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THE ABANDONMENT OF THE GRAND PRINCIPLES OF NORMAN CUSTOM IN THE LAW OF SUCCESSION OF THE BAILIWICK OF GUERNSEY

de Vic Carey[1]

The author describes the substantial changes in the law of succession that have taken place throughout the Bailiwick of Guernsey since 1945. Little remains of the grand principles of Norman custom.

1 Until the changes of the revolutionary period culminating in the promulgation of the *Code Civil* in 1804, the law of succession in mainland Normandy had developed logically to follow and respect a number of special features. These included—

1.1 *La Masculinité*: the clear preference of males in descending successions to the virtual exclusion of females and the preference of the father's side of the family in ascending and collateral successions.

1.2. *L'Aînesse*: the privileges of primogeniture which resulted in the eldest son being recognised as the principal heir albeit that he was obliged to share with his brothers part of the inheritance. As a consequence of the way in which elder sons were preferred in many cases, it was possible to ensure in a society where land was the main source of wealth that the main part of a deceased's estate remained intact so as to avoid subdivision and financial difficulties resulting from too many members of the same family staying on the land and trying make a living from ever-diminishing parcels of pasture.

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[1] This article is based on a paper delivered to a *Colloque* held at the Chateau de Cerisy under the patronage of the University of Caen and the *Conseil Général de la Manche* in May 2011 to celebrate the 1100th anniversary of the foundation of Normandy.

1.3 *L'Indivisibilité*: Terrien[2] states "*Tout héritage est partable ou non partable*".[3] The principal *non partable héritages* comprise the tenures of the nobles "*Fiefs de Haubert*". To observe true indivisibility, one looks at the succession to the Crown of England and noble titles thereunder subsisting, such as Dukedoms and other peerages. Until a recent change in the law relating to succession to the Crown[4] not only has the principle of *indivisibilité* survived but also that of *masculinité* where the succession continues to pass to the eldest male heir. Noble indivisible successions would not feature in a study such as this, were it not for the fact that it covers tenure in Sark, where indivisibility still exists.

4. The distinction between *immeubles* and *meubles* and the subdivision o*f immeubles* for the purposes of succession into *propres* on the one hand and *acquêts* and *conquêts* on the other*.*

5. *Restricted testamentary capacity*: that is to say the severe restriction that was placed on the Norman's ability to dispose of his property by will and the consequent restrictions against lifetime disposals intended to defeat these prohibitions.

2 This article seeks to show how the law of succession has developed in the Islands of the Bailiwick of Guernsey since the separation of the Bailiwicks of Jersey and Guernsey from mainland Normandy in 1204 and to trace how the grand principles of the custom of Normandy, as outlined, above have in the last 70 years almost disappeared. Whilst concentrating on developments in Guernsey (which includes the Islands of Herm, Jethou and Lihou), reference has also to be made to Alderney, and Sark (which includes the Island of Brecqhou), which

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[2] Terrien, *Commentaires du Droit Civil tant public que privé observé au pays et Duché de Normandie Rouen 1574* reprinted (with introduction by Advocate Gordon Dawes), Barreau de Guernesey 2010*.* The first codification of the civil law of Guernsey was based on this work. This is to be found in the *Approbation des lois* prepared for the approval of the Royal Court which was given added authority by being approved by Her Majesty Queen Elizabeth I pursuant to an order in Council of 27 October 1583. See further Thomas Le Marchant, *Remarques et animadversions sur L'Approbation de Lois*, Guernesey 1826*.*

[3] *Livre VI Cap III*.

[4] The Succession to the Crown Act 2013, which provides that females can no longer be displaced in the line of succession to the Crown by a younger brother born after 28 October 2011.

Islands' legislatures have enjoyed for 400 or more a degree of self-determination, which has enabled them to frame their own laws of succession to suit the requirements of their own communities.

3 Under the laws of each Bailiwick jurisdiction there remains the clear distinction between *immeubles* and *meubles. Immeubles* comprise land and buildings and certain interests therein which are classified as *immeubles*; the principal of these are usufructs (including *douaire* and *franc veuvage* until they were abolished) and servitudes. Also included as *immeubles* are *rentes*, a form of perpetual annual payment secured on land; *hypothèques*, a capital charge secured on land, distinguished from the more frequent form of security termed a bond or *obligation* which is classified as personalty in the hands of the creditor; and certain goods and machinery employed in the exploitation of the land, and some plants and crops (some only at certain times of the year), the whole as defined in ordinances of 19 January 1852 and 1 October 1888.[5] The creations of *rentes* and *hypothèques* have fallen into disuse.[6]

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[5] Most legal systems have had to develop their own jurisprudence as to where the line is to be drawn between what is an *immeuble* and what is a *meuble*. This became a contentious issue as horticulture developed in the 19th century such that the Ordinance was passed in 1852 [*Recueil d'Ordonnances Tome III p 231*], clarifying the distinction and providing for certain crops to be treated as *meubles* with effect from a particular date in each year, notwithstanding the fact they had not been harvested. Some of these dates had to be adjusted in 1888 [*Recueil d'Ordonnances Tome IV p 299*] with the development of glasshouse cultivation.

[6] A *rente* was primarily created as a balancing payment when deeds of division (*partages*) were concluded. They were payable in measures of wheat, the cash equivalent thereof being fixed annually by the court until 1927 [*Loi ayant rapport à l'abolition de l'affeurement de rentes et au taux de paiement des rentes—O en C Vol VIII p 143*] when a permanent fixed cash alternative was prescribed. This caused hardship in times of inflation. As a consequence the Law of 1954, promoted at a time when banks were ready to lend more freely, prescribed that all adjustments under a *partage* must be expressed as payable in money. *Hypothèques* had a period of popularity from after 1950 until 1962 as United Kingdom domiciled individuals could, until the Finance Act of that year removed the exemption, avoid paying inheritance tax on foreign realty. A simple and safe way of taking advantage of such a facility was to lend money to a Channel Island

Meubles comprise everything else, including furniture and chattels, animals, money, bonds and other securities and, most importantly, leasehold interests. This is an important distinction as the two estates are to be kept separate and, as will be seen, to this day they are dealt with in different ways on death.

4 The earliest restatement of the laws of succession as they existed in Guernsey after the *Commise* is to be found in Terrien Book VI, as commented on in the Approbation. A summary of the law as it took effect in his day contained in a work of Jurat Laurent Carey,[7] who held office between 1765 and 1769. This article takes as its source for explaining the old law the "text book" for students and indeed practitioners, who had to know something of the law prior to 1954—a typewritten set of notes prepared by the late Advocate WH Foote.[8] The effect of this is that the law is generally stated to be to be as it was in the 19th century before and after it was reformed by the *Loi sur les successions 1840.*[9]

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resident secured as a *hypothèque* which, being classified as an *immeuble* under the local law, remained so classified in the eyes of the British Revenue.

[7] *Les Institutions, Lois et Coutumes de l'ile de Guernesey publié par ordre de la Cour Royale 1889.*

[8] *Notes on the Law of Inheritance and of Wills of the Island of Guernsey.* Advocate Foote, admitted in 1908, was clearly one of the ablest members of the Bar of his generation. He was appointed HM Comptroller in 1916 but, as was the custom at that time, continued in private practice with Advocate Victor Carey (later Bailiff 1935–1946) until his untimely death in the influenza epidemic of 1919.

[9] *Ordres en Conseil*, vol I p 51. The procedure for enacting legislation in Guernsey is for the States to approve a *Projet de Loi* which is then submitted by the Bailiff as presiding officer on their behalf by way of petition to the Sovereign in Council. Today these petitions are of a formal nature, merely reciting the dates of approval of the *Projet* and earlier consideration of the topic. The Petition submitting the 1840 Law makes interesting reading. The petitioners state—

> "That the Law of Normandy in all matters of succession and inheritance is still the Law of Guernsey—That the lapse of ages and the altered state of society may, without any departure from the principle of that law, be said to necessitate changes recommended by justice, experience and general consent."

Reference is then made to petitions from "the most intelligent inhabitants" and subsequent debate. The petitioners finish by assuring Her Majesty that the *Projet* "far from being the result of agitation, wild

1. Succession to *immeubles* in the Island of Guernsey

A. *Prior to1954*

5 Dealing first with *immeubles* and succession to what Terrien refers to as *partables* (as opposed to *indivisible*s), the tenure found in Guernsey and Alderney, the underlying principle which continues to this day is that *Le mort saisit le vif*, that is, the heir comes into possession of the property of the deceased at the moment of death without any formality. Indeed as Laurent Carey points out, the heir can immediately protect his possession by invoking if necessary the *Clameur de Haro*. The same principle applies to property left by will: the devisee takes possession at death, albeit that the will has to be registered in the Royal Court before the devisee can make title.[10]

6 Starting with descending inheritance in direct line, in Guernsey, following Normandy, sons were entitled to claim one twentieth in area of the real property of the deceased to the exclusion of the daughters and if they did this on land that was built on it was to be valued as bare land. This must have caused all manner of difficulties and not surprisingly this right of *Vingtième* was abolished in 1840. The greatest problem must have been assessing *vingtième* alongside the right of the eldest son to claim his *préciput*. For more information on how the provisions as to *vingtième* were applied, see Laurent Carey.[11] Although *préciput* was abolished in 1954, it is extraordinary how cases still arise where parcels of real property have remained in possession of a family without the need for a formal *partage* and as a result the a claim of a *préciput* on behalf an eldest son still has to be made. The *préciput* is the right given to the eldest son before the *partage* with his brothers and sisters (by way of birthright or eldership and without making any compensation to the others) to take a certain part of his father's or mother's estate. Only the eldest son or, if he has predeceased, his eldest son can take a *préciput*. Daughters and sons of daughters cannot claim it, so if the deceased did not leave a son or a son of a son there will be no *préciput* and neither will there be a *préciput* in ascending or collateral successions. In former times, it was felt very important to continue a family living in an

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innovation, or party zeal was temperately proposed, maturely discussed and considerately adopted".

[10] Note, however, the formalities now in force relating to establish title on intestacy outlined in para 21 below.

[11] Pages 146–47.

unbroken line on the same estate, particularly in the rural areas of the Island. *Préciput* could not be claimed on properties within *les barrières de la Ville de Saint Pierre Port.*[12] The eldest son would claim the principal dwelling house and between 14 and 22 perches of land around it, together with stables and outbuildings, even if on a separate site in cases where the main enclosure amounted to less than one-third of the whole estate. Otherwise the *préciput* cannot extend beyond a single enclosure. It is the responsibility of the *douzeniers (conseillers de la paroisse)* to decide the extent of the property to be included in the award after giving the opportunity to the eldest son and other heirs to be heard. There were a number of rules introduced to prevent double preference of eldest sons where they wished to claim a second *préciput* in respect of the estate of a surviving parent—the separate estates of mothers also being eligible for the claiming of a *préciput.*

7 In addition to the right to *préciput*, the eldest son had other rights on the real estate of his mother or father—

1. Where the whole estate formed one enclosure, the eldest son had the right to take the whole enclosure subject to compensating his co-heirs with its value (less the value of the *préciput*) in the shares to which they were entitled.

2. Where there was more than one enclosure, the eldest son could only claim one third of the whole estate inclusive of the land on which the *préciput* was claimed. He was entitled to the balance of the enclosure on which the *préciput* was claimed but after that he was subject to the decision of the *douzeniers* as to which precise parcel of land he was to be awarded from the other enclosures.

8 After the entitlement of the eldest son had been established, the time had come for the preparation of a *partage*, or deed of division, of the rest of the estate between the eldest son and his co-heirs, and it would be at this stage that the most junior of the co-heirs would prepare the lots. As sons were considered senior to daughters, it would generally be for the youngest daughter to prepare the lots. It was clearly in the interest of the junior to make the lots as equal as possible because the seniors were

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[12] Originally a small area leading up the cliffs from the harbour but substantially increased by s 8 of the Law of 1840 to take account of the expansion of the town in the late eighteenth and early nineteenth centuries.

going to have the right to choose in preference to the lot-making junior who, having last choice, would get left with the lot perceived to have the lowest value. The rule for division of real estate was that sons got two thirds divided equally between them and daughters one third divided equally between them. There were two exceptions to this: if the share of a son exceeded double that of a daughter the son's share was reduced to double that of the daughter, and if the daughter's share exceeded that of a son, both sons and daughters shared equally.

9 Turning to collateral successions, as previously stated, there was no *préciput*. One starts by distinguishing between *propres* on the one hand and *acquêts*[13] on the other. The term "*propres*" means real estate which the deceased has inherited, that he has acquired by *retrait lignager*[14] or that acquired *de qui on est héritier présomptif. Acquêts* comprise realty acquired by an individual by purchase or otherwise, that is to say, not by inheritance.

10 *Propres* were divided "*per stirpes"* (by branches—*par souches*) in the line from which the heritage descends. That is to say, if the property was inherited from the father's side of the family it went to the father's heirs alone, and likewise to the mother's heirs if inherited from her. Representation is allowed *à l'infini.* Until 1840, males excluded females, but thereafter males shared two thirds and females one third with similar exceptions for excessive entitlements outlined in the case of descending successions.

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[13] Historically, distinction was made between *acquêts*, land acquired before marriage, and *conquêts*, that acquired after marriage. As any practical distinction in the treatment of the two disappeared, reference will be made herein to both as *acquêts.*

[14] This is the right of certain relatives of a vendor to claim back land sold to a stranger on reimbursement of the stranger's costs of purchase. It has been abolished in Guernsey. It exists in Alderney, under the Alderney Land and Property Law 1949, although it has not been used in recent history, and in Sark, where the customary law still applies, and in respect of which guidance was given by the Royal Court in *Rang v Wakley* (1987). See, generally, S Poirey, 'Le droit coutumier à l'épreuve du temps. L'application de la coutume de Normandie dans les îles anglo-normandes: le retrait lignager', *Revue Historique de Droit Français et Étranger* 75 (1997), 377–414.

11 *Acquêts* passed differently. If the deceased was survived by a brother or sister then representation was allowed so, to give an example, if there were originally four siblings, of whom two are deceased, the heirs of the deceased siblings take the share of their parent between them. In the example, the amount to be shared will depend on whether the deceased sibling was male or female and, after that, nephews and nieces of the deceased will share that part which their parent would have inherited, two thirds to males, one third to females. If, however, all brothers and sisters predeceased the deceased, the nephews and nieces share per capita as heirs *de leur propre chef*, *i.e.* as next of kin. Again the rules respect the two thirds entitlement of males and one third of females. The other difference to note is that once representation is not allowed, the property passed per capita to the nearest relatives. This would exclude children of a deceased nephew or niece to the advantage of the surviving nephews and nieces.

12 Concluding with ascending successions, an ascendant heir could only inherit from the last of his descendants. With *acquêts* and *conquêts*, the father was preferred to the mother and the paternal line to the maternal in parity of degree. A simple example may be given. If a son dies leaving a mother but not a father, the mother will inherit as next of kin in preference to any grandparent. If, however, the mother has predeceased, leaving grandparents of the deceased, the paternal grandfather will be preferred to the maternal one and will inherit. It should be noted that this preference for the paternal line does not exist with *propres*. As explained these go back to the line paternal or maternal from which they have come and this may result the person inheriting not being the actual next of kin.

13 The rights of heirs or legatees were always subject to enjoyment rights of the deceased's surviving spouse. *Douaire* was the right to enjoy for life one third of the late husband's estate, including property he would have inherited in direct line had he lived. *Franc Veuvage* was the right of a husband to enjoy the whole of the deceased wife's real property until remarriage, provided that there was a child of the marriage born living. In both cases the widow or widower has in effect a *usufruit*[15] over the property of his deceased spouse.

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[15] The concept of *usufruit* was well known to Roman and Norman law. As to how it is regulated in Guernsey and how the responsibilities between *usufruitier* and *nu proprietaire* are divided see *Ordonnance de*

14 So far as testamentary capacity was concerned, a person who had no descendants could, following the reforms of 1840, make a will of real estate in favour of whomsoever he or she chose, subject to the rights of enjoyment of the surviving spouse already described. No such power was available to those leaving descendants. Wills of realty executed in Guernsey had to be witnessed by Jurats of the Royal Court, and the rule that such wills could not also dispose of personalty continued to apply.

15 To summarise the position pertaining to inheritance of real property in the Island of Guernsey prior to the enactment of the Law of 1954, many of the Norman characteristics can be seen to be clearly preserved. *L'Aînesse* was still recognised, with the eldest son enjoying the privileges of *Préciput. La Masculinité* was still respected, with the double entitlement of male heirs over that of females in both direct and collateral successions and the preference of the father's side in ascending successions of *propres* and *acquêts* where there was parity of degree. The distinction between *propres* and *acquêts* was still important and disposal of real property by will remained prohibited for those with descendants.

B. *The reforms of 1954*

16 The Inheritance (Guernsey) Law 1954[16] was a remarkably short law which made substantial reforms. Its brevity is to be compared with the complexity of the *travaux préparatoires* which is to be found in the reports submitted prior to no less than four debates in the States, commencing with a report in January 1940.[17]

17 The Law of 1954 abolished the "*droits de préciput, douaire, franc veuvage and l'aînesse*". The Law went on to provide for a general right to leave real estate by will subject to the proviso

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la Cour Royale 16 janvier 1854 (*Recueil des Ordonnances Tome III p 308*).

[16] *Ordres en Conseil Volume XVI* p 10.

[17] The investigation committee seem to have proposed an unprecedented number of alternatives including a minority view, which did not find favour at that time, that there should be no restriction on the right of testamentary freedom where a person left descendants. It is clear from the report of the 1940 Committee (whose work was interrupted by the Occupation) that there had been a number of earlier debates on the subject.

that a person leaving descendants shall only be able to exercise that right in favour of any one or more or all of the following—

(a) his surviving spouse;

(b) his descendants;[18]

(c) his illegitimate children and their descendants;

(d) his step-children and their descendants; and

(e) the illegitimate children of his descendants, of his illegitimate children or of his step-children[19]

18 In the event that one of these devisees predeceased the testator, representation was to be allowed unless a contrary intention appeared in the will.

19 *Douaire* and *franc veuvage* were replaced by a provision that the surviving spouse should have a life enjoyment until remarriage of one half of the realty of the deceased.[20] A further important change was the repeal of all the preferences given to males over females in the Law of 1840.

C. *The twenty-first century*

20 In an age when marriage has become very much an optional precursor to the procreation of children, fairness requires that illegitimate children, as they are still rather disparagingly referred to, enjoy the same rights to inherit as a legitimate sibling. The adherence of the Bailiwick to international conventions requiring the removal of all forms of discrimination against illegitimate children resulted in further changes made by the Law Reform (Inheritance and Miscellaneous Provisions) (Guernsey) Law 2006. The provisions that had been made in 1979[21] to enable descendant

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[18] In all matters relating to succession, adopted children are to be treated as the children of the adopter born in lawful wedlock. See Adoption (Guernsey) Law 1960 as amended.

[19] Added by s 2 of the Law of Inheritance (Guernsey) Law 1979 but later repealed by the Law Reform (Inheritance and Miscellaneous Provisions) (Guernsey) Law 2006.

[20] Or the whole if the annual value was less than two hundred pounds—a provision extinguished by inflation. The right shall be exercised on such part of the estate as the surviving spouse may reasonably select.

[21] See the Law of Inheritance (Guernsey) Law 1979.

illegitimate children to share in testate successions, if the testator so provided, were extended to apply to intestacies of realty and personalty.

21 The Law of 2006 went on to deal with two further matters. First, it tightened up on the procedure for conveying realty. In the old days when Guernsey was a static community and ownership of one's own home was not as common as it is today, the knowledge of the genealogies of land-owning Guernsey families, retained in the minds of the advocates and their conveyancing clerks, ensured sufficient protection for purchasers against subsequently finding that the heirs who had purported to sell property to them were not those entitled to it. Unlike estates of personalty, where the personal representatives had to prove the will or obtain a grant of administration in the Ecclesiastical Court, nothing was required of heirs of realty before they appeared in the Conveyancing Court (*La Cour des Contrats*)[22] to transfer inherited property. Although greater care has been taken in recent years, it was, on any view, an amazingly slack system, with increased risks of the true heirs being overlooked following the influx of new residents of recent years. It is only now that with the possibility of an illegitimate heir appearing about whom no one knew that the system has had to change. The result is that on intestacies, heirs, however *bona fide* and well respected, cannot expect that their right to convey will be accepted. Instead one of the heirs must first go to court and be appointed as administrator of the deceased's realty. Once so appointed the administrator can give good title to a purchaser but will be liable to account to any unidentified heirs who may subsequently appear. This means in theory that he will have to retain the proceeds of sale for six years, although the court regularly exercises its power to curtail that period.

22 The consequences of these changes are that parties who were content to let the law take its course which ensured their realty be shared equally between children without making a will are now finding themselves advised to see an advocate and

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[22] All instruments transferring or hypothecating interests in land have to be passed before the Royal Court sitting twice weekly as a conveyancing court. Since the days of Sir William Arnold (1960–1973), the Bailiff has excused himself from presiding, leaving the conduct of proceedings in the capable hands of a senior Jurat sitting as Lieutenant Bailiff.

draw up a will disposing of their realty, so as to eliminate doubt and in particular avoid enquiries as to the existence of other descendants whether or not born in wedlock.

23 However, it is no longer technically necessary to employ an advocate to prepare a will as the rules requiring that wills of realty executed in Guernsey must be witnessed by Jurats and that realty and personalty cannot be disposed of in the same instrument were relaxed by the Law of 2006. The promoting committee observed that a temporary emergency law passed during the Occupation in 1944 and extended indefinitely in 1955[23] to the effect that wills executed outside Guernsey were not to be invalidated by the fact that they disposed of both realty and personalty had not given rise to difficulty and it saw no reason why the law should not be likewise changed for wills executed in Guernsey. The reason why the law had not given rise to difficulty is that very few wills executed outside Guernsey have come to be registered and in practice there will be good reason for continuing to make two wills, particularly where the testator has descendants, as any devise of realty must made direct to a descendant whereas bequests of personalty will initially vest in the executor or administrator.

2. Succession to *immeubles* in the Island of Alderney

24 Although the States of Guernsey is empowered to pass legislation relating to the criminal law of the Bailiwick, the legislatures of Alderney and Sark exclusively may promote legislation in matters of succession in their own Islands and, accordingly, none of the laws passed in Guernsey, to which reference has been made, has any effect in those Islands. The Alderney law relating to succession to realty and personalty developed separately in the nineteenth and early twentieth centuries. A Law of 1841 mirrored the Guernsey Law of 1840. Although reference is made in the preamble to land holdings being much smaller than Guernsey and the fact that there were few large farms,[24] *Préciput* continued to exist in Alderney, but without any exclusion of urban areas.

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[23] The Wills (Temporary Provisions) (Amendment) (Guernsey) Law 1955 *Ordres en Conseil* Vol XV1 p 225.

[24] Agricultural land on the open Blayes on top of the Island was, when it was still being cultivated, generally held in small strips with owners claiming a *vaindiff* (the right to turn a plough) on the adjoining owner's strip.

25 The Island was completely evacuated during the Second World War and the occupying power managed not only to destroy the public records of land ownership at the Island's Greffe, but also disturbed much of the land area with military works so that most boundary marks were lost. Thus a Land Register had to be established with a specially appointed Commissioner charged with awarding the land to those who were entitled thereto. Many of the original owners had not returned, so the law[25] that established the Register introduced a system whereby the Greffier[26] took possession of land on an intestacy and had conferred on him powers of administration, transfer to those entitled, or sale where he had to account to those who were beneficially entitled, including surviving spouses who were still entitled to rights equivalent to *douaire* and *franc veuvage.*[27] This can in practice involve administrations lasting many years. Subject to respect for these rights on intestacy the Law spelt out who were to benefit from the proceeds of sale—a simplified list abandoning distinctions between *propres* and *acquêts* and preferences of males. More remarkably the Law went on to provide that a testator had freedom, subject to the above-mentioned rights of the surviving spouse, to dispose of realty to whom he wished by will. This was a major departure from the previous law which had given no testamentary powers in respect of realty to persons who had left descendants.

3. Succession to *immeubles* in the Island of Sark

26 Medieval Sark had manorial and legal regimes similar to those of the other Islands of the Bailiwick, but these disappear from the record after the epidemic and other crises of the fourteenth century had taken their toll. It is also possible that the parcels of land on the Island which would have been *partables* had been divided up and encumbered so that they became

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[25] *Alderney Land and Property etc. Law 1949 Ordres en conseil* Vol XIV p 67.

[26] Much of the post-war reforms on Alderney were overseen by officials from the UK Home Office and a strong English influence is to be detected in the form of the legislation that was enacted in Alderney in the post-war period. The old office of Greffier was reincarnated with the English title of "Clerk of the Court" but happily the States of Alderney reverted to the old title of "Greffier" when the functions of the office were rearranged in 2004.

[27] See para 13 above.

unprofitable to work and, as a consequence, the descendants of the original settlers left. Marauders and pirates used the Island as a haven, much to the discomfort of those who wished to go about their lawful business in the Bay of Mont Saint Michel. In order to prevent a repetition of this state of affairs, the Charter given in 1565 by Queen Elizabeth I to Helier de Carteret[28] to resettle Sark provided that the Island would be divided into 40 tenements which would remain indivisible (passing to the eldest male heir) and could not be encumbered.[29] There was to be a further obligation imposed on every tenant to keep on the tenement a man armed with a musket for the defence of the Island.[30] That indivisibility is the one thing one sees preserved in the major reform to the law that came into force at the beginning of the millennium.[31] The Law has removed the preference of males and has given power to make wills of realty in favour of one natural person, although in the case of those leaving descendants only to one of those descendants. To overcome the perceived injustice of only one person being able to inherit, a limited power to leave real property by will on trust for sale was introduced. Detailed rules for intestate succession were codified in a schedule to the Law and, most important of all, the law provided ahead of all the other Islands of the Bailiwick that illegitimate children are entitled to inherit not only by will but also on intestacy. *Douaire* and *franc veuvage* were abolished although, as in Guernsey, in 1954 the surviving spouse is entitled to a life enjoyment but then only of one third of the realty of the deceased.

27 Cracks are appearing in the edifice of indivisibility. First the decision in *Surcouf v de Carteret*,[32] has dispelled to a large

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[28] Seigneur of St Ouen on the North West corner of Jersey.

[29] There would be no system for registering charges and obtaining security for indebtedness. Similarly, long leases were open to challenge on the grounds that they were an encumbrance that an heir might set aside, but see judgment of the Royal Court in *Surcouf v de Carteret.*

[30] Dame Sybil Hathaway, DBE had reason to remind a former tenant of Brecqhou, who, having found that with advancing years the winters were too harsh, wanted to move to warmer climes and leave the Island unoccupied, that he must keep a caretaker on the Island—he was not to rely on the good offices of the Sark constable to go over and see all was in order.

[31] Real Property (Succession) (Sark) Law 1999 as amended.

[32] 1999–27 GLJ 128.

extent doubts as to the validity of long leases of parts of tenements. Divorce became available to persons of Sark domicile as recently as 2002 and the Law extending the Matrimonial Causes legislation that had subsisted in Guernsey since 1939 made special provisions enabling the Court of Matrimonial Causes[33] to direct a party to proceedings to grant a statutory lease of part of a tenement in favour of his divorced or separated spouse without dividing the tenement itself.[34] More importantly, the constitution of the Chief Pleas *(Les Chefs Plaids)*, the Island's legislature, has been radically reformed to meet modern concepts as to representative government.[35] The 40 tenants have lost their automatic right to membership resulting from their ownership of their tenement, and the legislature now comprises 28 *conseillers* elected by universal suffrage. With the inbuilt powers of the landowners to conserve the *status quo* removed, it seems likely that reform will come, including the provision of machinery to enable borrowing to be secured by way of a charge against land. The General Purposes Committee of Chief Pleas is currently investigating this whole matter with a view to further reform.

4. Succession to *meubles* in the Island of Guernsey

28 Guernsey has continued to maintain the basic rule of the Norman custom that limited the deceased's power of testamentary disposition to one third of his *meubles* if he left a spouse and issue, or one half if he died leaving only a spouse or issue. Mention is often made of the right of the pious Norman to leave this disposable part to a suitable part of the church so as to ensure that prayers would be faithfully offered for the repose of his soul. As a result the church regularly found that it had an interest in the timely administration of estates and, if no one was named as executor, the Bishop appears to have taken it to himself to discharge the duty. This explains the apparent anomaly of the Ecclesiastical Court in Guernsey sitting on a weekly basis under the presidency of the Anglican Dean or his *délégué* to issue grants of representation to executors and administrators in respect of personal estate situate within the

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[33] A division of the Royal Court.

[34] Matrimonial Causes (Amendment) (Guernsey) Law 2002, in particular art 57B.

[35] Reform (Sark) Law 2008.

Bailiwick.[36] The requirement that before personal estate can be dealt with a grant of representation is required contrasts markedly with the provisions relating to succession to realty. If a will was not made and the disposable part was thus not dealt with, the disposable part passed to the issue if there were issue or, if the spouse alone survived, to the next of kin of the deceased.

29 The old Norman rules were modified in the Bailiwick and again it is appropriate to start in Guernsey with the *Loi sur les successions 1840*. This introduced a *droit d'aînesse* for the eldest son to take, after the widow had claimed her third, one seventh of the "*meubles meublants*",[37] all the family portraits and all silver and other objects given to his father or his ancestors by public bodies. Unlike the position with *préciput*, where if an eldest son wished to claim a *préciput* on the real estate of the second of his parents to die, he had to give credit in respect of what he had taken on the first, the *droit d'aînesse* could be claimed on both the estates of the father and the mother. The next important point to note is that, unlike succession to realty, females share equally with males. Married daughters who had been furnished with "*Dot*", or a dowry, on marriage had, if they wished to share in the parent's succession, to give credit for the value of the *Dot.* In descending successions, representation is allowed. In collateral successions to *meubles* the rules are the same as those for *acquêts* in collateral line, save that there was, even prior to 1954, no advantage for males over females, all sharing being equal.

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[36] Similar jurisdictions existed both in England and in Jersey, but were transferred to the secular courts from the church courts in 1858 and 1946, respectively. As recently as 1985, the States of Guernsey accepted the recommendation of an investigation committee that the jurisdiction for non-contentious applications for grants of probate and representation should remain with the Ecclesiastical Court but that there should be transferred to the Royal Court responsibility for adjudicating on contentious matters (see Ecclesiastical Court (Jurisdiction) (Bailiwick of Guernsey) Law 1994).

[37] *Meubles meublants* may generally be translated as "household furniture", but that would appear to be an over-generalization. Foote draws attention to the provisions of art 534 of the French Civil Code and suggests that as providing the best definition.

30 Prior to the passing in Guernsey of the Married Women's Property Law 1928,[38] the personal property of the wife vested in the husband unless there had been a marriage contract reserving her separate estate for the enjoyment of herself and her heirs.[39] Consequent to that reform, further legislative reform enabled a husband to claim a *légitime* of one third (or one half if there were no issue) in respect of his wife's estate.[40]

31 Whilst the entitlement of the surviving spouse to receive outright his or her *légitime* is absolute, the *légitime* of all or any of the children may be put in trust by the parent on the basis that the child will enjoy the whole of the income from his entitlement during his lifetime. On the child's death the *légitime*, so placed in trust, reverts to the estate of the child and falls to be disposed of according to the child's will or in accordance with the rules of intestacy.[41]

5. Succession to *meubles* in the Island of Alderney

32 The rules as to testate and intestate succession are similar to Guernsey with two stark differences resulting from a failure of the Alderney legislature to keep up with changes that have been made in Guernsey. The first of these was that following the enactment of the Alderney Land and Property etc. Law 1949 similar provisions relating to married women's property were extended to Alderney as had been included in the Guernsey legislation of 1928. However no equivalent provision to that contained in the Guernsey Law of 1930[42] was included to enable husbands to be entitled to a *légitime* in respect of their wife's estate. It is understood that a proposal to fill this apparent lacuna was brought forward in the States of Alderney, but was rejected! One of the consequences of this is that if a wife dies

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[38] *Loi étendant les droits de la Femme Marie quant à la propriété Mobilière et Immobilière 1928.*

[39] A recent suggestion in Woods, "All that I have I share with you" (2011) 15 J&G Law Rev 67, at 67 that Guernsey has no ante-nuptial marriage provision thus appears in doubt and indeed the Island's divorce law of 1939 provides (art 45) that the court may adjust marriage contracts *etc*.

[40] *Loi Relative à la portion disponible des Biens Meubles des Pères et Mères 1930.*

[41] *Loi supplémentaire à la loi des successions 1889.*

[42] *Loi Relative à la portion disponible des Biens Meubles des Pères et Mères 1930.*

intestate in Alderney, her husband gets nothing, the children get one half of the estate as *légitime* and the other half as next of kin. The second is more serious in that there has been no equivalent legislation in Alderney to provide for the interests of illegitimate persons such as has been enacted in Guernsey in 1979 and 2008[43] or Sark in 1999 and 2007. However this all appears likely to change in the near future.[44]

6. Succession to *meubles* in the Island of Sark

33 The law is similar to Guernsey so far as the rights of spouses and descendants are concerned. Married women's property rights and the entitlement of a husband to a *légitime* were introduced in 1975.[45] Section 1 of the Personal Property (Succession) (Sark) Law 2007 abolished any rule whereby a person for the purposes of succession to personalty in Sark was distinguished from a legitimate person on the grounds of his illegitimacy. This mirrors s 1 of the Guernsey Law of 2006 save that, unlike the Guernsey Law, it makes no reference to successions to real estate, for the simple reason that such reforms had been anticipated in the provisions of the 1999 Law. So far as collateral successions are concerned there is no ascending succession to personalty and there are in respect of collaterals apparently still preferences afforded to males over females in parity of degree. These seems strange and non-compliant with the ECHR. The excellent rules as to inheritance of realty contained in the Schedule to the 1999 Law have not been adapted for successions to personalty. No doubt the matter will receive the attention of the Sark legislators in due time.

7. The end of the Norman tradition: recent reforms in Guernsey

34 At its meeting on 27 January 2010, the States approved proposals from the Inheritance Law Review Committee to enact legislation—

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[43] Law of Inheritance (Guernsey) Law 1979 and Law Reform (Inheritance and Miscellaneous Provisions) (Guernsey) Law 2006.

[44] See para 37 below.

[45] Married Women's Property (Sark) Law 1975 and Successions (Personal Estates of Married Persons) (Sark) Law 1975.

- to replace the current system of what the Committee described as forced heirship in Guernsey by testamentary freedom accompanied by family provision;
- under testamentary freedom, an individual will be able to leave, by will, the whole of his or her immoveable (real) and moveable (personal) property to such person or persons, and in such proportions, as he or she chooses;
- family provision will be similar to that which applies in England and Wales (under the Inheritance (Provision for Family and Dependants) Act, 1975);
- wills executed and marriage or other contracts made before the proposed legislation comes into effect will not be affected by it, so as to protect people who are unable or unwilling to make a new will or contract;
- to introduce new rules on intestacy, including the abolition of the distinction between "*propres*" and "*acquêts*";
- to abolish the effect of the ruling in the case of *In re Davis* which prohibits a person creating a testamentary trust of his or her real property in his or her will if he or she has descendants; and
- to clarify the order of inheritance where two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, along the lines of the Law of Property Act, 1925.

35 These proposals met with less consideration and debate in the States of Deliberation than the reforms of the nineteenth and twentieth centuries received in their time. Apart from vocal opposition from a few doughty advocates who still had some respect for the Norman tradition, the *Projet de Loi* implementing these proposals[46] was nodded through with little opposition or understanding of the real issues involved.

36 These radical provisions have swept away the system of *légitimes* enjoyed by spouses and descendants in successions to *meubles* and removed the restrictions on persons leaving descendants who had previously to exercise their testamentary powers in respect of *immeubles* in favour of their surviving

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[46] Duly ratified by Her Majesty in Council as the Inheritance (Guernsey) Law 2011.

spouse or one or more of their descendants. One can see that, with the rainbow of different familial and social relationships that exist in society today, testamentary freedom may be regarded as the only solution that can meet all aspirations. But as always there is the other side, what is to be done with the old man who after fifty years with the same wife abandons her and his children and transfers his affections to a younger woman to whom he wishes to give everything? English law has developed complex provisions to protect those who have a moral and material claim in these kinds of circumstances, and the Guernsey law mirrors these, but with less detail. The potential for injustice and litigation is even greater in Guernsey where there are no capital taxes on death, with a consequent lack of incentive to divest oneself of assets prior to death in the same way as in the United Kingdom

8. Conclusions

37 What, if any, then remains of our Norman heritage in the law of succession in the Bailiwick of Guernsey?

Masculinité has gone and rightly so.

Aînesse survived until it was no longer considered important to keep property in the family and enable one sibling to succeed to the estate and enjoy the fruits therefrom in a similar style to his deceased parent. There was a strong agricultural interest in maintaining viable farms in a small island but that interest appears to have extended to the larger town estates of the merchant class of the early 19th century. This is evidenced by the way in which the town boundaries were drawn to exclude many of the larger town houses.[47]

Indivisibilité is only relevant in Sark and looks as if after a final burst of life evidenced in the Law of 1999 it will soon disappear.

Immeubles and *meubles* will have less significance if the rules of succession thereto are elided. There will continue to be a material difference between them when one comes to consider methods of charging and giving security.

5. The States of Alderney has just issued (May 2014) a consultation paper which can be found on its website setting out

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[47] For example Les Cotils, Castle Carey, Lukis House and the houses on the upper or western end of the Grange, the Mount (now Government House) Rozel, Montville.

the case for testamentary freedom of both moveable and immoveable property with similar family provision safeguards to those in Guernsey. Little discussion is included of the merits of the alternative namely that of retaining the status quo. It is also proposed to abolish *retrait* and remove the responsibility of the Greffier for dealing with intestacies of immoveable property, a duty imposed originally in 1949 when heirs could not always be found and long overdue for reform.

In contemplation of indivisibility disappearing in Sark, in which event it would seem likely that Chief Pleas will follow the other Islands in abandoning the restrictions on testamentary freedom, one will see complete testamentary freedom throughout the Bailiwick.

Sir de Vic Carey was the Bailiff of Guernsey and President of the Guernsey Court of Appeal between 1999 and 2005. After retirement he was appointed a Lieutenant Bailiff and ordinary judge of the Court of Appeal and held those offices until 2012.