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THE FUTURE OF LÉGITIME—VIVE LA DIFFÉRENCE!

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Légitime is not a curious and outmoded interference with the rights of a testator to dispose of his property as he sees fit. Rather, it is one of the ways in which all countries protect the rights of widows, widowers and children, and assert the value of family in society. Légitime in Jersey is a product of the Island's jurisprudential history.

Introduction

1 The debate concerning the reform of succession rights, and in particular freedom of testation over movables and immovables, has rumbled on for more than a decade,¹ with suggestions that the States ought to implement a system of inheritance rules similar to that in the Inheritance (Provision for Family and Dependents) Act 1975.² There is no doubt that grist was added to the mill of those we term the “abolitionists” by the fact that aspects of the law relating to *légitime* over movables were at one time incompatible with the European Convention on Human Rights. This was remedied by the Wills and Successions (Amendment) (Jersey) Law 2010, so that it seemed that there was little more to say on the subject. Jersey had chosen to maintain a system of fixed rights of inheritance over movables which was not dissimilar to that in Scotland and France. Yet there still seems to be an undercurrent of discontent with this decision, which can no longer be based on the argument that *légitime* does not comply with the provisions of the European Convention on Human Rights, and which must have its roots elsewhere.

2 The social function of the law of inheritance is inextricably linked with the family,³ which is an important social unit, and must be

¹ See the Legislative Committee's consultative document of 2 January 2001, RC3/2001.

² *Ibid.*

³ The meaning of the family has, of course, changed throughout the ages, but particularly so in the latter part of the twentieth century. Jersey has altered and adapted its laws of succession to meet these changes.

protected economically. As Hayton says, “All civilized systems of law . . . provide some protection against a testator leaving his family too little by giving or bequeathing his estate to others”.⁴ It is just that the manner by which these systems achieve this is different, with civil law systems having a rigid, compulsory share system for the deceased’s relatives, and legal systems whose origins lie in the common law relying on judicial discretion. Jersey is neither a common law system nor a civil law system, but rather a mixed legal system, with her laws of succession having originally arisen from Norman French customary law. There has been an increasing influence of English law in Jersey which may be due, in part, to the fact that most Jersey lawyers study in England, where freedom of testation and discretionary rights of inheritance are the norm. The aim of this paper is to explore why there is this dichotomy of approach between England and Jersey, and to demonstrate that it is a natural result of the differing historical, legal and political factors which operated in England, Jersey and northern France. Jersey has remained wedded to the ideas and concepts that underpinned Norman French customary law, and this in turn is much closer to a civilian lawyer’s thinking than that of a common lawyer.⁵

Origins of *légitime* in Jersey

3 The origins of *légitime* (in the sense of it being a right of a child to inherit a portion of the movable estate of its parents) lie in Roman law. The *lex Falcidia*, which was enacted in 40BC, prevented a testator from making legacies which exceeded three quarters of the estate, thus guaranteeing the heir, who was often the testator’s son, a portion of the testator’s estate. Later the Institutes of Justinian set out the rules of how the *lex Falcidia* interacted with the concept of testamentary freedom, both of which were inextricably linked to the notion of *pietas* within the Roman family, which as Saller says was “[a]t the center of the Romans’ ideal view of familial relations”.⁶ This “piety” had a reciprocal quality, with children owing duties to parents and *vice versa*. In cases where the obligation owed to the child was breached, Justinian said that the action of the inofficious will (the *querela*

⁴ Hayton, *European Succession Laws*, Jordans, 1998, p 8.

⁵ That is not to say that Jersey has slavishly followed the civil law approach to interpretation and development of her law. She has not. See Nicolle, *The Origin and Development of Jersey Law*, Jersey and Guernsey Law Review, 2009, Section 14 for a discussion on this point. But in relation to the law of succession her laws have far more in common with French law (even post-Revolutionary) than English law.

⁶ Saller & Pietas ‘Obligation, and Authority in the Roman Family’, in Kneissel & Volker Losemann (eds), *Atle Geschichte und Wissenschaftsgeschichte*. Festschrift für Kare Christ zum 65. Geburtstag, Darmstadt: Wissenschafts-geschichte Buchgesellschaft, 1988.

inofficiosi testamenti) was available. A connection between “natural affection” and the inofficious will was thus established,⁷ and where children demonstrated a regard for their parents, obedience and deference they had a claim against the estate. The *lex Falcidia* became the *legitima portio* or the “legitimate portion” in the Codex of Justinian:⁸ the Novels of Justinian (from around 538AD), changed the amount of the *legitima portio*, and the testator was obliged to leave one third of his property to the children if there were not more than four, and one half if there were more than four children; the share of ascendants and of brothers and sisters was fixed at one quarter.⁹

4 Transfers of movables are rarely mentioned in the early charters in Normandy and, as Génestal says, transfers of movables are less likely to be recorded than transfers of immovables, given the relative importance attached to the latter compared with the former.¹⁰ Extant documents from early Norman times contain examples of gifts of a person’s *pars*, *portio* or *substantia* (the terminology had not been standardised) of movables being made to a convent after his death,¹¹ and a “portion” seemed to be a recognised feature of post-obit gifts to convents, at least in eleventh-century Normandy.¹² Nevertheless the evidence of a quota system operating generally in relation to property in Normandy is meagre.

5 There is no doubt that *légitime* was in use amongst the Gallo-Romans in the *pays de droit écrit* and that it was firmly entrenched in most districts of southern France by the year 1100,¹³ but there is no evidence of it operating in northern France until much later (see *post*). Thus *légitime* existed in practically the same form as it had in Justinian’s Novella.¹⁴ The indisposable portion of the estate was one third if there were fewer than four children, and one half if the children numbered five or more. In cases of unjust disinheritance, the will fell,

⁷ See Codex 3.28.36.2; Novella 1.1.2.

⁸ Codex 3.28.30 and 3.28.31.

⁹ Novella 18.1.

¹⁰ Génestal, *Les formes du testament dans le droit Normand*, Caen, 1928.

¹¹ *Ibid*, p 88. For example, in the charters from Saint-Martin de Sées, Saint-Evroul, La Trinité du Mort and also in charters from Fécamp. See Tabuteau, *Transfers of Property in Eleventh-Century Norman Law*, University of North Carolina Press, 1988, pp 88–89.

¹² Most of the charter evidence from Normandy dates from the 1080s and 1090s, but there are a few charters which pre-date this. *Ibid*.

¹³ Chénon, *Histoire générale du droit français public et privé des origines à 1815*, Tome II, pp 286–287; Brissaud, *Histoire générale*, Tome II, 1634–1637. This *légitime* applied to both movables and immovables.

¹⁴ See Novella XVIII.

and in cases where a claimant had received less than he was entitled he could obtain the shortfall.¹⁵

6 *Légitime* does not appear in the *pays de droit coutumier* until towards the middle of the thirteenth century, and it is likely that it spread from the south and this spread reflected a desire to foster a moral duty to provide for one's children.¹⁶ The amount was not at first fixed in the Roman manner, but rather was decided upon by a judge, at least during the period of Phillippe de Beaumanoir,¹⁷ and would be determined so that the "heirs could live reasonably and have their maintenance according to their condition in life".¹⁸ The amount of *légitime* finally became fixed in the fourteenth century¹⁹ and applied to both movables and *acquêts*.²⁰ By the sixteenth century, the Parlement of Paris declared that *légitime* was part of local custom,²¹ and it was included in a revised text of the Custom of Paris in the late sixteenth century.²² A combination of court decisions and revision of the published customs resulted in it being adopted throughout the *pays de droit coutumier*.²³ The introduction of *légitime* into Normandy appears at a later date than in the rest of the *pays de droit coutumier*. The *Ancienne Coutume de Normandie* did not grant children either a right of *légitime* nor a right of *réserve*.²⁴ Nevertheless the redacted *coutumier*, from around 1583, set out the increased children's rights to the property of their parents, where they were given a right to a "tiers" of the movables of the father and of the mother.²⁵ This right was in a way an analogue of the "*douaire des enfants*" practised in other regions of northern France, in particular Paris, where in cases where the mother predeceased the father the children were given the right of dower which the widow would have taken were she to have survived:

¹⁵ Vallier, *Le Fondement de Droit Successoral en Droit Français*, Paris, 1902, p 124.

¹⁶ Engelmann, *Testaments Coutumiers*, 1903, pp 258–259. Most of the customs established *légitime* for children, but a few did so for ascendants too.

¹⁷ Akehurst (ed), *The Coutumes de Beauvaisis of Philippe de Beaumanoir*, Philadelphia, University of Pennsylvania Press, 1992, 12,37: 70,5.

¹⁸ *Ibid.*

¹⁹ Brissaud, *A History of French Private Law*, vol II, Little, Brown & Co, 1912, p 743.

²⁰ Beaumanoir (fn 17) 12, 3, 5, 6, 17, 18; 44, 55; 14, 15, 31; 70, 5.

²¹ Dawson, *Gifts and Promises*, Yale University Press, 1980, p 41.

²² Brissaud, *ibid*, fn 19, 516.

²³ *Ibid*, p 41.

²⁴ Boissonade, *Histoire de la réserve héréditaire et de son influence morale et économique*, Paris, 1873, p 275. The *réserve*, which is superficially similar to it, is the part of a person's property (usually the *propres*) which the law assured to the heirs, and of which they could not be deprived by gifts made to others – see Planiol, *Traité Élémentaire de Droit Civil*, 11th ed, 1937, vol 3, p 860.

²⁵ Cout de Normandie art 399–402.

it was in effect a “*propre héritage aux enfants*”.²⁶ Terrien, some ten years earlier in his commentaries on the law of Normandy, had written of the child’s “*part légitime*” (in the context of *avancements de succession*), and this is one of the first examples of *légitime* being referred to as such in Normandy: by the time Godefroy was writing in the 1620s the term *légitime* had slipped more into common usage.²⁷ A system similar to that in Normandy operated in Jersey, certainly by the time Le Geyt was writing, since in his *Privileges Loix & Coustumes de l’Ile de Jersey*²⁸ he describes the limitations that are imposed on a testator *vis-à-vis* the disposition of his movables where there is a surviving wife and child(ren), and these limitations closely mirror the current law of *légitime* in the Island.

The English position

7 England was not wedded to freedom of testation until the nineteenth century. Up to this point there was a degree of testamentary restriction over both movables and immovables. *Légitime* and *jus relictæ* (i.e., the right of a surviving spouse to a portion of the movables of the deceased) existed in England and Wales at a very early date, although their origin has remained obscure.²⁹ Glanvill, when writing his treatise of the laws of England around 1187, describes the customary division of a person’s chattels into thirds (where a wife and heir survive, with one third devolving to the wife, one third to the heir and one third being the free part over which the seriously ill testator had a power of disposition), or halves (where only the heir survives, with one half devolving to the heir and one half being the free part).³⁰ The writ of *de rationabili parte bonorum* lay for the enforcement of the right, although it was more usually asserted in the ecclesiastical courts, primarily because of the evolution of the separate religious and secular courts in England. It is somewhat ironic that these restrictions over testamentary freedom were waning in many regions of England and Wales by the end of the fourteenth century, before they had taken root in Normandy and Jersey, although in many regions of England and

²⁶ J Yver, *La rédaction officielle de la coutume de Normandie*, (1986) 36 *Annales de Normandie*, 18.

²⁷ See Godefroy, *Coustume de Normandie, Commentaries sur la Coustume Reformée du Pays et Duché de Normandie*, 1ère ed, 1626, see 477 pt and 502 pt.

²⁸ Titre V, art 7 and Titre VII, arts 3 and 4.

²⁹ See Helmholz, *Canon Law and the Law of England*, Hambledon Press, 1987, p 247.

³⁰ Glanvill, *The Treatise on the Laws and Customs of the Realm of England*, ed Hall, Nelson, 1965, VII, p 5.

Wales they continued until 1724.³¹ Ultimately the Wills Act 1837, s 3 provided that a person was entitled to freely dispose of all his movables.

8 Likewise, the testator's power to dispose of immovables in England was also controlled, and this control was linked to the doctrine of tenures and estates, the rule of primogeniture and incidents, such as wardship. From the time of Bracton around 1257, freehold land could not be devised, except where local custom allowed otherwise (for example, gavelkind). This led to land being conveyed to feoffees to uses for the use of the feoffor until his death and then to the uses declared in the will. The Statute of Uses in 1535 was designed to put an end to this, but instead led, in part, to the rebellion known as the 'Pilgrimage of Grace' which in turn led to the Statute of Wills 1540. This Act, as amended, allowed a landowner to devise two thirds of the land they held in knight's service and all the land they held in socage tenure. The Tenures Abolition Act of 1660 converted a knight's service into socage tenure, thereby allowing all land to be devised by the landowner. Nevertheless, despite the fact that a man had freedom of testation over his immovable property after 1660, this was subject to his widow's dower which gave her a life interest in one third of the freehold estates of inheritance of which her husband was seised during the marriage, and which the issue was capable of inheriting. It was not until the nineteenth century and the Dower Act of 1833 that a widow's right of dower could be overridden by a disposition made by the husband.³² Thus the Dower Act 1833 and the Wills Act 1837 represented a move towards complete freedom of testation in relation to both movables and immovables³³ which reached its zenith in the nineteenth century. The position is summed up clearly by Sir James Hannen, P in *Boughton v Knight*³⁴ where he said—

“By the law of England everyone is left free to choose the person upon whom he will bestow his property after death entirely unfettered in the selection he may think proper to make. He may

³¹ 4 Will & Mary (1692) cii, s 3 abolished *légitime* for citizens in the Province of York, 7 & 8 Will III (1696) abolished it for a man living within the principality of Wales and parts of the Marches, 2 & 3 Anne (1704) gave testamentary freedom over the personal estate to freemen of York, and 11 Geo I (1725) c 18, ss 17 and 18 abolished the custom of *légitime* for freemen of London.

³² The Married Women's Property Act 1882 allowed a wife to defeat her husband's right to curtesy (an English type of *viduité*) over her immovable estate.

³³ After the Tenures Abolition Act 1660, a man had testamentary freedom over his immovable estate, subject to his wife's right of dower, although it was not until the Dower Act 1833 that a husband could completely defeat his wife's claim to dower.

³⁴ (1873) LR 3 P & D 64.

disinherit, either wholly or partially, his children, and leave his property to strangers to gratify his spite, or to charities to gratify his pride, and we must give effect to his will, however much we may condemn the course he has pursued”.

The political reasons for the dichotomy of approach

9 Complete testamentary freedom in England is very much a construct of the nineteenth century, and probably reflects a type of English *laissez-faire* liberalism of the time; it was an aspect of ‘freedom of property’.³⁵ Perhaps it was seen to reflect the spirit of the age much better than the restrictive system which was redolent of a feudal system, which had collapsed as an economic system in the fourteenth century. As we have seen, inroads into forced heirship began in 1540 with the Statute of Wills, and was complete with the abolition of a widow’s right to dower. The fact that this freedom could result in a testator not providing for his family was not a reason to deny this freedom. Rather it allowed the making of appropriate provision in the circumstance,³⁶ and which could be exercised to reward “dutiful and meritorious conduct”.³⁷ Even Jeremy Bentham saw the power to make a will as a beneficial instrument of social control, “an instrument of authority confided to individuals, for the encouragement of virtue and the repression of vice in the bosom [of one’s family]”.³⁸ The few occasions where a man might leave his property away from the family were not considered a reason for denying the freedom itself.³⁹ As the nineteenth century progressed, testamentary independence became embedded in common law thinking.

10 Nevertheless, by the end of the nineteenth century there was a shift towards a more humanist philosophy and an acceptance of legislative intervention (by the state) over individual power where that power had been abused.⁴⁰ The old liberalism of *laissez-faire* had changed to a “new” liberalism of state interventionalism occasioned by the need to protect the weaker members of society.⁴¹ As Freedon said, “the new liberal aim was to establish an ethical framework to prescribe and

³⁵ See Locke, *Two Treatises of Government*, 1690, Laslett (ed), Cambridge, 1960.

³⁶ Blackstone, *Commentaries on the Law of England (1765–69)*, vol I, pp 437–438.

³⁷ *Banks v Goodfellow* (1870) 5 LR QB 549, per Cockburn, LJ.

³⁸ Bentham, ‘Principles of the Civil Code’, *The Works of Jeremy Bentham*, vol I, Edinburgh, 1843, Pt II, Ch 5, ‘Of Wills’, p 337.

³⁹ *Ibid.*

⁴⁰ See Mill, *On Liberty*, London, 1859.

⁴¹ This can be demonstrated by the type of legislation being passed by Parliament, which included Acts regulating the conditions in factories and legislation dealing with the regulation of industrial disputes.

evaluate human behaviour and, where necessary, to re-create social institutions".⁴² The power of testamentary disposition was abused in cases where the husband or father had not exercised it in a way that fulfilled the expectations of the law, and the testator ignored their responsibilities to their spouses and children. The problem of testators ignoring their wives and children was acute in the newly developing dominions of Australia, New Zealand and Canada.⁴³ As a reaction to the perceived injustice of unrestricted freedom of testation in the late nineteenth century, New Zealand introduced a Bill in Parliament, the Limitations of Disposition by Will Bill in 1896, which mirrored the approach of forced heirship in civil law countries, and which was designed in the main to prevent a husband from making a will which directed the whole of his property away from his wife. This Bill was never approved since, it was believed, it interfered too much with a testator's freedom of testation. The ruling liberal party in New Zealand at the time held the same views as the "new" liberals in England, and accepted that the state should intervene in certain cases. It did not however approve of the mandatory nature of the inheritance which the Bill proposed; the Bill failed to discriminate between individual cases and circumstances, and failed to establish a link between inheritance rights and the liberal rationale of intervention. Therefore it was not until 1900 that New Zealand successfully introduced the Testator's Family Maintenance Act, which provided for a discretionary form of family maintenance, which enabled the court to overturn wills so far as was necessary to provide the proper maintenance and support for a spouse and children, *i.e.*, the Act introduced a moral framework within which it could operate, and the emphasis of the law moved away from the rights of the deceased's heirs to the sanctity of the perceived intention of the testator. This was quickly copied in Australia, Canada (except Quebec) and England and Wales. Thus the origin for the legal basis of the reform of the English system of testamentary succession came from the British Commonwealth, rather than England's European neighbours, where the ideas of "new" English liberalism had been embraced.

11 Political liberty and individual equality were two of the main objectives of the French Revolution, and within this framework the law of succession was seen to be one of the most important branches of the law. The right to own property was a construct of society, and thus must be exercised within the limits of the interest of the state,

⁴² Freeden, *The New Liberalism: An Ideology of Social Reform*, Oxford, 1978, p 40.

⁴³ Mackintosh, 'Limitations on Free Testamentary Disposition in the British Empire', 1930, 12(1) *Journal of Comparative Legislation and International Law*, p 13.

which represented society.⁴⁴ Thus a decree passed on 4 August 1789 abolished the feudal regime in France, and promoted equality of inheritance. Nevertheless it was in the interest of the state and society that an individual's freedom of testation (and of *inter vivos* gifts) was curtailed. Forced heirship would lead to the parcellation of land, which would in turn break up the large estates, and the encouragement of the maximum distribution of property was necessary for the development of the state,⁴⁵ and the widening of the distribution of wealth which was core to the tenets of the Revolution. Between 1790 and 1800 there was a succession of laws which fixed the limits of the disposable portion of a testator's estate, with the remainder of the estate devolving by means of forced intestate succession largely in favour of the children.⁴⁶ All plans for the codification of French civil law contained rules for the transmission of property, which were based on a just balance between the right of ownership, the bonds of blood, political laws, the division of property and public prosperity.⁴⁷

12 Curiously there was not a "clean break" with the pre-Revolutionary ideas pertaining to the restriction of the power of testamentary disposition in France, but rather these ideas were adapted to accommodate the new post-revolutionary philosophy. In the legislative debates that led to the Civil Code there was no opposition to the idea of limiting a testator's testamentary power in relation to the rights of his children. A parent was responsible for giving a child his natural existence, and thus it was his duty, not only as a parent, but also as a citizen, not to abuse his power of ownership of property, but rather to use it to ensure that the child had a proper civil existence. A man's rights of ownership came to an end with his death, and the state was justified in becoming involved with this matter, since the interests that were involved here were wider than the interests of the testator. It was important to the interest of the state that it encouraged a good family spirit and hence good citizenship. The law was not acting in contravention of a parent's wish in these matters, but rather was confirming the presumed affections of the parent. Thus the law did not place restrictions or limits on the power of disposition, but rather granted the child a positive right to *légitime* (although that particular term was not used in the Civil Code, but rather the term *la réserve* which had been a type of forced intestate succession that operated in

⁴⁴ Vallier, *op cit*, fn 101.

⁴⁵ 3 Colin & Capitant, *Cours Élémentaire du Droit Civil Français*, 8th ed, 1936, p 755.

⁴⁶ See Beautemps-Beaupré, *De la Portion des Biens Disponible et de la Réduction*, 1855, pp 82–83.

⁴⁷ Dainow, 'Forced Heirship in French Law', 2 La. L. Rev. (1940) 669, p 678.

the most of the *pays de droit coutumier* and was of Germanic origin) in favour of a certain proportion of the estate, which the child would only lose if he were “unworthy”.⁴⁸

13 Jersey was unaffected by the French Revolution and the pervading ideas of the role of the state in the life of its citizens. But as we have seen the Civil Code took many of its concepts from the “old” (pre-Revolutionary) law and these remained the basis of the law of succession in Jersey; hence the law of succession in Jersey is more closely aligned to that of its civilian neighbour. That is not to say that the law of inheritance in Jersey remained stale and outdated: it did not. The liberal ideas and reforms which were sweeping England, France and the rest of Europe affected the Island too, so that the *Loi (1851) sur les testaments d’immeubles* conferred on persons leaving no surviving descendants the power to dispose of their *acquêts* and certain *propres*. This testamentary power was extended to persons who had descendants by a Law of 1902, and finally in 1926 the *Loi sur les héritages propres* gave an unrestricted power of testation to all persons to dispose of immovables in their will. The only restriction being the widow’s right of dower and the widower’s right of *viduité*.⁴⁹

Conclusion

14 It is clear that the principles underpinning the law of succession in Jersey are closer to those of France than of England, and this is particularly (although not exclusively) the case in relation to the curtailment of a testator’s testamentary power; this article has sought to examine the reasons for this, and to show that both the fixed and discretionary system of testamentary provision for the deceased’s family are a natural social function of the law of succession, with there being no “correct” way of achieving this goal.⁵⁰ No weight can be given to the argument in favour of the abolition of *légitime* based on the fact that the English system of discretionary rights is superior in some way. Fixed rights of inheritance for a child are a common feature of the testamentary succession laws in most countries which do not have the common law as their jurisprudential basis. In fact, to the civil law lawyer it is the English system of discretionary rights of inheritance which is a little peculiar. It is usual to consider one’s own

⁴⁸ See Civil Code, arts 726 *et seq.*

⁴⁹ See *Basden Hotels Ltd v Dormy Hotels Ltd* (1968) JJ 911 for a detailed discussion on this point.

⁵⁰ In fact Jersey’s neighbour, Guernsey, in the Inheritance (Guernsey) Law of 2011 opted to implement a system of freedom of testation which is very similar with that in England and Wales, and thereby abolished the customary principles of both *légitime* and the *droit de conjoint*.

legal system as natural and normal, and anything that is different to be somewhat curious; this may be part of the reason why many English lawyers consider theoretical freedom of testation as a necessary and usual incident of ownership, and that discretionary rights of inheritance based on the exercise of a judicial discretion should supplement this freedom. This method is merely one way in which a child may be economically provided for after the death its parent. Jersey has a different method, albeit one which is closer in its philosophical basis to civil law.

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