleaver v. Spurling, 2 P. Wms. 527.
\(c\) Goodwin v. Ramsden, 1 Vern. 200.
\(e\) Folkes v. Western, 9 Ves. 460.
If a child be married in the lifetime of the intestate father with his consent, although such child was not fully advanced, yet to entitle himself or herself to a further portion, he or she must produce a writing under the father's hand expressing the value of the advancement, in order that it may be ascertained what proportion it bore to the share by the custom. (a)

If no such writing be produced, or if on the production of such writing, the specific amount does not appear on the face of it, such advancement is presumed to have been complete till the contrary be shewn. (b) But the mere declarations of the father that he had fully advanced the child, whether with or without the specification of the value, will be of no avail. (c)

If a freeman leave no wife but several children, as for instance, three, one of whom is fully advanced, another partly advanced, and the third not advanced, after the former has brought in his partial advancement, they shall share one-half equally between them by the custom, and the other half, namely, the dead man's part, although the first child has been fully advanced, shall without his bringing his advancement into hotch-pot be distributed by the statute equally amongst them all. If such advancement exceed his orphanage part, then whether the excess shall go in satisfaction of his distributive share by the statute or not, seems to depend on the provision


being expressly in satisfaction of the orphanage part, or being general, and without any stipulation. (a)

There is an important difference between the custom of London and that of the province of York with respect to the nature of the advancement, subject to be brought into hotch-pot. According to the former, the advancement, whether complete or partial, must arise exclusively from personal estate. (b)

If, therefore, a citizen settle a real estate on a child it will be no advancement, (c) nor, although it be expressly made for that purpose, will it bar him of his orphanage part. (d)

But the custom includes chattel interests, and therefore a settlement of a term of years is an advancement within its provisions. (e)

In the province of York not only does land as well as money constitute an advancement, (f) but the heir-at-law, if he takes by inheritance any land, either in fee or in tail general or special, is divested of all claim to any filial portion; (g) and however small in point of value the land may be in comparison with the personal estate, (h) and even although the estate he inherits be only a reversion, (i) and although the land devolved upon him by settlement made on his father’s marriage, he is excluded. (j)

(a) Toller, 398.
(b) Clavel v. Littleton, 1 Eq. Cas. Abr. 150, note (a). Tomkyns v. Ladbroke, 2 Ves. sen. 593, by Lord Hardwicke.
(c) Cox v. Belitha, 2 P. Wms. 274.
(e) Cox v. Belitha, 2 P. Wms. 274.
(f) Constable v. Constable, 2 Vern. 375.
(h) Swinb. part 3, § 18, pl. 11. 4 Burn, E. L. 464.
(i) Swinb. ib. pl. 12. 4 Burn, E. L. ib.
(j) Constable v. Constable, 2 Vern. 375.

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The custom is on this head construed strictly, and is held to apply merely to the heir at common law, and to lands only which devolve on him in that character. If, therefore, he takes them by purchase as tenant in tail or for life, under his father’s will, and not by descent, or if he inherit them as heir by borough English, or if the estate be copyhold to which he succeeds as customary heir, he will in none of these instances be excluded from his filial portion. (a)

With respect to the species of benefit which shall be regarded as an advancement under the customs out of the personal estate, the propositions which have been stated on this head with respect to the construction of the statute of distributions, are here equally applicable. It has indeed been questioned whether such provision as amounts to an advancement under the customs ought not to be made on marriage, or in pursuance of a marriage agreement. But it seems clear that the customs on this head are not so restricted, but extend to any other establishment of the child in life. (b)

The interest which a child has in his orphanage part is a mere contingency and no present right, and therefore a release of it is not valid in point of law, but if founded on a valuable consideration, it will operate as an agreement, and be binding in equity. (c)

VI. In all the British West India Colonies, except those of Demerara, Berbice, Trinidad, and St. Lucia, the English Statute of Distributions being in force, the collation is that which is enacted by that statute.

(a) Swinb. ib. pl. 14. 4 Burn, E. L. 465.
In the North American colonies of Nova Scotia, New Brunswick, and Prince Edward's Island, the real as well as personal estate of the intestate is distributed amongst the children, giving to the elder son a double portion. Those children who have been advanced by settlement or portions not equal to the others' share, have so much of the surplusage as makes the estate of all to be equal, except the eldest son then surviving (where there is no issue of the first born, or of any other elder son), who has two shares or a double portion of the whole. (a)

Such estate wherewith such child or children have been advanced in the lifetime of the intestate is to be accounted for upon the oath of such child or children before the judge of probate and wills, and for granting letters of administration, or by other evidence, to the satisfaction of the judge, and in case of refusal to account upon oath, such child or children so refusing shall be debarred of any share in the estate of the intestate.

There is generally in the statute laws of the several states of America, except Louisiana, a provision relative to real and personal estates, similar to that which exists in the English Statute of Distribution concerning an advancement to a child. If any child of the intestate has been advanced by him by settlement, either out of the real or personal estate, or both, equal or superior to the amount in value of the share of such child, which would be due from the real and personal estate if no such advancement had been made, then such child and his descendants are excluded from any share in the real or personal estate of the intestate. But if such advancement be not equal, then the child and his descendants are entitled to receive from the real and personal estate

sufficient to make up the deficiency, and no more. The maintenance and education of a child, or the gift of money without a view to a portion, or settlement in life, is not deemed an advancement. (a)

This is the provision as declared in the New York Revised Statutes, (b) and it agrees in substance with that of the statute laws of the other states. (c) They substantially follow the Statute of Distribution, although there are a few shades of difference in the local regulations on the subject. The statutes in Maine and Massachusetts require that the evidence of the advancement should consist of a declaration to that effect in the gift or grant of the parent, or of a charge in writing to that effect by the intestate, or of an acknowledgment in writing by the child. The provision in those states and in Kentucky applies equally to grandchildren, whereas the language of the provision is generally in the other states, like that in the Statute of Distribution, confined to an advancement to the child of the deceased. It is declared in New York, that every estate or interest given by a parent to a descendant by virtue of a beneficial power, or of a power in trust with a right of selection, shall be deemed an advancement. (d)

In New Jersey the statute uses the word issue.

It has been seen, that in England no collation takes place if there be a will, although there be a surplus undisposed of by such will.

It seems doubtful whether that be the operation of the revised statutes in New York, in consequence of a variation in its language from the English statute. In speaking of advancements in relation to the distribution of personal estates, the word "deceased" is substituted for in-

(a) 4 Kent's Com. 417.
testate, whereas in speaking of it in relation to the
descent of the real estate, the word "intestate" is re-
tained. (a)

In some of the States, as in Virginia, Kentucky, and
Missouri, there is a special provision, that the child who
has received his advancement in real or personal estate,
may elect to throw the amount of the advancement
into the common stock, and take his share of the estate
descended, or his distributive share of the personal es-
tate, as the case may be.

In Virginia, by a statute of 1785, real estate was to be
brought into hotch-pot only with real estate, and personal
estate only with personal; but the law was changed in
that respect by the statute in 1819. (b)

In Louisiana, this return of property to the mass of
the succession takes place, unless the testator has ex-
pressly forbidden it. (c) The Civil Code of this State
adopts the rules of the Code Civil of France.

(a) N. Y. Rev. Stat. vol. 1, p. 754. Hawley and King v. James and
others, decided by Ch. Walworth, July, 1835. 4 Kent's Comm. 418.
(b) 3 Randolph's Rep. 559.
N. S. 557. 4 Kent's Comm. 419.
SECTION III.

APPROBATE AND REPROBATE.—ELECTION.

A bequest of that which belongs to another imposes on the heir, if he accepts the succession, the obligation not to disappoint the legatee.—Distinction, if the testator believes it to be his own property.—This distinction not admitted, if the subject bequeathed belonged to the heir.—The law of Holland and Spain, and the Coutumes of Paris and Normandy, adopt the doctrine of the civil law.—The Code Civil treats the bequest as void, if it belonged to another, without any distinction whether the testator knew it to belong to another, or believed it to be his own property.—But a bequest of property belonging to the heir or universal legatee obliges the latter to make it good.—The law of approbate and reprobate in the law of Scotland.—Nature of.—Of election by the law of England.

By the civil law, if a testator bequeathed a subject which he knew was the property of another, the legatee was entitled to recover from his heir either the subject itself, or its value, if its real owner would not part with it at a reasonable price: (a) "Non solum autem testatoris vel hæreditis res, sed etiam aliena legari potest; ita, ut heres cogatur redimere eam, et præstare; vel si eam non potest redimere, aestimationem ejus dare. Sed si talis sit res, cujus commercium non est, vel adipiscì non potest, nec aestimatio ejus debetur; veluti si quis campum Martium, vel basilicas, vel templam, vel quæ publico usui destinata sunt, legaverit: nam nullius momenti tale legatum est. Quod autem diximus, alienam rem posse

(a) Dig. lib. 30, tit. 1, l. 39, § 7; l. 104, § 2; l. 71, § 3; lib. 32, tit. 3, l. 30, § 6.
legari; ita intelligendum est, si defunctus sciebat alienam rem esse, non si ignorabat. Forsitan enim, si scivisset alienam rem esse, non legasset; et ita Divus Pius re-scripsit. Et verius est, ipsum qui agit, id est, legatarium probare oportere, scivisse alienam rem legare defunctum, non hæredem probare oportere, ignorasse alienam: quia semper necessitas probandi incumbit illi, qui agit." (a)

The testator might also by express declaration impose on his instituted heir, or on any person taking a benefit under his will, the obligation of providing the bequest or its value. (b) If the bequest were made by the testator under the belief that the subject belonged to him, it would be void, unless from the relation in which the legatee stood to him, (c) or from other circumstances, or from the terms in which the bequest was made, it was presumed that he intended the heir should at all events make it good, as when the testator in making a division, had assigned it to one of the devisees as his share. (d) But if the property belonged to the heir, and it was the testator's belief that it belonged to himself, it would not exempt the heir, if he accepted the inheritance, from delivering it to the legatee. (e)

The heir was at liberty to accept or renounce the inheritance or legacy thus burthened. He forfeited the bequest if he refused to make good to the legatee the subject which had been bequeathed to him.

If he elected to take under the will, and the bequest was pecuniary, he was compelled to perform the bequest to the extent of the principal and interest which he had received. If it were specific, he was bound to deliver

(a) Inst. lib. 2, tit. 20, § 4.
(b) Dig. lib. 30, tit. 1, l. 114, § 3; lib. 32, tit. 3, l. 1, § 6; l. 14, § 2. Cod. lib. 6, tit. 37, l. 10; tit. 42, l. 9. Instit. lib. 2, tit. 20, § 1, 4.
(c) Inst. lib. 2, tit. 20, § 4. Dig. lib. 31, tit. 2, l. 67, § 8.
(e) Dig. ib. Cod. lib. 6, tit. 42, l. 25.
the specific subject, although it might exceed the amount of the benefit which he derived under the will. (a)

These rules were admitted in the jurisprudence of Holland and Spain, and under the coutumes of Paris and Normandy. (b) The Code Civil renders void the bequest of a subject which belonged to another, whether the testator believed that it belonged to himself or another. (c) But a bequest of a subject belonging to the heir or universal legatee would be valid. (d)

The law of Scotland has adopted the rules of the civil law respecting legata rei alienae. (e) They are justly extended to legacies, even when the subject which really belonged to the deceased was not transmissible by testament. Thus the legacy of an heritable bond due to the testator himself, which he could not but know was heritable, and consequently not devisable by testament, falls under the rule of a legacy rei alienae scinter legate, and the legatee may either demand it specifically, or its value, although the subject of the legacy was res sua. (f)

The principle on which the bequest of an heritable bond by a testament in which the testator’s heir is appointed executor and universal legatee, cannot be questioned by him, is that he cannot be allowed to appropriate and reprobate the same deed; he must not, in the character of heir, decline payment of the bequest with which the testament is charged, and at the same time take the benefit of the testament as executor. (g)

(a) Dig. lib. 31, tit. 2, l. 70, § 1.
(c) Art. 1021.
(d) Toull. des Disp. Test. liv. 3, tit. 2, c. 5, n. 517.
(g) Cunningham, Jan. 17th, 1758, Dict. 617.
It is thought that this principle of approbate and reprobate affords the only ground on which a bequest of heritage can be made effectual. In order to warrant the application of this principle, it is essentially requisite that there be clear evidence of the real intention of the testator, although he used an inhabile mode to convey the heritage; and the party against whom the bequest is claimed must have so connected himself with the deed devising the legacy, e. g., by making up his title, or otherwise taking benefit under it,—that by his own act he is bound to give effect to its whole scope and intention. A legacy of heritage is not good against the heir-at-law, if he repudiates in toto the settlement in which it is contained, and confine himself to his strict legal right. But it is good against any party who has no title but the settlement, or who has chosen to accept of that title; because the intention of the testator being thus the basis of his own right, he cannot avail himself of that intention partially, but must allow it to operate as a whole. (a)

The alternative which compels the party to make an election is raised, either by an express, or implied condition. (b)

Where the condition is expressly imposed in case of acceptance, the maxim "quod approbo non reprobo," directly applies. (c) But, 1. The person imposing the condition must have power to make the settlement stated in the condition, or at least uncontrolled power to confer


(b) Ersk. b. 3, tit. 3, § 49. Kerr, in House of Lords, 1 Bligh, 21. 1 Bell's Com. 146. Dundas, 4 W. and S. 460.

or withhold the benefit conditionally bestowed. (a) 2. The condition must be possible and lawful. (b)

To raise an implied condition on acceptance, the intention to impose it must be clear beyond all doubt. And, 1, There seems to be a fair inference of such intention from a deed or deeds of settlement framed to regulate the whole succession of the deceased, and of which the parts are meant to stand or fall together. (c) 2. Where there is a revocation of a former, and the declaration of a new disposition, the heir is so far favoured, that his right is held to revive if the revocation be not made provisionally; (d) and in such case the new disposition will be considered as an independent substantive deed, and liable to the same objections as if it were so, unless the benefit conferred on the heir be made expressly conditional of his assent to this disposition. (e) If then the disposition of the heritage be not made in such a form as to give evidence of such an intention, and if there be only an implied condition of assent to the heir’s acceptance, it will not be of force sufficient to put the heir to his election. (f) But if the deed be not null, and only subject to challenge for the benefit of the heir, it is held good evidence of intention, and sufficient to compel the heir to make his choice. (g)

(b) Arbuthnot, July 4th, 1792, Dict. 620. Bell’s Cases, 161. 1 Bell’s Comm. 148.
(e) Brodie v. Barry, 2 Ves. and Bea. 130. Kerr, 1 Bligh, 23.
(g) Paterson, July 19th, 1746, Dict. 3333. Kerr, in House of Lords, 1 Bligh, 25. Bell’s Prin. 1939.
The general rule adopted by the law of England is, that where a man does by will more than he has strictly a right to do, and gives a bounty to the person to whose prejudice that is done, the person prejudiced by one part shall not insist upon his right, and at the same time upon the bounty by the will. (a)

The foundation of the equitable doctrine of election is the intention, express or presumed, of the author of the instrument to which it applied. (b) And such is the import of the expressions by which it is described as proceeding, sometimes on a tacit, (c) implied, (d) or constructive, (e) condition; (f) sometimes on equity. (g) From this principle the whole doctrine, with its distinctions and exceptions, is deduced.

The doctrine of election extends to deeds, (h) as well as wills. The intention to dispose of property which is not his, must be manifest, (i) not conjectural; (j) and it is difficult to apply the doctrine of election, when the testator has some present interest in the estate disposed of, though not entirely his own. (k)

But a legatee declining one benefit charged with a burden given to him by a will, is not bound to decline another benefit unconnected with a burden given to him by the same will. (l)

(b) Lord Com. Eyre, 1 Ves. jun. 557.
(c) Ca. temp. Talb. 183. 15 Ves. 392, n.
(d) 2 Vern. 582. 10 Ves. 609, 616. 13 ib. 220, 322. 3 Bro. P. C. 178.
(e) 2 Ves. 14.
(f) 1 Eden, 536.
(g) 1 Ves. 306. 3 Bro. P. C. 178. 2 Atk. 629, 3 ib. 715. 4 Ves. 538.
2 Hargrave’s Jur. Arg. 302. 303. 3 Ves. 530. 2 ib. 530.
(k) Lord Raneliffe v. Parkyns, 6 Dow. 185.
(l) Andrews v. Trinity Hall, 9 Ves. 534.
An absolute power in the testator to dispose of the subject and an intention to exercise that power would seem in general sufficient to raise a case of election; and therefore a devise to the heir, although inoperative (the heir whether disputing or admitting the will taking by descent), compels him to elect between the estate devised, and claims adverse to the will. (a)

Election to take under a deed or will, imposes an obligation (to the extent at least of the benefit taken), (b) to give effect to the whole instrument, by the relinquishment of every inconsistent right. On this principle, some children of a freeman of London electing to abide by the custom, and others by their father's will, it was decided that the customary shares of the latter passed by the will. The title of the children to the orphan's portion being paramount to the will, the condition of their claim under it was (by the ordinary rule), that their property of which it assumed to dispose, should be subject to its disposition. (c)

The rule of not claiming by one part of an instrument in contradiction to another, has exceptions; and the ground of exception seems to be a particular intention, denoted by the instrument, different from that general intention, the presumption of which is the foundation of the doctrine of election. "Several cases have been, and several more may be, in which a man by his will, shall give a child or other person a legacy or portion in lieu or satisfaction of particular things expressed, which shall not exclude him from another benefit, though it may happen to be contrary to the will; for the Court will not construe it as meant in lieu of everything else, when he has said a particular thing." (d)

(c) Morris v. Burrough, 2 Atk. 627.
(d) Lord Hardwicke, East v. Cook, 2 Ves. 33.
ELECTION. 719

Thus, if a testator, having by express proviso, made disposition in the event of his not possessing power to devise certain estates, no implied condition arises against the heir, disappointing the devisee, but complying with the proviso. (a)

A legatee who cannot obtain a benefit designed for him by the will, except by contradicting some part of it, will not be precluded by such contradiction from claiming other benefits under it. (b)

A devise of freehold by a will not executed conformably to the Statute of Frauds will not impose the obligation of election on the heir disputing its validity, and at the same time claiming benefits under other clauses of the will. (c) A devise by an infant is equally ineffectual for this purpose. (d)

In these cases, as the devise is void for all purposes, the Court cannot advert to it as evidence of the testator’s intention; the will must be read as if that clause were expunged, and it then contains nothing to raise a question of election. Upon the same principle the Court refused to read for the purpose of compelling the husband to elect, a bequest of a diamond ring in the will of a married woman, which the Ecclesiastical Court had adjudged to affect her separate estate only. (e) But if the will affords valid evidence of the testator’s intention, as by a condition annexed to a personal legacy to the heir not to dispute the will, which not being duly executed, contained a devise to a stranger, it is settled, though the propriety of the distinction has been much questioned by Lord Kenyon, (f') Lord Eldon, (g) Lord Erskine, (h) and by

(a) Bor v. Bor, 3 Bro. P. C. 167.
(b) Huggins v. Alexander, cited 2 Ves. 31.
(d) Hearle v. Greenbank, 3 Atk. 695; 1 Ves. 298; 13 ib. 223.
(e) Rich v. Cockell, 9 Ves. 381.
(f) 1 Cox, 244. (g) 8 Ves. 497. (h) 2 Sugden on Powers, 160.
Sir W. Grant, (a) that the heir must elect between the inheritance and the legacy. (b) He cannot take the legacy without complying with the express condition. (c) The rule of election, it was said by Lord Redesdale, was a rule of law, as well as of equity; and the principal reason why Courts of Equity are more frequently called upon to consider the subject (particularly as to wills) than courts of law, was, that at law, in consequence of the forms of proceeding, the party cannot be put to elect; for in order to enable a court of law to apply the principle, the party must either be deemed concluded, being bound by the nature of the instrument, or must have acted upon it in such a manner as to be deemed concluded by what he has done; that is, to have elected. This frequently throws the jurisdiction into equity, which can compel the party to make an election, and not leave it uncertain under what title he may take. (d)

Lord Rosslyn also is reported to have said, "The principle of the cases of election is very clear. The application is more frequent here; but it is recognized in courts of law every day. You cannot act, you cannot come forth to a court of justice, claiming in repugnant rights." (e)

It has been a subject of much controversy, whether the effect of election to take against the deed or will, is to induce absolute forfeiture, or only to impose an obligation to indemnify the claimants whom it disappoints? Whether a devisee, asserting his right to property of which the will assumes to dispose, must relinquish the whole of the benefits designed for him, or so much only

(a) 2 Ves. and Bea. 130.
(b) Boughton v. Boughton, 2 Ves. 12.
ELECTION.

as is requisite to compensate by an equivalent the provision which he frustrates. (a)

Lord Eldon, in delivering his judgment in the House of Lords in *Lord Raneliffe v. Parkyns*, 1818, explicitly adopts the doctrine of compensation: "If I choose to devise my real estate to the noble marquis opposite, and in the same will I dispose of an estate which is not mine but his, a court of equity will say, that he shall take no benefit from that will, unless he makes good the whole of the will: and the noble marquis would not take therefore unless he allows the whole of the will to be effectual, i.e. suffers his own to be disposed of according to the will, or makes compensation for as much as he takes of mine." (b) The same distinguished judge had in a previous case stated, that "where a case of election is raised, it does not give a right to retain the thing itself; though it may give a right to compensation out of something else." (c)

The doctrine of compensation has been thus stated by Sir William Grant with his characteristic precision: "That an heir, to whom an estate is devised in fee, may be put to an election, although by the rule of law, a devise in fee to an heir is inoperative, I should have thought perfectly clear, independently of Lord Cowper's decision in the case in Gilbert; (d) for if the will is in other respects so framed as to raise a case of election, then, not only is the estate given to the heir under an implied condition, that he shall confirm the whole of the will, but in contemplation of equity the testator means, in case the condition shall not be complied with, to give the disappointed devisees out of the estate over which he had a power, a benefit correspondent to that of which they are deprived by such noncompliance. So, that the devise is read, as if it were to the heir absolutely, if he confirm

(a) 1 Swanst. 433. (b) 6 Dow. 179.
(c) Dashwood v. Peyton. 18 Ves. 49. Lord Eldon in Ker v. Wanchepe, 1819, 1 Bligh. 1. (d) Anon. Gilb. Ca. in Eq. 15.
the will; if not, then in trust for the disappointed devisees, as to so much of the estate given to him, as shall be equal in value to the estates intended for them." (a)

SECTION IV.

THE LAW WHICH IS TO BE SELECTED.

Conflict when the heir by the lex loci rei sitae is liable in solidum, and by the law of the domicile only pro hereditariid portione, or when one part of the succession is burthened and another part exempt from debts, and there are different heirs to these parts.—Opinions of foreign jurists.—The law which governs the obligation to collate and to elect.

There is a great diversity amongst these systems of jurisprudence on the nature and extent of the liability incurred by the heir, the exclusive or primary applicability of one species of property to the payment of the debts, the rights of heirs or devisees between each other to obtain contribution or indemnity when they have paid debts which as between them and their coheirs they were not liable to pay, and the obligation to collate.

In the same succession, if it be situated in different countries, there will frequently be found several conflicting laws on each of these subjects. A selection therefore of that law which ought to be adopted becomes necessary, and it is to be inquired on what principles the selection is to be made.

One part of the succession may be situated in a country where the law permits the creditor to proceed against each heir in solidum, whilst in the place of the domicile

(a) Walby v. Welby, 2 Ves. and Bea. 190, 1. 1 Swanst. 440, 1.
of the deceased, the law which governs the personal estate only entitles the creditor to proceed against each heir pro portione hæreditariâ. There is a great difference of opinion amongst jurists, whether the law of the domicile or that of the locus rei sitae, should determine the rights of the creditor and the liabilities of the heir.

In a case where the deceased was domiciled at the time of his death in a place where the law rendered the heirs liable only in respect of their shares in the succession, but who left real property situated in a place where the law rendered them liable in solidum, it was decided by the Great Council at Malines, that the creditors could only proceed against the heirs pro parte hæreditariâ. (a)

In a subsequent case, the deceased was domiciled at Brussels, where the debts are divided amongst the heirs. He left two heirs, one of them was dwelling in Paris, and the other at Dinant in Liege. A part of his succession was subject to the coutume of Artois, where the heir may be proceeded against in solidum. The heir to the property subject to the latter coutume insisted that the law of the domicile, and not that of the situs of immoveable property should determine whether he could be sued in solidum. The court held that he was liable in solidum. (b)

It is contended by those who advocate the first of these opinions, that as the succession opens in the place where the deceased was domiciled, the heir by accepting the inheritance contracts his obligation towards the creditors according to the law which prevails there, and his liability to be proceeded against in solidum or pro parte is imposed on him in his character as heir. It accompanies him to any other country in which any part of the succession may be situated. The advocates for

(b) Arrêt, March 28th, 1696. Merlin, Rep. ib. 1 Boull. tit. 2, c. 2, obs. 17, p. 278. 1 Bouhier, c. 21, n. 313.
the contrary opinions rely on the same argument. They urge that the heir also contracted this obligation in every country where there is any part of the inheritance to which he has succeeded. In respect of that part he is heir according to the law of the country in which it is situated, and his liability to the creditors is regulated by that law.

It may be added, that the remedy provided by the law of the country in which the real property is situated is adapted to the right of the creditor and the liability of the heir; whilst the adoption of the law of the place of the domicile may probably be at variance with it. It seems therefore more consistent with the rule which allows the law of the country to whose tribunal recourse is had to prescribe the forms and remedies for that purpose, that the right of the creditor and the liability of the heir should be determined by the law of the country in which the property is situated, and in which also the creditor in respect of that property must proceed against the heir.

It would further seem that as between the creditors and heirs, the extent of the liability of the latter, as it is part of the burthen of the succession, must be determined by the law to which the property composing that succession is subject; that the questions, whether the creditor can proceed in solidó against the heir, and whether his demand constitutes a charge on the whole or on any particular part of the succession, must be answered by the law which prevails in loco rei sitæ in respect of the immoveables, and by that of the domicile in respect of the moveables.

The occasions in which the conflict arises are when several heirs succeed to different parts of an inheritance which are situated in different countries, and the succession in the one is for instance burthened with moveable debts, and in the other it is burthened with all the debts, without any distinction.

An inhabitant of Blois, where the coutume burthened
the heir to the moveable estate with all the moveable
depts, left in his succession biens propres situated in
Blois, and others situated in Orleans. The coutume of
the latter place makes all the different heirs subject to all
the debts. He left an heir to his moveable estate, and
another heir to his biens propres, situated in Orleans and
Blois. In this case Pothier says that the heir to the
biens propres must, conformably to the coutume of
Orleans, where he had succeeded to that part of the
succession, bear his part of all the debts of the succession,
even those which are moveable, regard being had to the
value which the real estate at Orleans would bear to the
whole succession. By this apportionment effect is given
to the coutume of Orleans as well as to that of Blois, for
the heir to the real estate contributes only to the debts in
respect of that part of the estate which is situated in
Orleans, and he does not contribute in respect of that
part which is situated in Blois: (a) "Si verò agatur de
dissolvendo ære alieno à pluribus hæredibus, quorum
unus mobilia habeat, bona autem sint in diversis pro-
vincis quæ de hereditariis debitis variè statuánt: putà
apud Turones tenetur ad omnia personalia debita qui
mobilia præcipit: apud Pictones verò, ut nihil de mobi-
libus statuitur, ita et primogenitus ex æquo hereditatem
unà cum reliquis suis fratribus liberat: In illa igitur
diversitate consuetudinum, calculi istius ratio potior visa
est patronis qui in hoc accersiti sunt anno 1602, com-
putanda scilicet omnia defuncti bona, omniaque per-
sonalia debita, dicimus faire une masse de tous les biens;
it a ut si quadraginta millia in bonis comperiantur,
quorum decem putà existant in Turonia, et 30, in
Pictania, triginta autem millia æris alieni sint, tunc 20
millia ex æquo solvenda esse ab omnibus, habità ratione
consuetudinis Pictonicæ, decem autem millia à solo

(a) Pothier, Tr. des Success, c. 5, § 1, p. 249.
hærede primogenito ut qui solus sit hæres mobilium, inspectis nempe Turonum moribus." (a)

To this doctrine however is opposed the Arrêt of the parliament of Paris, in the succession of the Bishop of Metz, April 15th, 1747. It was held that where the deceased was domiciled at his death in a country where the law charged the heir to the personal estate with the payment of the personal debts, he was bound to discharge them to the extent of the whole personal property which had devolved on him, and that he could not compel contribution from the heirs of property situated in a country which subjected all the heirs to the payment of the debts of the deceased, without any distinction. (b)

The principle established by that Arrêt is, that as the law of the place of the domicile regulates the succession to personal estate, it must necessarily determine what are the liabilities incurred, and what are the conditions implied by accepting the succession to the personal estate. In the preceding case, that law had rendered the succession liable to all the debts. If he had been permitted to resort to the heirs of the other property for contribution, the successor to the personal estate would have taken it, exempted from the obligation which had been imposed on it by the lex loci.

Basnage reports the following decision on the conflicting coutumes of Paris and Normandy. A person died domiciled at Paris, where he was possessed of moveables and biens acquêtis. He was also possessed of biens propres in Normandy. According to the coutume prevailing in the latter place biens propres are not liable to the debts, whilst the coutume of Paris subjects all the property to the payment of the debts, without any distinction. It was decided that the successors to the

(a) Mornac. Dig. lib. 5, tit. 1, l. 50, § 1.
(b) 1 Boullenois, Tr. des Stat. ib. p. 281.
moveables and _biens acquêtés_ at Paris could compel the heir to the _biens propres_ in Normandy to contribute to the payment of the intestate’s debts. This case is distinguished from that of _Balfour v. Scott_ only in one respect, that the succession in the place of the domicile consisted of real as well as of personal estate. It is however to be observed, that the contribution by the co-heir in Normandy is not claimed on the ground that according to the _coutume_ of Paris the personal estate was merely a contributing and not an exclusive fund for the payment of the debts.

It is difficult to reconcile this decision with the principle that the _lex loci rei sitæ_ regulates the succession to real estate, and determines the rights of the heir to that estate. If it be said that it was the right of the heir to the personal estate to obtain contribution from the real estate according to the _coutume_ of Paris, which regulates the succession to the personal estate, it may with equal propriety be said on the other hand that it was the right of the heir to the real estate in Normandy to be exempted from such contribution, and that such right was conferred by the _coutume_ which regulates his succession to that estate.

This celebrated jurist has censured the decision in unqualified terms, and the grounds on which he impugns it seem unanswerable: “Il est certain que les héritiers aux meubles et acquêtés tiroient avantage fort mal à propos de la consultation des avocats de Normandie; ils attestoient seulement que l’usage étoit qu’il n’y a point de subrogation de coutume à coutume, et que l’on ne pouvoit pas demander le remploi d’un propre sis en Normandie sur des acquêtés sis à Paris; mais il ne s’ensuivoit pas de cette maxime, que les propres de Normandie dussent contribuer aux dettes avec les acquêtés situez à Paris; car rien n’est plus contraire à l’esprit de notre coutume et à nos usages, suivant lesquels les
propres sont entièrement déchargez des dettes contractées
par celui de la succession duquel il s'agit. Il est vrai
que par l'art. 234 de la coutume de Paris, les héritiers
aux propres contribuent avec ceux des acquêts au paié-
ment des dettes, mais il ne doit avoir lieu que quand
tous les biens généralement, meubles, acquêts et propres
se trouvent situez sous la coutume de Paris, tous les
commentateurs de cette coutume demeurans d'accord
qu'il n'a point d'extension dans les autres coutumes qui
ont des dispositions ou des usages contraires. Donc la
coutume de Paris ne pouvant sortir hors de ses limites,
et les propres de Normandie devant être déchargez des
dettes par les meubles et acquêts, elle ne peut jamais
s'appliquer ni faire règle pour les biens de Normandie.

"Ce fondement posé, que la coutume de Paris ne
peut avoir d'empire ni de pouvoir sur les propres situez
en Normandie, l'arrest est tout à fait contraire à la
coutume de Normandie; car on objecterait inutilement
que la coutume de Normandie ne peut pas faire loi pour
les meubles et les acquêts qui sont à Paris. On convient
de ce point; mais on répond que ce n'étoient pas les
héritiers aux propres qui attaquoient les héritiers aux
meubles et acquêts, ils étoient en une paisible possession
de leurs propres, et les créanciers du sieur de Breteville
ne leur demandoient rien; c'étoient donc les héritiers
aux meubles et acquêts qui les attaquoient, et qui
demandoient la contribution aux dettes par les propres,
et qui par consequent vouloient que la coutume de Paris
fit loi sur des propres de Normandie: Ils ne pouvoient
donc être traduits hors leur jurisdiction pour leur faire
changer de loix et de coutumes, puisque ce n'étoit qu'à
raison des propres de Normandie que l'on avoit action
crontr'eux, et que ces propres ne pouvoient être reglez
par d'autre loi que par celle de leur situation. Ils
venoient donc atacker la coutume de Normandie dans
son propre détroit, et ils vouloient porter celle de Paris
bours de son territoire pour la faire regner en Normandie.” (a)

The Court of Session in Scotland was called on to decide between an obligation annexed to the personal estate by the *lex loci domicilii*, and a similar obligation annexed to the real estate by the *lex loci rei sitae*. The deceased was domiciled in England, where he had personal estate. He had heritable estate in Scotland, and was indebted on a heritable bond. By the law of England, his personal estate was the primary fund for the payment of his debts, but by the law of Scotland, his heritable estate was the primary fund for the payment of this bond. It was paid out of the proceeds of the sale of the latter estate, and the heir to that estate endeavoured to obtain reimbursement from those who had succeeded to the personal estate. The House of Lords affirmed the judgment of the Court of Session, by which it had been decided that this heritable bond was a burthen on the heritable estate, that the heir by accepting the inheritance had incurred the obligation to discharge it, and was not entitled to be reimbursed by those who had succeeded to the personal estate. (b)

In some *coutumes* there existed the law that the same person cannot be both heir and legatee. If such a *coutume* prevails in the place where the property is situated, although no such law existed in the testator’s domicile, the law of the *situs* will prevent the heir from claiming it. If a testator domiciled at Rheims, where such a bequest was permitted, should devise to one of his heirs an estate situated within the *coutume* of Paris, where it is prohibited, the devisee could not claim it, but if the testator had been domiciled at Paris, and had devised property situated in Rheims, the devisee would take it, without incurring the obligation to collate. If the subject of the bequest were

(b) Drummond v. Drummond, 6 Bro. Parl. Cas. 601.
moveable property, its validity would depend on there being no such law in the testator's domicile. (a)

When the immovable estate descends on the eldest son, or on some individual who is excluded from a share of the personal estate, unless he collates his real estate, if such be the law in the place of the domicile of the intestate, the heir to the real cannot share in the personal estate, without collating the former, that is, bringing it into the general stock, although it be situated in a country where no such obligation is imposed on the heir. The collation is incident to the personal estate, and therefore the law of the domicile which regulates the succession to the latter, prescribes the condition on which it allows the heir to take a share of it.

In two processes of multiplepointing, brought for the purpose of obtaining a settlement of the claims of James Robertson and his sister Mrs. Macvean under certain deeds of their father and brother, it was considered advisable by James to repudiate the heritage and to claim his share of the moveables. James had taken up, as heir, a Scotch heritable bond for £600, and had entered into possession of real estate situated in Jamaica. James offered to collate the bond; but denied that collation could extend to the real property in Jamaica. On the other hand, his sister maintained that he had no right to take a share of the moveables, unless he collated the whole heritage, whether situated in Scotland or elsewhere.

The Court were clearly of opinion, that James could not claim a share of the moveables without collating his right to the heritage. He lay under no compulsion to take along with the executors; but if he chose to avail himself of this privilege, which may be regarded as a praetorian interposition to soften the rigour of law, he must fulfil the condition annexed. There is no interference with the law of succession of a foreign country.

(a) Pothier, de Success. c. 4, art. 3, p. 220.
Indeed, this is not a question of succession at all. It is a question of right of parties inter se. The claimant comes forward as a Scotch heir to avail himself of a Scotch privilege, and to take something from the executors; and they are entitled to insist that equality shall be preserved, by throwing the heritage into the common fund. The petitioner has no more right to retain the Jamaica estate, and at the same time interfere with the executry, than a bankrupt, who claimed the benefit of the Scotch bankrupt law, could insist upon reserving, free from his creditors, heritable property which he happened to possess abroad. (a)

On the other hand, if the domicile of the deceased was in a country where the law did not impose collation on the heir, he would not be obliged to collate real estate situated in a country where collation did take place. (b)

This principle is to be found in the decision of the House of Lords in the case of Balfour and Scott. (b) The ancestor died domiciled in England, the heir to his estate in Scotland being one of the next of kin, succeeded to his personal estate according to the law of England, but that law permitted him to take his share of the personal estate, and also the real estate, without imposing on him the obligation of collating the real estate. If the decision had compelled him to collate, he would have taken the personal estate burthened with an obligation which had not been imposed by the lex loci domicilii.

It will be presumed that the right of the heir to a share of the moveables where he is one of the nearest of kin depends on his collating, but that on the other hand his succession to the moveables is no bar to his taking up

the heritable property. The heritage he takes up unconditionally, but when he claims also a share of the moveables, he is met with the objection that *quid* heir, he stands disqualified from drawing his portion until he renounces his separate advantage. If the law of the domicile does not require collation, the heir who has succeeded according to the principle of distribution by the foreign law to a share of the moveables, is not barred from serving himself heir to the heritable property, because although other nearest of kin might, under different circumstances contest his claim to a share of the moveables, they have no colour of title to question his right to the heritable succession.

It may perhaps be stated as the correct rule, that where an obligation or an exemption is annexed to the personal estate, but no similar obligation or exemption is annexed to the real estate, the *lex loci domicilii* will prevail in whatever country the rights or liabilities of the heir became the subject of adjudication, but if similar obligations or exemptions are annexed to the personal and real estate by the respective laws to which the succession to these two species of property is subject, and the effect of adopting the one law rather than the other would be to throw on the one estate a burthen, or confer on it an exemption not annexed to it by the law of the country which governed the succession to it, it would be the more just and correct rule to adopt the *lex loci rei sitae*, rather than the *lex loci domicilii*. The case of Drummond and Drummond would seem to warrant the adoption of such a rule, nor is the decision in the Bishop of Metz's succession at variance with it. The *lex loci domicilii* had alone annexed to the personal estate an exclusive liability to pay the debts, and no such liability was annexed to the real estate by the *lex loci rei sitae*. The only liability which was annexed to the real estate by that law was an obligation to contribute with the
personal estate, but such a contribution could not take place, because the personal estate was subject to a law which made it exclusively applicable, and therefore the liability to contribute could only exist when the personal estate was subject to the same law as the real estate.

A person having his domicile abroad, but the owner of heritable property in Scotland, dies, and leaves a general settlement and conveyance of his whole property, which from the want of due solemnities is insufficient and ineffectual to convey the Scotch heritable estate, the question whether the heir at law taking up the heritable estate, can also take a share under the will of the other property conveyed by it, without at the same time collating the Scotch heritage, depends upon the law of the country in which the testator was domiciled, and according to which he had executed his settlement, and the intention of the testator with regard to putting his heir to his election must be discovered from the terms of his will, as construed by the law of the country of his domicile. (a)

A person domiciled in Scotland, having, by a deed executed in that kingdom according to the Scotch form, conveyed an estate situated in England, together with the rest of his property to trustees, but which deed was insufficient to convey it, it was held that his heir-at-law, who was entitled to take the English estate ab intestato, could not claim any benefit under the settlement without surrendering that estate to the purposes of the trust. (b)

The doctrine of approbate and reprobate, and of election, seems to require the application of similar principles. If a party domiciled abroad, leave both heritable and moveable property in Scotland, and execute an imperfect deed with the view of conveying his

(a) Trotter v. Trotter, Dec. 5th, 1826, F. C. Aff. 3 W. and S. 407.
(b) Dundas's Trustees, against Wedderburn, Dundas, and Others, Jan. 14th, 1829, F. C. 2 Dow and C. App, Cas. 358.
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whole property, but which is invalid as to the heritage, although efectual *quoad mobilia*, the heir's right to a share of the moveables must be decided by the *lex domicilii*. If from the manner in which the deed is executed, it would put him to his election by that law, it must, in any other country, for the condition is *annexeto* the moveables, and not to the heritage.

If then, the law of the domicile do not put the heir to his election, neither can the law of the place in which the heritage is situated. (b)

CHAPTER XVI.

TESTAMENTARY EXECUTORS.

Appointment of a testamentary Executor can scarcely be said to have formed a part of the civil law.—Subsequent practice in Holland, Spain, and other States of Europe.—The nature of his functions and interest. The Coutumes of Paris and Normandy, and the Code Civil admit of the appointment.—The limited powers and interests of the executor under the law of Scotland.—England.—States of America.—The office in Louisiana resembles that under the Code Civil.

The civil law contains no express title on the office of testamentary executors, and very few texts from which even the existence of such an office could be inferred. There are none which could convey any idea of the existence of such an office as that which was afterwards admitted in those systems of jurisprudence which are founded by the civil law.

The term executor is represented by Lord Hardwicke as a barbarous term unknown to the civil law. It sometimes but rarely happened that the testator named a person who was neither his heir nor legatee under the testament to execute those bequests for the maintenance which he had made in favour of his emancipated slaves or others. There were, however, certain duties and some offices of private friendship or charity which he requested a friend to perform. Sometimes he was di-
rected to pay one or more of the legacies bequeathed by the will. (a)

The jurists generally concur in considering that the appointment was for a considerable period rarely made. As the progress of Christianity advanced, the practice of making such appointment increased and the office was frequently connected with the performance of those acts which the testator was taught to believe concerned the salvation of his soul. (b)

In Holland and the other states of Europe, the office of executor gradually acquired its present character. The person appointed by a testator was under no obligation to accept it, but if he had once consented to accept it, he was bound to execute it. His consent would be presumed if he accepted a legacy bequeathed to him intuitu executionis, or if he intromitted with that part of the estate which was entrusted to his executorship. (c) He was considered to have come under a quasi contract with those for whose benefit he was appointed. His office resembled in the obligation which he thus incurred that of procurator, and he was compellable to discharge its duties: "Executoris testam. officium procuratio quae-dam est, ipsique executores passim à Dd. procuratores vel qs. dicuntur. Plane sicut legatarius agnito legato, sub modo vel cum onere fidei-commissi relictio, iis, quo-rum interest, obstringitur ad modum impleendum, et fidei-commissum praestandum. Ita perinde executorem nostrum constituiri, et deinceps ad exequandum obligari censemus." (d)

(a) Androvin v. Poilblanc, 3 Atk. 300. Dig. lib. 11, tit. 7, l. 12; lib. 30, tit. 1, l. 107; lib. 34, tit. 1, l. 9, 10. Cod. lib. 3, tit. 44. Brunneman, ad Cod. lib. 1, tit. 3, l. 28.


(d) Lauterb. Disp. 79, n. 48, 49, 50.
There were few person disqualified from being appointed executors. Thus an alien might be appointed. (a)

If the testator instituted no heir, but committed to the executor the entire disposal of his estate amongst particular persons, for the benefit of the poor, or for pious purposes, such an executor was said to be an universal executor, and was deemed a species of successor. But when the testator merely committed to him the disposal of a part of his succession in payment of particular legacies, he was considered to possess a mere naked authority; he was *nudus minister*. So little interest had he by virtue of the latter office, that he was deemed a competent witness to a testament. (b)

The interest which he took in the testator's estate, and the powers which he could exercise were very limited. Until the heir had adiated or accepted the succession, he possessed no authority, and was destitute of the means by which he could dispense that property which was committed to his charge: "Hæreditate non adita et deserta, frustra est officium executorum, et non habent, quibus distribuant, quod est relictum, sed hæreditas ad hæredes ab intestato devolvitur." (c)

Even after the acceptance of the succession by the heir, the executor could not without the consent of such heir, take possession of the effects which were subject to his executorship, nor could he make sale of them without first citing the heir. (d) If he were resisted by the heir, he could adopt legal proceeding to enforce the delivery of that part of the property to which the executorship extended. It seems doubtful whether it was competent for him to compromise. (e)

The office was strictly personal, and not transmissible to the heir of the executor. (f) He was bound to render

(a) Ib. c. 6, n. 12, 13.
(b) Stockman's Decis. decis. 7.
(c) Lauterb. Diss. disp. 79, c. 9, n. 31.
(d) Lauterb. ib. n. 34. Mevius, ad Jus. Lub. p. 2, tit. 1, art. 15, n. 7, et seq.
(e) Lauterb. ib. n. 54.
(f) Ib. n. 142.

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an account and return an inventory of the effects which as executor he had received. (a)

In British Guiana, the practice of appointing testamentary executors is general.

The extensive interests of English subjects in that colony, and the continued intercourse with English law and English lawyers, may account for attempts which are sometimes made to place executors on the same footing as heirs, to subject them to the consequences which are incurred by heirs when they have adiaticd without benefit of inventory. It is clear, however, that unless the appointment be so comprehensive as to invest the executor with the whole succession, and to render him in effect an instituted heir, he is still distinguished from the latter both as to the estate or interest which he takes, the power which he possesses, and the consequences incurred by the entering on the succession without benefit of inventory: “Executores testamentorum, cum sint quasi procuratores a testatore constituti ad funus curandum, credita exigenda, legata et æs alienum solvendum, bonaque administranda, usque dum dividi possint, cumque adeo et hæredum negotia gerant, non possunt hæredes ab hæreditate arcere, nisi alius jussit testator, nec invitis hæredibus bonæ alienare.” (b)

The executor is obliged by particular regulations no less than by the general law which attaches to the office, to account for his intromissions, and to make an inventory of the effects which he takes in his character of executor. He is also entitled to commissions at the rate of five per cent. on the sums which he receives, and five per cent. on those which he pays. (c)

(a) Ib. n. 149.
(c) Ib.
The appointment of executors, *cabezaleros o albaceas*, is part of the law of Spain. It is their duty to carry the testament into effect by the payment of the legacies which the testator has bequeathed. (a)

They are bound to publish the testament within a month, and if they neglect to do so they forfeit any legacy which is bequeathed, and if no legacy has been bequeathed, they are liable in damages to the party aggrieved by the neglect, and forfeit 2000 maravedis to the crown. (b)

They must execute the will in a year, computing it from the death of the testator. (c)

The act of one or more is valid in case all the executors cannot be present. (d)

If the executors make default in performing the will, the heir must give effect to the dispositions which it contains.

Testamentary executors are universal or general, and particular or special. To the former is committed the entire execution of all the dispositions of the testament, and the distribution of the property of the deceased; the latter are appointed to carry into effect some special object or purpose of the will.

The office of executor is not transmitted to the executor or heir of the deceased executor, unless with the express direction or authority of the testator, and such direction or authority will be controlled when the executor has improperly executed his duty or trust.

The office is voluntary, but if the person appointed accepts or undertakes it expressly or tacitly, he may be compelled to discharge its duties. (e)

He is not entitled to *salario*, or remuneration for discharging his office as a guardian, except by the direc-

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(a) L. 1, tit. 10, p. 6. Covarruv. ib.
(b) L. 5, tit. 18, lib. 10, Nov. Recop.
(c) L. 5, tit. 10, p. 6.
(d) Ib.
(e) Febrero, Adic. 1 vol. p. 15, n. 275.
tion or declared consent of the testator, but it seems that an allowance of this nature having reference to the trouble or duty performed by the executor may be granted by the judge. \((a)\)

He cannot sell the real property of his testator, unless he be authorised by the will, and then it appears the sale must be by public auction. \((b)\)

It would also seem that a bequest or legacy to an executor is presumed to be made \textit{contemplatione offici} and therefore if he renounced the office, he lost the legacy. If a legacy or bequest be left among executors, and one of them dies in the testator’s lifetime, or renounces the office, his share \textit{jure accrescendi} is divided among the surviving or acting executors. \((c)\)

In case only one executor was appointed and he died in the testator’s lifetime, or renounced the office, the bequest or legacy would lapse, and go to the heir or residuary legatee or devisee.

The obligations which testamentary executors incur in the island of Trinidad under rules of the Court of First Instance have been already stated.

Under the \textit{coutume} of Paris, the heir was charged with the due execution of the testator’s will. It was not necessary that this trust should be committed to any other person. Still from the jealousy with which it might be supposed he would regard the testamentary disposition, and his inclination to dispute its provisions, he was not unfrequently distrusted by the testator, and the practice was introduced of naming in the testament one or more persons in whom the testator confided, and whom he charged with the execution of his testament. They were called \textit{executeurs testamentaires}. \((d)\)

It was an office of private trust, which the executor

\((a)\) Carpio, de Execut. p. 81, n. 110.
\((b)\) L. 62, tit. 18, p. 3.
\((c)\) See L. 33, tit. 9, p. 6. Covarr. 1 vol. c. 18, § 1, p. 119.
was not bound to accept. It was gratuitous, and unless the testator had given him a recompence for his trouble, he could not claim it. (a) The wife might be appointed executrix by her husband, although the coutume prevented the husband leaving anything to his wife. An alien might be appointed. A minor could not be appointed. The insolvency of the person named was a sufficient ground for excluding him from the executorship. (b)

The saisine which the coutume gives him for the accomplishment of the will, constitutes the powers of the testamentary executor. It is perfectly compatible with that of the heir. He has not the actual possession in his own right, but is rather the sequestrator or procurator of the heir, for he holds in the name of the heir:

"Hæc consuetudo non negat, nec facit quin hæres sit saisitus, ut dominus: sed operatur quod executor potest ipse manum ponere, et apprehendere, non autem vendere sine hærede, et usque ad concurrentiam tantum. Et etiam executor non est verus possessor et nisi ut procurator tantum.” (c)

The coutume of Paris gives to the testamentary executor the saisine of the moveable estate for a year and a day from the testator’s decease, in order that he may accomplish the testator’s will: “Les exécuteurs testamentaires sont saisis durant l’an et jour du trépas du défunt, des biens meubles demeurés de son décès pour l’accomplissement de son testament, si le testateur n’avait ordonné que ses exécuteurs fussent saisis de sommes certaines seulement. Et est tenu ledit exécuteur de faire inventaire en diligence, sitôt que le testament est venu à sa connoissance, l’hérétiq presomptif présent ou dûement appelé.” (d)

It did not, like the coutume of Orleans and of other

(a) Argou, liv. 2, c. 18.  (b) Potmer, Traite des Test. c. 5 s. 1.
(c) Dupoullin, sur la Cout. de Paris, tit. 7, § 15, n. 10, 11, Tom. 1, p. 861.
(d) Art. 297, 1 Duplessis, p. 577.
places limit the saisine of the executor to such part only of the personal estate as was sufficient to enable him to accomplish the directions in the will. Unless therefore, the appointment was specially limited, as it might be by the testator, to a specific part of the estate, the heir could not exclude the executor from his office by offering to perform it himself, and give security, or by leaving in the executor's hands a sum sufficient for that purpose.

The testamentary executor is to pay not only the legacies, but the moveable or personal debts of the succession. If the testator has fixed by his will the amount of the personal estate of which the executor shall be seised, the heir may by offering him the amount prevent him from taking possession of the estate.

The testator, although he might give to the testamentary executor a more limited power than the coutume authorizes, cannot give a more extensive power. He cannot, therefore appoint him a testamentary executor in respect of his immovable or real estate. (a)

It is his first duty to make an inventory of the effects of the succession, and when he has made it he becomes seised. He has no right to intermeddle therewith until he has made it, unless in relation to the funeral of the deceased.

The heirs, if they are in the place, or if they are not, the Procureur de Roi, or some other public officer in the place of the testator's domicile ought to be parties to the inventory. The testator cannot, it seems, dispense with the obligation of the executor to make the inventory. (b)

When the inventory was made, the executor might, with the consent of the heir, cause a public sale to be made of the moveables, and if the heir withheld his consent to such sale, he ought to obtain the authority of

(a) Pothier, c. 5, § 3. (b) Pothier, ib.
the judge. He has no right to sell more than is necessary: "non potest vendere sine hærede et usque ad concurrentiam tantum." (a)

As testamentary executor he may collect and receive moveable debts owing to the succession, but not rent, because he is only entitled to moveables.

He is first bound to pay the funeral expenses, then the debts, and lastly the legacies. If he has monies in his hands, they are to be applied with the consent of the heirs, and if there he not sufficient funds, a sufficient part of the moveables must be sold.

He is bound to render his account to the heir or other universal successor, showing all the money or effects of the testator received, the debts and legacies paid by him, and having rendered that account, to pay over the surplus to the heir. He is not entitled to a salary or reward, unless, as is common, the testator bequeaths it to him by the will for his trouble, and then it is payable to him if he accepts the office, but not otherwise. (b)

If on the executor's accounts with the estate a balance is due to him, he has a lien on such of the personal estate as may still be in his possession, and he has a tacit hypothec on all the personal estate for the debts and also for the legacies he may have paid, to the extent of such part of the estate, as was subject to disposition by the testator. (c)

The office is personal, and does not therefore on the death of the executor devolve on his heirs, although the latter are bound to render an account of his transactions, but the testator may appoint a particular officer, as the Procureur de Roi for the time being, and in that case the death of the person will not terminate the executorship.

The coutume does not permit the executor to retain

(a) Argou, liv. 2, c. 18.
(b) Pothier, ib.
(c) Pothier, ib.
his office longer than a year from the day of the testator’s death. He cannot retain it for a longer period on the ground that the legacies were payable on a condition which has not yet taken effect. But if the heirs are not solvent, and the estate consists only of personal property, and there is danger that it may be squandered away, the executors may require that they should give security for the payment of the legacies.

The coutume of Normandy resembles that of Paris: “Les exécuteurs testamentaires sont saisis durant l’an et jour du trépas du défunt, des biens meubles demeurez après le décès, pour l’accomplissement du testament, jusqu’à concurrence des legs et autres charges, en faisant au préalable inventaire, appellez les héritiers et en leur absence les plus prochains parens, si mieux l’héritier ne veut saisir l’exécuteur testamentaire des legs et charges en argent ou en essence.” (a)

The Code Civil allows a testator to name one or more executors if he thinks proper.

If the person thus named has accepted the office, he cannot relinquish it. (b)

A married woman cannot accept it without the consent of her husband. If she has separate property, and the husband withholds his consent, she must obtain the authority of the judge. (c)

A minor cannot accept it, even with the authority of his tutor or curator. (d)

The heir or legatee may be an executor, but if the heir would impeach the testament he ought not to accept it but with an express reservation. (e)

The Code Civil adopts the principle of the coutume of Paris that the seisin which the executor acquires is not incompatible with, nor does it obstruct that of the heir of

(a) Coutume of Normandy, art. 430. Merville on this Article. p. 425.
(b) Art. 1025. Toullier, liv. 3, tit. 2. c. 5, § 7.
Art. 1029.
(d) Art. 1030.
(e) Nouveau Denisart, Ex. Test. § 1, n. 6.
blood or the instituted heir: "Cet...de l'erreur insti...ce dernier est saisi. C'est toujours...l'erreur qui est le véritable possesseur: lui seul est saisi comme propriétaire.

"L'exécuteur testamentaire ne possède que comme séquestre, et au nom de l'erreur, et du légataire universel, qui peuvent faire cesser la saisine, en offrant de remettre aux exécuteurs testamentaires, une somme suffisante pour le paiement des legs mobiliers, ou en justifiant de ce paiement, (a) et ce, quand même le testateur aurait chargé l'exécuteur testamentaire de vendre tous ses biens." (b)

By the law of Scotland, the executor acquires by his appointment a right to take possession of, and hold the executory funds, and confirmation of the office is not necessary to enable him to take the moveables out of the hereditas jacent of the deceased. (c)

But confirmation is necessary, in general, as an active title. (d) No debtor is bound to pay without it; and the general rule is, that no diligence is effectual in competition where confirmation has not preceded it. But to this last rule there are some exceptions. And, 1st, If the testator have conveyed by his will the thing or debt in question specially, or by general disposition, referring to an inventory signed by him, and containing it, the title is good without confirmation. (e) 2ndly, If

(a) Art. 1027.
(e) Act, 1690, c 26.
the debtor to the deceased have renewed or corroborated his debt by bond, &c. to the executor, no confirmation is necessary. (a) 3dly, If the executor have obtained actual possession, he will require no confirmation, nor can he be deprived of such possession on pretence of want of title. (b) But doubts may arise as to what is to be held possession; whether constructive possession of moveables, for example, be sufficient; or still more, in regard to debts, payment of the interest of which, though sufficient to vest the succession, may not be safely relied on as a title for completing diligence. (c)

Confirmation is a sentence of the commissary Court at Edinburgh, or of a sheriff as provincial commissary, giving authority to an executor, to administer, "intromit with, uplift, receive, discharge, .and, if needful, to pursue;" in short, to recover and distribute, as trustee for all concerned, the moveable estate belonging to a person deceased. (c)

By the law of England and of those colonies which do not adopt the jurisprudence of Holland, Spain, or France, and in the States of America, except Louisiana, the whole personal estate of the deceased, both at law and in equity, vests in the executor or administrator.

As the executor's interest is derived exclusively from the will, so it vests in him from the moment of the testator's death. (d)

The Civil Code of Louisiana allows the testator to give his testamentary executor the seizin of the whole of his succession, or only of a certain determinate portion, according as he has expressed himself, saving the restrictions contained in the following articles.

(a) Watson, June 19th, 1782, Dict. 7609.
(b) Dobie, July 8th, 1707, Dict. 14,390.
(c) Ersk. b. 3, tit. 9, § 27. Bell's Princip. 1892, 1889.
But this seizin cannot continue beyond a year and a day from the decease of the testator, if he died in the State, or from the day on which his death was first known, if he died out of the State.

If the testator has not granted the seizin to the testamentary executor, the latter cannot acquire it. (a)

The testator may express his intention to grant the seizin of his estate to the testamentary executor, either in express terms, by authorizing him to take possession of the whole or a part of the estate of his succession after his death, or by merely naming him testamentary executor and detainer of his estate, the word detainer sufficiently announcing that the executor is to be seised of the property of the succession.

But if the executor testamentary be merely appointed testamentary executor, without any other power, his functions are confined to see to the execution of the legacies contained in the will, and to cause the inventory and other conservatory acts of the property of the succession to be made. (b)

In default of funds sufficient to discharge the debts and legacies of sums of money, the testamentary executor may cause himself to be authorized by the court to sell the moveables and the slaves not employed on plantations, and if they are insufficient, the immovable to a sufficient amount to satisfy those debts and legacies. (c)

Except in the cases provided for in the preceding article, he cannot cause the immovable nor the slaves employed thereon to be sold, unless he is authorized by the will to do so. (d)

He must proceed to the sale and to the payment of the debts of the succession, in the same manner as prescribed for curators of vacant successions. (e)

(a) Louisiana Code, art. 1652. (b) Art. 1653.
(c) Art. 1661. (d) Art. 1662. (e) Art. 1663.
CONFLICT OF LAWS.

The heirs can at any time take the seisin from the testamentary executor, on offering him a sum sufficient to pay the moveable legacies. (a)

(a) Art. 1664.

THE END.
APPENDIX TO VOLUME IV.

In page 300 of this volume reference is made to a motion before the Vice Chancellor at the instance of the Marquis of Breadalbane to enjoin the Marquis of Chandos from enforcing execution of the judgment of the Court of Session which had established the title of the Marchioness of Chandos to *legitime*, and had been affirmed by the House of Lords. The Vice Chancellor made an order on that motion granting the injunction prayed. From this order the Marquis of Chandos appealed to the Lord Chancellor. His Lordship rescinded the order and dissolved the injunction.

This motion involved some of the propositions stated in these Commentaries. (a)

The following judgment was delivered by the Lord Chancellor, on the 22nd of July, 1837, and it is inserted not only with reference to those propositions, but on account of its luminous application of some of the most important principles of a court of equity. "The bill raised three propositions; first, it prayed the court to declare that by the construction of the settlement of 1819, the claim to *legitime* was barred. Secondly, it alleged that if that should not be found to be so, it was a matter of contract and agreement between the parties at the time of the marriage settlement of Lord and Lady Chandos in 1819, that the *legitime* should be barred. Thirdly, it alleged, that there was a paper which was lately discovered, being the proposals which preceded the settlement, and that those proposals furnish evidence of the intention of the parties, or at least contain words amounting to a contract that the settlement should contain a provision barring Lady Chandos' title to *legitime*. On these three grounds, the construc-

(a) See ante, Vol. III. p. 1069.
tion of the settlement of 1819, the alleged contract between the parties and the effect of words found in the proposals though not introduced into the settlement, the bill prays that the court will grant an injunction to restrain Lord and Lady Chandos from taking advantage of the judgment of the Court of Session, by which Lady Chandos has been decreed entitled to her legitime. Now as to the first of the three propositions raised by the bill that is finally disposed of by the judgment of the House of Lords. The construction of the settlement of 1819 has been the subject of the judgment of the Court of Session, and that judgment has been affirmed by the House of Lords, by which it has been decided that the settlement does not bar the title to legitime. The next proposition in the bill, namely, that it was a matter of contract between the parties, and that the settlement therefore did not carry into effect that which was agreed upon, is positively denied by the answer, and this being a motion on the answer, for the present purpose it must be assumed, indeed I have not the slightest doubt, looking at all the transactions between the parties, that there was no such contract between them. The only point therefore remaining, is that which has been put forward as the principle of equity in support of the claim of the plaintiff to this injunction, namely, that the proposals which were not in evidence before the Court of Session, and which it is alleged have been since discovered, contain within themselves that which amounted to a contract, whether the parties had it in contemplation or not, that the legitime should be barred.

"Now the proposals were prepared in London by Mr. Vizard. It is stated that they were approved of by the Duke of Buckingham acting for his son Lord Chandos, and by Lord Breadalbane acting for his daughter Lady Chandos. The proposals were, that Lord Breadalbane should pay 20,000l., 10,000l. down and 10,000l. within eighteen months after the marriage, and that he should enter into security for the payment of 10,000l. more after his own death. In consideration of these three sums making 30,000l. the Duke of Buckingham agreed to settle very large estates on the issue of the marriage, and out of those estates to provide a jointure for Lady Chandos and provisions for younger children; and then after enumerating the trusts of the money to be secured for the benefit of such younger children, the proposals provided for the different purposes which the parties had in view with regard to the real estate and the settlement of 30,000l. for the benefit of the children. Then the proposals contain these words: 'The set-
tlement to contain the usual clause of indemnity to the trustees and all other usual and necessary clauses.'

"It is contended, that inasmuch as it is usual in Scotland when a father provides a portion for a child, that he should require the child to make a renunciation of her claim to legitime, that these words in these proposals, whether the parties had it in contemplation or not, amount to a contract between the parties that the settlement should contain that which is alleged to be an usual provision in Scotch settlements. Now the settlement itself was entirely of English manufacture. It was prepared by Mr. Vizard, and in fact contains no such clause, but it recites that Lord Breadalbane was to pay and secure 30,000l. as the portion or fortune of Lady Chandos. That has been adjudicated not to amount to a renunciation of legitime, it being clearly shewn that in the Scotch law legitime cannot be renounced by inference, but that it requires express contract and distinct renunciation for the purpose of depriving the child of legitime.

"Lord Breadalbane afterwards executed two bonds, one to secure the 10,000l. to be paid eighteen months after the marriage, and the other to secure the 10,000l. to be paid after his own death.

"It appears that in 1831, the other daughter of Lord Breadalbane, now Lady Elizabeth Pringle married, and in her marriage settlement there is an express renunciation of her title to legitime.

"It appears also, that in 1824, (Lord Chandos's marriage having taken place in 1819,) Lord Breadalbane was desirous, under a power which an act of parliament gave him, of charging upon his estates the 10,000l. which he had contracted to pay, and in that bond he expresses that the 10,000l. so charged was to be in bar of Lady Chandos' title to legitime. Now that can be material only as it may evidence the impression upon Lord Breadalbane's mind; it cannot affect the rights of the parties, which are to be determined, not by any thing which Lord Breadalbane did after the marriage, but by that which took place between the parties at the time of the marriage.

"It also appears, that in the years 1794, 1798, and 1812 Lord Breadalbane executed certain instruments making provision for younger children, and in all those instruments it is provided, that the provision so secured was to be in bar of the childrens' title to legitime. These of course are immaterial to the present purpose. They are important only as they may shew Lord Breadalbane's knowledge of what was necessary to bar a child's claim to legitime.
The intention there expressed is not consistent with the marriage settlement, in which it appears, that no such intention was expressed, and no such means taken to bar Lady Chandos' title to *legitime*.

"The Court of Session in Scotland is unquestionably a court of equity as well as a court of law, and I apprehend there can be no doubt that it was within the jurisdiction of the Court of Session to entertain the question which the plaintiff has thought proper to raise upon this record. The suit in Scotland was a suit of multipointing. All parties having any claim were called before the court for the purpose of asserting their title to the personal property of Lord Breadalbane. The question was raised in that suit, whether the title to *legitime* was barred by the settlement; but any supposed title arising from the terms of the proposals was not brought forward. It certainly is contrary to the practice of this court to assume jurisdiction on equities arising from parties not having taken the opportunity of asserting their title in that court in which the matter has been the subject of adjudication, and in which they have either missed their opportunity, or not thought proper to bring their title forward; but in the view I have taken of this case, it is not necessary to pursue that question further. I have adverted to it only that I may not be misunderstood, that it may not be assumed that this court would have jurisdiction to enforce an equity after an adjudication by the Court of Session where the matter of equity was cognizable by that court, on the ground of the party not having thought proper, or by accident or any other reason having taken no steps to bring forward the claim before the court.

"Such being the case made by the bill, the defendants' answer positively denies all contract or understanding on the subject. They say that the whole negotiation was left to the Duke of Buckingham on the one side, and to Lord Breadalbane on the other. They admit that it is usual in Scotland to insert clauses barring *legitime*, but they state that which was established by the decision of the House of Lords in this very case, that though it is usual to insert a clause barring *legitime*, yet that *legitime* cannot be barred except by distinct contract. They also admit that on Lady Elizabeth Pringle's marriage *legitime* was barred, but then they allege that it was barred by express contract introduced into and specified in the settlement.

"Now from what is stated in the answer, and from that which was decided in the Court of Session, and confirmed in the House
of Lords, three points were clearly established, first, that the mere giving a portion is no bar to *legitime*; second, that in order to bar *legitime*, it is necessary there should be express renunciation, and thirdly, that the settlement in this case did not operate as a bar to Lady Chandos' right to *legitime*. The sole question, therefore, is, whether the provision in the proposals for the insertion of the 'usual and necessary clauses' gives a title to correct the settlement by the insertion of such a clause.

"The first question is, was that the intention of Lord and Lady Chandos the party from whom this very valuable right was supposed to be taken by what passed in 1819. They by their answer positively deny, not only that there was any such intention, or that there was any such contract, but that the subject matter was present to their minds at all; in short, they state that they knew nothing about *legitime*, and there is not any reason to suppose that the case is at all misrepresented by the answer. The next question is, was it the intention of the Duke of Buckingham to surrender the claim to *legitime*? It is equally clear, that he thought nothing about it; it is probable he knew nothing about it, and there is an absence of all evidence that he had present to his mind the question of *legitime* to which his son in right of his wife would become entitled, or that he intended to consent to the barring of any such right.

"Then it is said, though that may be true, yet Lord Breadalbane living in Scotland, and being acquainted more or less with Scotch law, and having the assistance of a very experienced Scotch lawyer, Lord Lauderdale, whom he appears to have consulted on all the arrangements with regard to the settlement must have known the law of Scotland with reference to the child's title to *legitime*, and that it was usual to insert clauses barring *legitime* in the settlement which a father makes on his children, and that therefore, he must have understood the words 'usual and necessary clauses' as intending to provide that the settlement should contain a clause barring Lady Chandos' title to *legitime*.

"Now the first observation that arises upon that proposition is this, that he was afterwards a party to the settlement itself which contains no such provision. It also appears, that he subsequently, namely, in the year 1824, when he executed a deed of that date made an attempt which was obviously not likely to have a very beneficial effect to himself, he charges the provision upon his estates, and he says it shall be in bar of *legitime*. Now if he had supposed that *legitime* had been before barred by the settlement,
it would have been a perfectly unnecessary provision in that deed which was to carry into effect the provisions of the settlement to specify that it should be in bar of legitime.

"But supposing that he had any such intention, supposing that he residing in Scotland and being more or less cognizant of Scotch law, the right of the child to legitime, and the means by which that right would be barred had been present in his mind, it is quite clear that he never even communicated that to the other parties. The renunciation of legitime by his child was that which accrued to his own benefit. He was authorized to treat on behalf of his child with respect to her rights, those which he had conferred upon her by the provision of 30,000l.; he was authorized on the part of his daughter to treat with the father of the intended husband, but he had no authority, nor was it ever supposed that Lord Breadalbane was invested with any authority to treat, not as with the father of the husband, but as between himself and his daughter on the subject of her claim to legitime, the daughter and her intended husband being entirely ignorant of any such question being raised or any such effect being given to the transactions then in progress.

"Now if he put that construction upon those words, of which however there is not only no evidence, but I am perfectly satisfied that the subject matter, strange as it may appear, was as absent from his mind and from the mind of Lord Lauderdale who was acting for him, as it was from the minds of Lord and Lady Chandos or Mr. Vizard who was acting for them, or the Duke of Buckingham who was acting for Lord Chandos, but if that was present in his own mind and not communicated to the other parties or present in the minds of the other parties, it would be very difficult to contend that the right of Lady Chandos to legitime out of the personal estate was barred.

"Now, if Lord Breadalbane had so understood the words, it must have been because he was acquainted with the Scotch law, and knew that such covenants were usually inserted in Scotch settlements, but it is most extraordinary, that with that knowledge and with the supposed construction put upon the words in the proposals, he afterwards executed a settlement which contained no such provision, although the proposition is this, that he knew the Scotch law, and knew that an express renunciation of legitime was necessary in order to carry it into effect. Upon the whole, it is positively denied that the parties sought to be affected by this injunction knew any thing about legitime. The result of the whole
leaves no doubt upon my mind that it was not present to the minds of any of the parties. But still though the parties had not the subject matter present to their minds, they may have used words which may operate upon rights of which they were not cognizant. If a party thinks proper to bar all rights that he has, it is not necessary to prove that he knew all his rights, or that he had ascertained what his rights were.

"That brings the case to the question, the only arguable question, what is the effect of those words in the proposals? Now, it is always to be kept in mind, that by the law of Scotland, nothing but an express renunciation will have the effect of barring the title to legitime, and it would be a strange conclusion, if the court were to decide that the effect of the words being introduced into the proposals would be to deprive one of the parties contracting of the title to property of the enormous amount of that in question, none of the parties to that arrangement having any intention that they should so operate, or that that should take place. Still it is possible that the words may have that effect. Now, the proposals relate entirely to English subject matter. They are between parties resident in England, the only party not resident in England being Lord Breadalbane. It was the marriage settlement of the son of an English nobleman, marrying the daughter of a Scotch nobleman. It was prepared in England, the subject matter is English, and all the parties English, and after providing for all the purposes usual in a settlement of that description, the provision for younger children, for the wife and for the settlement of the estate, the words of the proposals are 'to contain the usual clauses of indemnity to trustees and all other usual and necessary clauses.' Now, I apprehend, that taking those proposals according to their ordinary meaning, after parties have stated what they profess to do, and the provisions that they intend to make, when they provide that 'all usual and necessary clauses' shall be inserted, they must be taken to mean all usual and necessary clauses for the purpose of carrying into effect the provisions before expressed of which the right of legitime forms no part.

"In the case of Anstruther v. Adair, (a) the question arose out of a settlement which was executed in Scotland between parties domiciled in Scotland, and the question was with respect to the equity of the wife according to the English law. It was decided and most properly by Lord Brougham, that the settlement being

(a) 2 Myl. & K. 513.
executed in Scotland between Scotch parties, it must be disposed of according to the law of Scotland, and that you cannot apply the equity of the English law between parties living in Scotland, and who never had in contemplation the equity of the English law. This is a settlement executed in England, relating to English subjects matter and providing for objects by the usual clauses with reference not to any thing dehors the settlement, nor to any right which might arise by the law of a foreign country, Scotland being for this purpose a foreign country, and different laws being administered there from those administered here. The obvious meaning of these words is, that there shall be such clauses as are usual and necessary for the purpose of carrying into effect the contract between the parties.

"There were cited, not I believe in the argument here, but in the argument in the House of Lords, a variety of cases with respect to that part of the law of *legitime* in Scotland, namely, the rights of parties to a share of estate under the customs of London and York, and several cases were cited where the title of the child was barred by the provision given by the father to the child, but in no case was there any instance found of the orphanage part being barred merely by the giving of the portion. There were cases where the father had advanced a portion to his child and had stipulated that that should bar the orphanage part. No case was produced where the title of the child was held to be barred by that which has taken place here, namely, simply advancing the portion of the child under terms such as those which are contained in this settlement on which the argument in this case has been founded, that that settlement barred the claim to *legitime*.

"The ground upon which this motion is rested, is, that there is evidence which would justify the court in correcting the settlement. The proposals being afterwards matured into a settlement, it is the settlement which binds the rights of the parties, unless there is something bringing the case within the authority of other cases in which the court has felt itself authorized to correct a settlement upon the ground of mistake or misapprehension, and to introduce into the settlement something which appears to have been the intention of the parties as evidenced by other means than the settlement itself. Now, in order to justify the court in doing that, there must be clear intention proved, it must be shewn that the settlement did not carry the intention of the parties into effect. If there be merely evidence of doubtful or ambiguous words having been used, the settlement itself is the con-
struction which the parties have put upon these doubtful or ambiguous words. They have themselves, therefore, removed any doubt which might have existed upon that which forms the foundation of the settlement. But in this case, although it is unnecessary I should pursue this subject further there is an absence of proof that the settlement did carry out those proposals. It differs from the proposals in some most important facts. No doubt those were the proposals originally suggested, but what passed between the time of the proposals and the execution of the settlement, what gave rise to any change of intention, or why it was that the settlement was not in conformity with the proposals in other matters, does not at all appear, but there is evidence of a manifest departure in important points in the settlement from the arrangements contained in the proposals. In order to justify the court in correcting the settlement, it must be proved not only that the contract was different from that which the settlement carried into effect, but that there was no change of intention to explain how it happened, that the settlement did not follow the terms of the original contract.

"Now if Lord Breadalbane had this knowledge, which is the foundation of the whole argument, if seeing these words in the proposals he imagined the settlement would contain terms barring Lady Chandos' title to legitime out of his estate, he of course would have expected that the settlement would be framed so as to effect that purpose, and he who would take the benefit of that renunciation would naturally look to see that that object of his had been carried into effect. He is a party to that settlement, not for the purpose of taking the benefit of Lady Chandos' renunciation, but inasmuch as he was a party contracting to make further provision to Lady Chandos by paying £20,000 at a future period. Is there any thing then in that settlement which would induce him to suppose that the intention which he had in his mind of protecting his personal estate from Lady Chandos's claim to legitime had been carried into effect.

"In the course of the argument here, many books were referred to for the purpose of shewing that in Scotch settlements it is usual to insert clauses barring legitime, but that only proves that it is usual so to contract, for it is clear, that without special contract for that purpose, legitime cannot be barred; another question is not whether it is usual in Scotch, but whether it is usual in English settlements in which no reference is made to legitime, or any rights dependent upon the Scotch law. It is sworn by the
answer by which I am on this motion bound, that Lord and Lady Chandos never intended to give up their claim to *legitime*, and I am satisfied from all the facts of the case, that the question never occurred to the minds of any of the parties. If it had, that claim might have been barred, but looking to the settlement, I am equally clear, that it provided 'all the usual and necessary clauses' which the parties intended, and I must construe the proposals to mean all clauses usual and necessary for the purpose of carrying into effect the arrangement before detailed, of which the renunciation of *legitime* forms no part. And I am also of opinion, that if this were doubtful, the settlement afterwards executed removes the doubt and proves what the parties meant and that there is not any such evidence to shew a mistake in the settlement as to justify a court of equity in interfering to reform that settlement. Upon these grounds, I am bound to dissolve the injunction which the Vice Chancellor has granted.—Injunction dissolved."
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/  .  *. Where the numeral is not placed before the figures the first volume is referred to.

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THE END.

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