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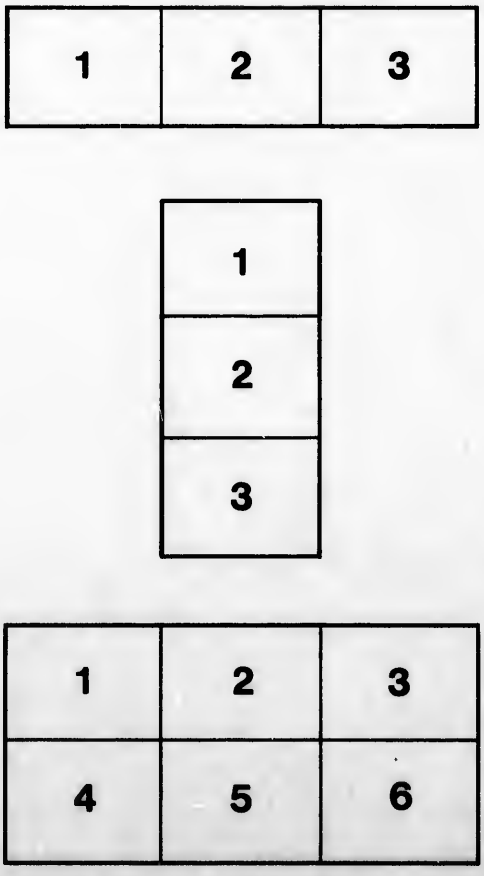

Honble. A. P. Caron with the author's respects

LAWS OF INTESTACY

IN THE

DOMINION OF CANADA.

By J. ARMSTRONG, Q. C., C. M. G.
LATE CHIEF JUSTICE, ST. LUCIA, W. I.

No man can be a knowing lawyer in any nation, who hath not well pondered and digested in his mind the common law of the world, from whence the interpretation, extensions and limitations of all statutes and customs must be brought.—STAIR.

Content if here the unlearned their want may view,
The learned reflect on what before they knew.

Montreal:
JOHN LOVELL & SON, ST. NICHOLAS STREET.
1885.

CONTENTS.

STATUTES REFERRED TO.

INDEX.

INTRODUCTION.

THE author having lately had occasion to study the law of Intestacy, in the different parts of the Dominion, was surprised to find that it was not the same in any two of the Provinces, although the Statutes enacting the law of Descent of real estate in cases of intestacy in British Columbia, Keewatin and the North West Territories are in a very great measure the transcript of that of Ontario. It will be admitted that it is desirable, where there is really no reason to the contrary, that the law should be uniform throughout the Dominion, and particularly when it affects persons residing beyond the jurisdiction of the enacting power. An imaginary line or a streamlet separates one Province from another, and the law may materially differ on one side from the other. The law of the domicile of the intestate at the time of his death governs the distribution of his personal estate; that of the situation governs with respect to the real estate. These rules are founded upon the maxims *mobilia sequuntur personam, immobilia sequuntur situm.* We find accordingly that to inherit from an intestate real property situate in any of the Provinces, except Quebec, the heir must have been born in wedlock, and he cannot even succeed if he has been legitimated by the marriage of his parents after his birth *per subsequens matrimonium.* So that if an intestate were the holder of real property in England, Scotland, Quebec, and Ontario, his son born before marriage, even if "legitimated" according to the law of his domicile, would not inherit the realty in England or Ontario, although he would in Scotland and Quebec.

The succession to personalty is different. On the death of an intestate domiciled in England a daughter of his deceased brother, born in Holland before the marriage of her parents, but legitimated there by their subsequent marriage, claimed to be

entitled to a share of the intestate's personalty as one of the intestates next of kin. It was held that the child so legitimated was entitled as one of intestate's next of kin. (*Re* Goodman's Trust, 44 L. T. R. N. S. 527.)

The Confederation Act, 31 Vic., chap 3, s. 94, enacts that the Parliament of Canada may make provision for the uniformity of all or any of the laws relative to property and civil rights in the Provinces of Ontario, Nova Scotia and New Brunswick, such law, however, not to take effect in any Province until its Legislature has adopted it. There are, doubtless, a number of laws which could be made uniform throughout the Dominion. The section of the Act quoted, unfortunately as the author believes, further declares that when the Act providing for a uniform law is adopted by the different Provinces mentioned therein, the Parliament of Canada shall have unrestricted powers to legislate thereon. The Provinces would possibly not object to-day to a law for the uniform disposition of intestate property, but they would object to granting the power of exclusive legislation hereafter to the Dominion Parliament on this question. A writer in an American Law Magazine, although of opinion that the enactment of a National Code would be attended with many advantages, admits that it would be strenuously opposed, "especially by those who are still " haunted by the ghost of the defunct doctrine of state rights; " and believes that there are certain subjects, "in which the whole " nation is to some extent alike interested, and in regard to which " a uniformity in the laws of the different States would be of " benefit to every section of the country." After a review of the laws affecting interest, dower, etc., the writer adds : " The " same confusion is found in the laws governing the descent of " the real estate and the distribution of the personal property of " deceased persons." He suggests that the existing laws be amended and unified by the Legislatures of the respective States without ceding any additional power to the Federal Government or asking for its interference. Another writer in the *American Law Review* of December, 1883, says, in the style peculiar to our neighbors :

" The progress of American unification must go on. It can no more be stopped than the progress of German unification can

be stopped. The narrow jealousies of a hundred years ago which made us a mere aggregation of tribes or petty communities dignified by the name of States, furnished a plan of government entirely unsuited to a great and homogeneous people * * * The trouble is that a great many things which were really local one hundred years ago, have, through increased means of intercommunication, become general, and hence national."

The common law of England, as regards the descent of real estate in cases of intestacy, at the time of the conquest of Canada, and which was then law in the Maritime Provinces, and introduced into Ontario by the Act of 1791, may be summed up thus:

Real estate lineally descended to the eldest son; it never ascended, it rather escheated to the Lord. The male issue was preferred to the female. If there were no male issue the females inherited share and share alike. In case of the death of the heir his representative succeeded. If the eldest son died without issue his next eldest brother succeeded. If the succession devolved upon females, the representatives of the deceased took her share.

On failure of lineal descendants, the inheritance descended to his collateral relations of the blood of the first purchaser.

The collateral heir was required to be the nearest collateral kinsman of the whole blood. The males were preferred to females, unless the lands had descended from a female. The relations on the father's side were admitted *ad infinitum* before those on the mother's side, and the relations of the father's father before those of the father's mother. But when the lands descended to a male from his mother's side the rule was totally reversed. Land could not be inherited of which the intestate was not in actual possession.

In no Province has the common law been expressly repealed, although more or less modified in each.

In the Appendix will be found a most interesting article on the distribution of the personal estate of intestates, which appeared in the London Law Magazine and Review of May, 1857, and which we have printed in *extenso*. In republishing this article in the March Number of 1858 the editor of the Upper Canada Law Journal (now continued as the Canada Law Journal),

accompanies it with certain remarks with which we, for the most part, agree. Having published a table of the distribution of personal estates, according to the law of Upper Canada and the then law of Lower Canada, he asks the question "which of the two is the more equitable?" and he answers by saying: "we cannot help thinking that our's is not. The student of the civil law finds in it traces of the Theodosian code in its roughest state, unsoftened by the novels of Justinian, while in the Table of Lower Canada he finds an offspring of the *corpus Justinianeum*." He objects to the *patria potestas*, the right, according to the law of England, of the father of an intestate to the personal property of the latter to the exclusion of the intestate's brothers and sisters, and, he adds, "the law of Lower Canada "is not open to the same objection," and that "if it had "nothing more to recommend it than the absence of the "*patria potestas*, we should, upon this ground alone, "all other things being equal, conceive it entitled to rank before "ours." There are few who will dissent from the editor, who writing some years before Confederation, thirty years ago, said: "From what we know of the laws of Lower Canada, there are "many good things which we might adopt with advantage. "Those in Lower Canada who know anything of our laws will, "we believe, return the compliment. The truth is that neither "system is perfect, and that neither section of the Province will "adopt the whole law of the other to the entire exclusion of its "own. The first step towards assimilation is inquiry." A practising lawyer can scarcely be expected to devote his time to the study of the laws of the Dominion. It is evident that, with the exception of Sir George Cartier, no minister has attempted any thing like a systematic reform of any branch of law.

Twenty-three years after the publication of the article from the Review, and the accompanying comments on it, the Editor of the Journal expresses his surprise that some Legislator had not taken up various departments or branches of the law of Ontario, and sought to treat them on some scientific principles. We may also express a like regret, for a well digested act on any branch of the law of the Province of Ontario, will, as it ought to be, be re-enacted to a great extent in the other

Provinces except Quebec. Where the law is the same the smaller Provinces will have the benefit of its interpretation by the learned judiciary of Ontario. We presume we may be allowed to say this without disparagement to other judges. Referring to the Wills Act, the writer appositely remarks "that "Mr. Meredith did good work for the profession when he pre- "pared the Wills Act—one of the best pieces of Legislature we "have on our Statute. We care not where he got the materials "which served as the foundation of the enactment. It deals "concisely and well with the subject. Why should we so nearly "assimilate the devolution of realty and personalty as we do in "this Province, and at the same time retain senseless and puz- "zling differences." No greater credit can be given to the framer of a law than that he has known to consolidate the different statutes of his country and to insert such parts of the laws of other countries as are admitted to be improvements upon his own. The Legislator ought to be acquainted with foreign laws and the circumstances under which those laws were enacted. We should not servilely copy any law, even if it be found in the English Statute Book, however strong a recommendation that may be. The writer in the Journal thus concludes his remarks:

"We adopted the Statute of Distributions as our rule as to the descent of personalty (22 & 23 C. II), and in 1851 we passed our Real Property Statute. By this means the descent of realty and that of personalty are brought very near the one to the other, but there remain distinctions difficult to bear in mind and not easy of explanation. The seventh section of the Statute of Distributions provides that there shall be no representation admitted among collaterals after brothers' and sisters' children. If the next of kin of the intestate should be nephews and neices, a child of a deceased nephew or neice will not be admitted to share in the distribution. If the deceased left realty the child of the deceased nephew would take his share. Then, again, in dealing with the law of contracts, why should we have one rule as to what is needed to bind in the case of personalty and another in the case of realty? No satisfactory reason can be assigned for that distinction, whilst much may be said against it."

These observations are partly applicable to the law of Quebec

as well as to the law under the Statute of Distribution. The law of Descent of Real Estate of Ontario, of British Columbia, the North West Territories and Keewatin is, upon the whole, more just than that of Quebec. A reference to the Table will, we think, satisfy most persons that it is possible to enact a Law of Descent, to Real and Personal Property, based upon both systems.

The author has met with more serious difficulties than he expected in making what he confesses can only be considered as a short summary of the Law of Intestacy in the Dominion. Even the Paliamentary Library at Ottawa does not contain a full series of the Reports of the Maritime Provinces.

LAWS OF INTESTACY

IN THE

DOMINION OF CANADA.

CHAPTER I.

INTESTACY.

An intestate is one who dies without having made a will, although he had the capacity to do so; or, having drawn up or signed a document intending to have it perfected so as to make a will has failed to do so; or who, having made a will, has revoked it without making a new one, or if it be revoked by law, *neque ego negaverim non uno genere fieri intestatos aut is intestatusqui non scripsit testamentum aut qui id scripsit quod valere non possit.* (*Quinctilian*) An intestate (Mackenzie, Roman Law,) is one who dies without a will, or who leaves a will which is not valid. The law appoints the person or persons who are to succeed to his property, according to certain rules, which mainly depend upon their proximity in blood to the deceased.

Not only do laws of succession differ in many of the Provinces but the legal terms have not the same meaning in Quebec that they have in the other parts of the Dominion; the words are different, and the familiar expression of the common law is comparatively unknown there. It seems therefore necessary to explain certain terms. For instance;

ANCESTOR.—By the common law the person from whom real property descended was called the ancestor. The first rule was that inheritance could not ascend. No inheritance could be claimed unless the ancestor was actually seized of the lands and tenements. This is not law now in any part of the Dominion where the common law is in force except New Bunswick.

Under the actual law of England, the son may be the "ancestor" of his father; in the United States it has been decided that the father is of the blood of his child, and that a younger brother was the "ancestor" of his elder brother.

ASCENDANTS.—We cannot but smile, says Story, in the present times, at some of the reasoning and some of the fictions which spread themselves here and there in small veins in the common law system. We are gravely told, for instance, by Bracton, in which he is followed by Lord Coke, that the true reason why by the common law a father cannot inherit real estate by descent from his son, is, that inheritances are heavy, and descend, as it were, by the laws of gravitation and cannot reascend.* We are again told that when the title to an estate is suspended upon future contingencies, the inheritance is in the meantime in abeyance, that is (as we are taught by the accompanying explanations) the inheritance is in *gremio legis* or in nubibus in the bosom of the law or in the clouds, which seems to mend the matter exceedingly in point of plainness. And again, when an estate is conveyed to trustees to serve existing uses, and future contingent uses also, we are told, that though a seisin is necessary to feed them and it be now exhausted; yet, happily for us, there remains a possibility of seisin, a *scintilla juris*, which kindles at the very moment the new uses spring into being, and by its vital power executes at once the possession of the estate to those uses, by some sort of legal legerdemain. And Kent, the equally renowned author, has remarked that the very artificial nature and absurd results of the old English rule that real estate never ascends, are strikingly illustrated by the well-known case stated by Littleton, that though the father could not be heir to his son, for the inheritance never could ascend, and the uncle, or father's brother, though in a remoter degree, had the preference; yet, if the uncle died intestate without issue, the father, as heir to the uncle, might succeed to the inheritance of his son; for, says Littleton, "he cometh to the land by collateral descent and not by lineal ascent. So it has been held that if either parent stood in relation of cousin to the son, they would inherit in that character, though not as father or mother." (4 Kent Com. 396.) This is the actual law of New Brunswick, or rather was considered such until the decision in the case of Wood *vs.* De Forrest. (See New Brunswick).

* Descendit itaque jus, quasi ponderosum quid cadens deorsum recta lineâ, vel. transversali et nunquam reascendit eâ viâ quâ descendit. Bracton, lib. 2, ch. 29, Co. Litt. 11.

Houard, a French writer, wrote in 1766 to show that Littleton's Institutes are almost a reproduction of the old custom of Normandy; to that end he gives Littleton in its original language and comments upon the different chapters. Littleton having laid down the broad maxim that if an intestate's only son dies without children, his collateral relations will succeed to his real estate, puts in the subsequent section (sec. 3, chap. 1) the case above cited:

"Mais si soit pier et fits et le pier ad un frère qui est uncle a "le fits, et le fits purchase terre en fée simple, et mort sans issue, "vivant son pier, l'uncle avera la terre comme heire al fits et ne- "my le pier, uncore le pier est pluis prochein de sanke, par ceo "qui que c'est un maxime en le ley que inhéritance poet lineale- "ment discender, mes nemy ascender. Uncore si le fits en tiel "case mort sans issue, et son uncle entra en la terre comme heire a "le fils (si come il devoit par la ley) et après l'uncle devia sans "issue, vivant le pier, donques le pier avera la terre comme heire "al uncle et nemy comme heire a son fits; pur ceo qu'il veigue al "terre per collatéral discent et nemy par linéal ascention."

Houard, after showing how this disposition of the law of England was contrary to the Salique law. "Si quis mortuis furit et filios non habuerit, si pater ant mater superfuerint ipsi in hæreditatem succedant, t. 62, No. 1 de Alod," says, that the change in England was made by the Feudal Lords, in view of military service, as they wished to exclude fathers who would not be able to perform the military duties required of them; and that there was a diversity of opinion in Normandy until Beaumanoir established that the father succeeded to the son in preference to collaterals. He acknowledged the maxim that real estate did not ascend but, he says, that it is to be understood when there is no issue. Che que l'en dit que hiritage ne remonte point, che est a entendre. Si je ai pere et ai enfans et je muirs, mes hiritages descendent à mes enfans et non au pere: mes se il y a nul hoir oissu de moi, nul qui m'appartiegne de costé n'emporte le mien, avant de mon père ou de ma mère.

CONSANGUINITY.—Under the common and civil law kindred are distinguished into those in the right line and those in the collateral. The right line is that of parents and children, computing by ascendants and descendants; the collateral line is

between brothers and sisters, and the rest of the kindred among themselves. Those of the right line are reckoned upwards, as parents, or downwards, as children; those of the collateral line are reckoned *ex transverso*, or sideways, as brothers and sisters, uncles and aunts, and such as are born from them. In the ascending and descending lines the degrees are the same by both laws, but in the collateral line they differ, and for the distribution of personal estate the degrees of kindred are reckoned according to the computation of the civil law, and not of the canon law, which the law of England adopts in the descent of real estates. In the descending line the son is in the first degree, the grandson in the second, and the great-grandson in the third. In the ascending line, the father is in the first degree, the grandfather in the second, and the great-grandfather in the third. In the collateral line, as reckoned according to the computation of the civil law, we ascend first to the father, which is one degree; from him to the common ancestor, the grandfather, which is the second degree; from the grandfather we descend to the uncle, which is the third degree; and from the uncle to the cousin-german or uncle's child, which is the fourth degree. So, again, we ascend to the father, which is one degree; from the father we descend to the brother, which is the second degree; from the brother to the nephew, which is the third decree; and from the nephew to the son of the nephew, which is the fourth degree.

The rule of the canon law, in the computation of degrees as to realty, is followed throughout the Dominion, except in Quebec and Nova Scotia. In Ontario, British Columbia, Keewatin and the North-West Territories upon the failure of heirs under their respective statutes, real property is distributed as if it were personal. Quebec and Nova Scotia are the only Provinces with one uniform law on this point; degrees, whether relating to realty or personalty, are computed according to the civil law.

In the division of personal estate the computation according to the civil law is followed throughout the Dominion.

Under the common law, on failure of lineal descendants, the realty descended to the collateral relations of the whole blood; but

now in England, since 1834, the half blood succeeds after any relation in the same degree as the whole blood.

There is no distinction as to half blood or whole blood in intestate personal successions throughout the Dominion, except in Quebec, when a succession coming to brother and sister, nephews and nieces, issue of different marriages, is equally divided between the two lines, paternal and maternal, of the intestate, those of the whole blood sharing in each line, and those of the half blood sharing each in his own line only; and where, if there be brothers and sisters, nephews and nieces on one side only, they inherit the whole of the succession, to the exclusion of all the relations of the other line.

In Ontario, British Columbia, Keewatin, North-West Territories, relatives of the half blood and their descendants inherit equally with those of the whole blood in the same degree, unless the inheritance (real estate) came to the intestate by descent, devise or gift from some one of his ancestors, in which case all those who are not of the blood of such ancestors are excluded from the inheritance. In Nova Scotia, New Brunswick and Manitoba there is no distinction. Children of half blood inherit equally with those of full blood in Prince Edward Island; but when a brother of the whole blood and the brother of the half blood are next of kin the former excludes the latter in successions to realty. The Statute does not make any distinction in matters of personalty. The rule is the same in realty as in personalty in Quebec.

Kent in his Commentaries (4, p. 407) makes the following remarks, which, from such a source, are deserving of serious attention: "The law of all countries, and our own in particular, are so different from each other on the subject that they seem to have been the result of accident or caprice, rather than the dictate of principle * * If the rule of inheritance had required no examination beyond the title of the intestate, and the proximity of blood to him, there would have been more certainty and simplicity introduced into our law of descents.

In this practical age the person who would submit a Bill to Parliament for the more equitable distribution of property would be better engaged than in discussing what the very

respectable Voet's opinion was of the true meaning of the 118 Novel of Justinian. He thought that under it the father and mother could succeed along with the brother of the intestate, and consequently that the brother excluded the grandfather. This view of the case was held by the English Courts previous to the case of Evelyn *vs.* Evelyn where it was also maintained by Lord Hardwicke. Yet Domat and other eminent civilians, as Mackenzie observes, have rejected the opinion of Voet. They say he has given an erroneous version of a passage in the Novel by the words "*si aut pater aut mater fuerint*," while the clause should be translated as it is by *Warnkoenig*, "*etsi pater aut mater sint?*" The true meaning of the law being that brothers and sisters are called to the succession along with ascendants even although these ascendants should be a father and mother. By the 127 Novel the nephews were only expressly called when brothers also came to the succession with ascendants, from which Cujas concluded that they could not come in their own right. Pothier was of that opinion. Dr. Irving in his Introduction to the Study of the Civil Law, page 100, contends that the reasoning of Voet and the decision of Lord Hardwicke are wrong. Art 632 of the Quebec Code has followed the English decision excluding the grandfather.

If the grandfather has suffered from Voet's opinion, he has also been injured by the legislators who have excluded him from any share in the real estate of his descendants. With Kent 4, p. 108, we may be allowed to say : "the analogies of the law would "have been preserved, and perhaps the justice of the case better "promoted, if in the Statutes remodelling the law of descents, "the claim of kindred on the part of the grandparent had not "been rejected."

HEIR was applied under the common law to one who was entitled to receive land by descent. A person could not strictly be said to be the heir to a personal estate. This technical learning has been obliged to give way. The Courts have interpreted the word "heir" in accordance with the popular acceptation of the term. Laws, one may be allowed to believe, should be made "to be understanded by the people," and when their legal interpretation is different from that given universally by laymen,

the Legislature has but one duty to perform, to make legal the popular interpretation, if the Courts will not.

In Quebec, as in Scotland, the term heir is applied to the one who is to succeed to the personal as well as to the real estate.

In Ontario the word "heir" in a will is construed to mean the person to whom the real estate would descend in case of intestacy. The old English maxim was that "none can be the heir of a living person," and that God alone, after the ancestor's death, makes the heir, not man. *Solus deus heredem facere potest, non homo.*

INHERITANCE.—The term "inheritance" in common parlance means all the estate of whatever kind, personal and real, of an intestate, and which devolves upon his heir or next of kin. Under the common law it is restricted to real estate and is defined as "a perpetual or continuing right to an estate invested in a person or his heirs." According to Littleton it includes not only land and tenements which have been acquired by descent, but also every fee-simple which a person has acquired by purchase may be said to be an inheritance, because the purchaser's heirs may inherit it. Kent writes "of the inheritance of personal estate." Inheritance, in the civil law, means the succession to property real or personal.

NEXT OF KIN.—The term "next of kin," technically speaking, does not include children or grandchildren, although they are nearest in blood, and so next of kin. "Next of kin" and "nearest of kin" do not convey the same meaning. It is well settled that a limitation to next of kin *simpliciter*, in a will or settlement, is a limitation to the person nearest in blood to the *propositus* or person from whom it is proposed (per Wood, L. J., Halton v. Foster, L. R., 3 ch. 505) but the Probate Court in dealing with the goods of an intestate applies the term to those who are the nearest in blood under the Statute of Distributions.

Husband and wife, not being related, cannot be next of kin.

PRIMOGENITURE is the right of the eldest son to inherit the whole of the realty. It does not exist in any part of the Dominion. The date of its abolition is mentioned under the heading of the different Provinces. It never existed in Quebec,

where, however, the eldest son had certain superior privileges as heir to seigniorial property. These have also been abolished.

Real and Personal Estate.—In Quebec the terms real and personal are used in the sense used by civilians as they are wherever the civil law prevails. The broad generic description is into "moveable" and "immoveable." The law makes some distinctions, for instance the property, real and personal, of an incorporated company is regarded as moveable with regard to each company as long as it is in existence. (Art. 387.)

On the other hand all moveable property of which the law ordains or authorises the realization, becomes immoveable by determination of law.

As the succession to property of each kind is the same in Quebec and in Manitoba, it is not of any special interest to the heir or next of kin if the law of either of these Provinces calls a thing moveable and immoveable. Neither is it of much consequence to the heir or next of kin in Nova Scotia; the only difference is that in Nova Scotia the widow gets her one-third of the real estate as tenant in dower if there be no issue, if there be, she gets one-half in her own right, while she gets one-third of the personal estate under any circumstances. In New Brunswick the widow gets one-third of the real estate as tenant in dower, and one-third of the personalty if there be children, and one-half, if there be none, in her own right.

Under the law of England, even at the present day, in order to distinguish "realty" from "personalty," says Amos, two wholly independent tests are applied; the one turning on the physical nature of the thing in question, the other on the accidental quality and extent of the rights which a person or persons may have a chance in it. In other words, a thing may be a realty either because it is land or firmly annexed to land that is immovable; or it may be realty because the rights of a certain person in it are such that, at his death, it descends to his heir and not his executor or personal representative. Mr. Justice Stephen, in his commentaries on Blackstone, says that when chattel interests are counted "in reference to the distinction between real and personal estate they are held to fall under the latter denomination," and thus the next of kin under the common law

succeeds. Lease-hold estates and estates extinguished by the death of the testator are not considered as real estate.

REPRESENTATION is a disposition of the law by which the representatives of a deceased person take among themselves the shares which he would take were he alive. Representation exists *ad infinitum* in the descending line. When, however, the grandchildren inherit in their own right, that is, when all the children of the deceased are dead, they inherit by heads or *per capita* in matters personal. When children and grandchildren inherit they come in *per stirpes* or by roots. The Imperial Statute of Distribution (of personal property,) 22 & 23 Car. chap. 10, sec. 4, enacts: "there be no representation admitted among collaterals after brothers' and sisters' children." In New Brunswick before the 1st April, 1858, no representation was allowed beyond brothers' and sisters' children. The Revised Statute does not re-enact this provision of the law as regards real estate left by intestates after that date, although it does with respect to personal property. Prince Edward Island provides for this non-representation in matters of real estate, sec. 2, and in matters of personal estate, sec. 11; and so does Manitoba, s. 8. In no Province has the Statute of Distribution been repealed.

In Quebec no representation is allowed in the collateral line, in any case, beyond brothers' and sisters' children. Nova Scotia and Manitoba, permit the representation of the issue of a brother and sister *ad infinitum* in the succession of an intestate child dying under age and unmarried, for the part which came to the intestate from their common parent. This is a great innovation, affecting both realty and personalty. This representation of collaterals *ad infinitum* is, however, applied only to this special case in those Provinces. Ontario, British Columbia, Keewatin, and the North-West Territories provide for representation, in the case of real estate, of the issue of the brothers and sisters of the intestate to the remotest degree, and of the brothers and sisters of the father or mother of the intestate.

In Nova Scotia and Manitoba, when two or more collaterals are in equal degree, the claimant through the nearest ancestor is preferred. A was the father of the intestate B. The latter left

C, his nephew, and D, his uncle, both in the same degree. C claims the estate as a descendant of A, while D claims as a descendant of A's father: thus C, the nephew, excludes D, the uncle.

"Re-Ross' Trusts," decided in England, 1871, by Vice-Chancellor Wickens, gave rise to a great deal of comment. It is referred to at length by writers on the subject. It must be considered extraordinary that a judicial interpretation of the law of Charles II. should only have been given in 1871. The decision was: that if an intestate leaves no children, but grandchildren *and* great-grandchildren only, they take *per stirpes* and not *per capita*. It was contended by the unsuccessful party that the property must be divided among the grandchildren, and, as there were seven of these, the property should be divided in seven parts, the seven grandchildren taking each one-seventh.

It was argued that the true construction of the Statute did not contemplate representation beyond "the children of an "intestate, and such persons as legally represent such children in "case any of the said children be dead;" and as the statutory "limit of representation was had, and only seven grandchildren of "the testator were alive (his children had been some time dead) "each one was entitled, as equally next of kin, to take *per capita*. "That the great-grandchildren would succeed to their respective "parents one-seventh as representing them."

Flood quotes Williams on Executors as if it were in contradiction to the judgment—which it is not. But, says Flood, "in the last edition of Williams on Executors it is stated "that, if an intestate's children and grandchildren have all pre-"deceased him, and he leaves great-grandchildren, these will take "*per capita*, and not by representation." This is in conformity with the judgment. Flood goes on to say "that, in Re-Ross, "there were grandchildren and great-grandchildren who claimed "by two lines of descent from their common ancestor, and that "probably we may regard the dictum of the very learned Judge "as being appropriate to the particular circumstances before "him, but not as applicable generally, unless the recognized "view of the doctrine of distribution *per capita* among "descendants is to be admitted as erroneous."

The Vice-Chancellor admitted that there was a difference of opinion on "representation" by grandchildren, but he plainly laid down the principles of division *per stirpes* when the descendants were of unequal degree, and to use his own words: "It "is hard to resist the conclusion that if there are descendants, but "no children to share the estate, it is to be divided into as many "shares as there are children who have left living descendants, "and that the descendants of each such child are to take as repre-"senting the child, and of course only the child's share; but when all are of the same degree, in matters personal, they take equally "*per capita.*" The judgment was that the money should be divided in moities of which one was divisible among the descendants of Alex. Ross and the other among the descendants of William Francis Ross: the division in each class being *per stirpes.*

If we bear in mind that by the common law in England property was always divided *per stirpes*, except in cases of primogeniture, and that the division *per capita* is that of the civil law, we shall not be surprised the decision of the Vice-Chancellor gave rise to some discussion, while civilians assume that no other could possibly be given. The Statute of Distributions was drawn by a civilian, the degrees of kinship are according to the civil law. A question of representation could therefore only be decided according to the rules laid down by that law. The Code, Art. 625, gives the law as it has always existed in Quebec. It is in conformity with the Statute Law of Ontario, British Columbia, the North West Territories and Keewatin as regards the realty. In matters personal the decision in the Ross Trusts would doubtless be followed throughout the Dominion. The Vice-Chancellor, in giving judgment, remarked that "the Statute of Distribution was drawn by a civilian." Sir Walter Walker seems to have intended to introduce the rules of Roman civil law into this branch of English law. It is therefore not irrelevant to remark that the view of the construction of the Statute which is taken above makes it conformable to the Roman law and not to the English common law.

Williams does not approve of this view of the case. He says: "It (the Statute) also bears some resemblance to the Roman law of succession *ab intestato*, which, and because the

Act was penned by an eminent civilian, has ..ioned a notion that the Parliament copied it from the Roman prætor, though it is little more than a restoration, with some refinements and regulations, of an old constitutional law which prevailed as 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." (Williams on Executors, 8th ed., p. 1493.)

The law which gives all the personal estate of an intestate to the grandfather, and which at the same time prevents his getting the slightest share in the real estate, ought surely to be changed. How can we defend the law of a Province which gives the grand-nephew of the intestate all his real property, and at the same time gives his uncle all the personal property? Should a brother's children deprive another brother's grandchildren of any share of the personal or real estate? Should the death of the father be a reason for the punishment of his children?

We can illustrate the effects of Representation in this way:

A dies, leaving one son and two grandchildren, children of a daughter deceased.	Property equally divided; one half property to the son; the other half equally to the grandchildren as representing their deceased mother.
Grandchild of A and great-grandchild of B.	Equally divided; each representing his ancestor.
Grandchildren only, or great-grandchildren only.	Being of equal degree, they come in their own right in matters personal. Realty in certain parts is divided *per stirpes*.

Succession.—The word succession, so familiar in the civil law, was understood differently under the common law, where it was applied to realty only. A "successor" was one who obtained property by descent as contra-distinguished to getting it by will. Wharton defines it "as the power or right of coming to the inheritance of ancestors." In this, as in other cases, Imperial legislation has brushed aside technical meanings, and has adopted the popular language in its Acts. By the Act, known as the Succession Duty Act, 1854, it is enacted by

section 1, that the word "property" shall include both realty and personalty, and the term "succession" shall denote any property chargeable with duty under the Act. By section 2, that "every past or future disposition of property, by reason whereof any person shall become beneficially entitled to any property * * upon the death of any person * * and every devolution by law of any beneficial interest in property, * * to any other person in possession or expectancy, shall be deemed * * by reason of such disposition or devolution succession."

The term, as understood under the civil law, is thus defined in the Code of St. Lucia (W. I.): "Succession means the devolution by law or by will of the property of a deceased person and such of his rights as are capable of devolution. The same term is also used to designate the property and rights of a deceased person, with respect to which such devolution has taken place. The terms "a succession" or "the succession" are always used in the latter sense."

An intestate succession is established by law alone, and a testamentary succession is derived from a will. The former exists only in the absence of the latter. Intestate succession is either legitimate or irregular; legitimate when the property devolves upon the relatives of the deceased, and irregular when, in the absence of relatives, the property devolves upon others. Code of St. Lucia, Arts. 540, 541.

We may assume, says Flood, that at the present day the term "succession" can, without impropriety, be applied to every acquisition of all property of all kinds under any circumstance.

TENANT BY THE COURTESY OF ENGLAND.—This has been abolished in British Columbia, the North-West Territories and Keewatin. It still exists in Ontario, Nova Scotia, New Brunswick and Prince Edward Island. It is unknown in Quebec. "When a man, says Lovelass, takes a wife seized of an estate "in fee simple or fee tail, and has issue by her, which might "inherit the estate, the husband, on her death, shall hold the "land during his life, as tenant by the courtesy of England. To "make a tenancy by the courtesy, these four requisites are neces- "sary: marriage, seisin of the wife, issue, and death of the wife." The issue must have been born alive, and must have been born

during the life of the mother, for if the mother dies in labor, and the cæserean operation is performed, the husband, in this case, shall not be a tenant by the courtesy, because at the instant of the mother's death he was clearly not entitled, having had no issue born, but the land descended to the child while he was yet in his mother's womb, and the estate being once so vested according to Littleton, cannot be afterwards taken from him. Chap. 16 of 35 Vict. of Ontario, modifies the husband's rights, in this particular. By it the real estate of any married woman, which is owned by her at the time of her marriage or acquired in any manner during her coverture, and the rents, issue and profits thereof respectively, without prejudice, and subject to the trust of any settlement affecting the same, are held and enjoyed by her for her separate use, free from any estate or claim of her husband during her life-time, or as tenant by the courtesy, and her receipts alone shall be a discharge for any rents, issues and profits.

Tenant in Dower.—By the common law the wife, tenant in dower, is entitled to one-third of the lands and tenements for her life-time of which her husband was seized in fee-simple or fee-tail in possession, at any time during the coverture or marriage. She must be the wife of the intestate at his decease. She is not endowed of land held by the husband in joint tenantcy, nor of a remainder or reversion expectant or an estate of freehold, but she is dowable of a reversion expectant on a lease for years, and has a third part of the reversion and the rents. She is not endowed of lands already assigned in dower to the widow of an ancestor from whom they descended to the husband.

The widow in Ontario has no right of dower on land in a state of nature if sold or even owned by the husband at the time of his death ; she is, however, allowed to take firewood and fencing.

CHAPTER II.

LEGITIMACY.

Under the heading "Quebec," it is briefly stated that in Quebec alone can one born out of wedlock succeed to the real estate of an intestate. The heir under the law of England is only "*quem nuptiæ demonstrant.*" The subsequent marriage of the parents does not legitimate as it does under the civil law. A bastard is one born out of lawful matrimony. Co. Lit. 244. Though matrimony be afterwards solemnised between the parties. (1 Rol. 357.)

Although that be the law of England, can it apply where the heir is legitimate according to the law of the matrimonial domicile? This question was fully discussed in the celebrated case of Birtwhistle vs. Vardill. The judges of England gave it as their opinion in that case, that the claimant must be legitimate by the law of his birth-place as well as by the law of England. The decision of the House of Lords in the above case has settled the law. The claimant born in Scotland of parents then domiciled there, and who afterwards married there, was declared unable to succeed as heir to an English estate, although legitimate in Scotland to all intents and purposes.

The law with regard to the personal property is that it has no *situs* and that it follows the person. The latest decision, we believe to be, that mentioned in the Introduction (*re* Goodman's Trusts,) in which it was held that a legitimated child could inherit personal property in England. Goodman was an Englishman who went to Amsterdam and there contracted marriage with the mother of the claimant after the birth of their child. The Master of the Rolls, Sir George Jessel, decided that Goodman's daughter could not inherit as next of kin to her father's sister who was domiciled in England. The judgment was reversed by the Court of Appeal, composed of Justices Lush, Cotton and James. Justice Lush was of opinion that the judgment was correct, it was overruled by the other two. The fact, however, remains that two

judges, such as Jessel and Lush, were of one opinion, and that Judges Cotton and James were of another. Judge Lush remarked: "If the father had left personal property in this country, our "courts would have administered it, not under the law of dis- "tribution, but under the law of Holland, and in that admin- "istration the claimant would have been treated as one of his "lawful children."

According to the learned judge, it is acknowledged by all parties that the Statute of Merton is confined to the inheritance of lands, but that it is, nevertheless, to be taken as a declaratory act of the common law as it existed. He admitted that if the property in dispute had belonged to a person domiciled in Holland, the claimant would undoubtedly have been entitled: but the property belonged to an English woman who had never left her English domicile. He quoted, with approbation, the judgment of Tindal, C. J., "that it does not follow that with the adoption of the marriage con- "tract the law also adopts all the conclusions and consequences "which hold good in the country where the marriage was cele- "brated." The oft quoted Statute of Merton (20 Hen. 3, c. 9), continued the learned Judge, "shows that the clergy of that day sought to introduce the canon law, which, like the civil law, recognized the subsequent marriage as legitimating the previous issue, but that the Barons stoutly resisted it." * * The Statute of Merton is in these terms: "To the King's Writ of Bastardy, whether one being born before matrimony may inherit in like manner as he that is born after, all the Bishops answered, that they would not nor could not answer it, because it was directly against the common order of the Church. And all the Bishops instanted the Lords that they would consent that all such as were born before matrimony should be legitimate, as well as they that be born within matrimony, as to the succession of inheritance, for as much as the Church accepteth such for legitimate. And all the Earls and Barons with one voice answered that they would not change the laws of the realm." *Nolumus leges Anglæ mutare.*

Cotton, J., argued that the principle upon which claimant's rights were founded, was: that the legitimacy or illegitimacy of any individual is to be determined by the law of that country which is the country of his origin. Referring to Birtwhistle *vs.* Vardill, he said, that the judgment was founded upon the rules

of inheritance to land in England. James, J., vigorously supporting the same side, asked: "Can it be possible that a Dutch father, stepping on board of a steamer at Rotterdam, with his dear and lawful child, should, on his arrival at the port of London, find that the child had become a stranger in blood, and in law, and a bastard *filius nullius*, and if it be a permanent domicile should thereby bastardise his children, and that he could relegitimate them by an another change of domicile from London to Holland." With every respect for the memory of the learned Judge one may suppose that if Judge Lush had spoken after Judge James, he would have said that it was precisely because the child was not a "lawful" child that he could not recognize her as such. The reasoning of Justice James, however just the conclusion may be in the case decided by him, might lead to consequences of a serious kind. A Turk landing in England with his wives and children might find some of his dear and lawful "wives" not recognised by the law. We would rather say with the Scotch judges that we must follow our own law when the Court is "called in to enforce or give effect, directly or indirectly, to any act which infers either a scandal on society or a breach of national morals and decency, or the commission of any crime," and with Chief Justice Parsons. (Greenwood *vs.* Curtis, 6 Mass. 358). "If a foreign state allows of marriages incestuous by the "law of nature as between parent and child, such marriage could "not be allowed to have any validity here." This most interesting subject is fully discussed by Savigny in his Conflict of Laws, a translation of which was published some years ago, edited by William Guthrie, advocate. The learned editor has furnished a number of very interesting notes on various subjects.

An illegitimate son born in England, of parents there domiciled, will not be legitimated by a subsequent marriage in Scotland, so as to inherit real property there. Ross claimed in the Scottish Court of Session, as having been legitimated, certain immovables of his father situated in London, but the action was dismissed by the Court of Appeal, on the ground that the status of illegitimacy, and consequently an incapacity to be legitimitised, had been impressed upon the claimant Alexander Ross by the English law as the *lex originis*, and this incapacity could in no way be removed by the accidental celebration of a marriage in

Scotland. In another case Lords Eldon and Redesdale principally rested their opinions against legitimation upon the birth of the claimant having taken place in England, and the subsequent marriage in Scotland. Savigny quotes the case of Jeanne Peronne Dumay, who had borne a son to Conty, Sieur de Quesnoy of Picardy. The parents afterwards went to England and there married. The son brought his action, which is erroneously cited as to be found in Vol. 3 of the *Journal des Audiences*. It will be found reported in the 2nd vol. 17, c. 17. The question upon appeal was argued on the 21st June, 1668, "en l'audience de la Grande Chambre, prononçant Monsieur le Président de Lamoignon." It was contended by appellant that by the English law, Conty's status was not altered, and that being born out of wedlock he remained illegitimate. On his behalf, the law of France was appealed to, and it was stated that even if he could not succeed to property in England, he was the legitimate heir in France; that the law of England only applies to those born in England. It was decided that as the succession was that of a Frenchman to property in France, the son could succeed having been legitimated by the marriage in England. Conty de Quesnoy, it will have been observed, was born in France, while Ross was born in England. It seems that the domicile of origin governs. In the Goodman's Trusts, two of the children born in England did not apply for the administration of their aunt's property. French writers of eminence although not maintaining the specific English law which requires the heir to landed property to be born in wedlock, support the decision *in re* Conty de Quesnoy in France, Goodman's Trusts in England and that in the Ross case in Scotland upon general principles of international law. "C'est pourquoi," says an eminent author, "si par les lois d'un royaume un homme né bâtard est légitimé par un mariage subséquent; ou, au contraire, si par les lois du royaume tel mariage subséquent ne légitime pas, comme en Angleterre, je suis persuadé que le Français légitimé de cette manière doit être regardé comme légitimé partout, même en Angleterre, et que le bâtard anglais, non légitimé en Angleterre par le mariage, doit être tenu pour bâtard même en France.

"J'applique encore cette décision à un enfant anglais, né en Angleterre d'un concubinage, et dont les père et mère anglais

seraient venus demeurer en France, et y auraient été mariés sans s'y être faits naturaliser, parce qu'étant véritablement étrangers, et comme tels soumis aux lois d'Angleterre, leur enfant ne peut pas être, suivant ces lois, bâtard en Angleterre de naissance, et être regardé comme légitime en France, parce qu'il porte partout l'état et la condition dont il est par les lois de sa nation."

CHAPTER III.

HOTCH-POT ADVANCEMENT.

The Statute of Distributions enacts that "in case any child who shall have any estate by settlement from the said intestate, or shall be advanced by the said estate in his life-time by portion not equal to the shares which will be due to the other children by such 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 life-time of the intestate, as shall make the estate of all the said children to be equal as near as can be estimated."

These words seem to mean that there should be equality among the children, when there is no express stipulation to the contrary. It has been decided that a mother cannot advance her child in the full sense of the term used in the Act, she can, however, advance in some cases. Flood (p. 764) says that this distinction has been forced into the Statute. Most persons will agree with him.

What is an "advancement" was decided so lately as 1875, in Taylor *vs.* Taylor (20 L. R. E., p. 155,) by Sir George Jessel, the late lamented Master of the Rolls, a decision which although doubtless correct, tends to destroy equality among heirs; for it was held that sums of money given and an annual allowance of £200 per annum were not advancements. "I have always understood," said the learned Judge, "that an advancement by way of portion is something given by the parent to establish a child in life, or to make what is called a provision for him, *not a mere casual provision*, not a mere casual payment of this kind. I agree, you may make provision by marriage portion on the marriage of the child: you may make it on putting him into a profession or business in a variety of ways: you may buy him the good will of a business or give him a stock in trade: all those things I understand;

they are portions or provisions. I also agree that if in the absence of evidence you find a father giving a *large sum* to a child in *one payment* there is a presumption that that is intended to start him in life, and make a provision for him, and if there is a *small sum* you require evidence to show the purpose."

Lovelass, who wrote in 1838, says that hotch-pot is generally "understood to signify a mixing and blending together, and con-"veys much the same idea as the term *collatio bonorum*, which "in the civil law is used to denote a similar mode of proceeding, "and signifies that if a child advanced by the father doth, after his "father's decease, challenge a child's part with the rest, he must "cast in all that he had formerly received, and then take out an "equal share with the others."

"The doctrine of hotch-pot," says Flood, p. 776, "is founded upon the maxim that equality is equity; but in no case, except when the donee wishes to share with the other children, is it obligatory upon a person to bring his advancement into hotch-pot, nor can any thing be taken from him to equalize the shares of other persons entitled to participate in an intestate's personal estate; also that unless a gift be clearly an advancement by portion, he may share in the property without being compelled to bring such gift into hotch-pot."

The law of Quebec carries out the maxim of the common law of England, but not followed, that EQUALITY IS EQUITY. The heir in Quebec must return everything he has received from the deceased by gift, directly or indirectly, he cannot retain the gifts made nor claim the legacies bequeathed, unless such gifts and legacies have been given him expressly by preference and beyond his share, or with an exemption from return. (Art. 712.) The only exceptions are the expenses of nourishment, maintenance, education and apprenticeship, the ordinary expenses of equipment, of weddings and customary presents (Art. 720), and the profits which the heir may have derived from agreements made with the deceased, if at the time at which they are made they do not confer an indirect advantage. (Art. 721.)

By the Statute of Ontario, if any child of an intestate has been advanced by the intestate by settlement or portion of real or personal estate, or both of them, and the same has been so

expressed by the intestate in writing, or so acknowledged in writing by the child, the value thereof is reckoned as part of the real and personal estate of such intestate descendible to his heirs, and distributed to his next of kin according to law; and if such advancement is equal or superior to the amount of the share which such child would be entitled to receive of the real and personal estate of the deceased as above reckoned, then such child and his descendants shall be excluded from any share in the real and personal estate of the intestate, and if the advancement be not sufficient to make the share of the child advanced equal to the others, the difference is made up to him. The maintaining or educating or the *giving money to a child*, without a view to a portion or settlement in life, is not deemed an advancement within the meaning of the Act. In view of the decision of the Master of Rolls, and the wording of the Ontario Statute, it may be asked what amount of money may be given to a child without its being so done by way of advancement.

The heir-at-law in New Brunswick makes no return in the distribution of personal estate. He must, however, bring into hotch-pot his advancement of realty if he seek a further portion of the real estate. The Nova Scotia and the Prince Edward Island Statutes merely enact that children advanced are required to return. The common law prevails in the North-West Territories and Keewatin.

The Manitoba Statute enacts that if any child of an intestate has been portioned or otherwise provided for by an advance in money or in any other way by the intestate to an amount equal to the distributive share of the other children he shall be excepted in the distribution of the estate, but if such child has only been in part portioned or provided for he is entitled to so much as will make his share equal to that of others.

CHAPTER IV.

PROVINCIAL LAWS.——ONTARIO.

By the Imperial Act, 31 G. III. c. 31 (1791), Upper Canada was separated from Quebec. They were united in 1841. Upper Canada is known since 1867 as the Province of Ontario. By the first Statute of Upper Canada it was enacted that in matters of controversy as to property and civil rights, resort should be had to the laws of England, such as they existed on the day the Statute was sanctioned, the 15th October, 1792. Primogeniture and the other incidents of the common law rules of descent of real estate were thus introduced. In 1834 the common law was amended. The old rule that "property never ascends," was set aside, the lineal ancestor was preferred to the collateral relation. By 14 and 15 Vic. c. 6 (1851), Primogeniture was abolished—nearly a century after the passing of the Nova Scotia Act.

The legislator has taken every care to prevent the grandfather from inheriting realty; the most remote descendant of the brother or uncle of the intestate excludes the grandfather. The authors of Blackstone's Commentaries on the Law of Real Property, "adapted to the present state of the law in Ontario," are of opinion that the whole course of descent, as established by the Statute, "does not differ widely from the rules of "succession to personalty under the Statute of Distributions; "that the former as well as the latter are based on the civil "law, and the claimants take much in the same order and "computation of degrees;" and, again, the variance seems "chiefly to consist in this: that the Statute of Victoria, when "the inheritance is derived by the intestate from a relative, "gives preference in certain instances to the blood of such "relative, as may be exemplified by its excluding the half-blood "(if the estate have been derived from an ancestor) and "*postponing* the uncles and aunts (if derived from a relative) "on the side on which the inheritance is not derived; and in "giving only the father a life-estate, if the property came on the

" maternal side, where he would otherwise take the fee; whilst, " as to personalty, no regard is paid as to the derivation of the " property. Again, grandfathers and grandmothers are excluded " as to realty, unless they can take under section 26; whilst " as to personalty, they are only postponed to those in the " same degree, viz., brothers and sisters, and share in the same " class with those of the third degree, viz., uncles and aunts. " Furthermore, as to realty, the right of representation is extended " to descendants of collaterals, as of brothers and sisters, uncles " and aunts; whilst as to personalty, it extends only to *children* " of one class of collaterals, viz., of the brothers and sisters of the " intestate." While the Ontario Statute has really, in some instances, followed the Statute of Distributions, it has departed from it in many others. It may be regretted that the Statute of Ontario had not been made applicable to both realty and personalty, in which case many absurd distinctions and differences in the succession to movables and immovables would of necessity have disappeared. The same person who is heir to the landed property would not have been excluded from any share of the personalty; there could not have existed "respective exclusions." The learned Messrs. Leith and Smith, authors of the work just quoted, style the Statute as that of "Victoria;" their comments are very valuable, and they have, doubtless, rendered great assistance to the profession, as the Statute of Victoria has been more or less copied in British Columbia, and in those passed for the North-West Territories and Keewatin. That of Victoria is itself based upon the New York Statutes, the first of which was passed in 1782 and the second on the 23rd February, 1786. It is provided by the Statute (s. 36), that upon failure of heirs under the rules laid down by the preceding sections, "the "inheritance shall descend to the remaining next of kin of the "intestate, according to the rules in the English Statute of Dis- "tribution of personal estate." Kent, remarking upon the want of a similar enactment in the New York Revised Statutes, says:—"It is a matter of some surprise, that the Revised Sta- "tutes of New York did not proceed, and, in cases not provided "for, follow the example of the law of descents in most of the "States of the Union, and direct the inheritance to descend to "the next collateral kindred, to be ascertained, as in the Statute

"of Distribution of the Personal Estates of Intestates, by the "rules of the Civil Law. Instead of that, we have retained in "New York, in these remote cases, the solitary example of the "application of the stern doctrine and rules of the Common Law. "But, except for the sake of uniformity, it is, perhaps, not "material, in cases under this last rule, which of the provisions "is to govern. The claims of such remote collaterals are not "likely to occur very often; and, as the stream of natural affec- "tions, so remote from the object, must flow cool and languid, "natural sentiments and feelings have very little concern with "the question."

QUEBEC.

After the Treaty of Paris, in 1763, King George III. issued a proclamation introducing the law of England. Courts were established in 1764 wherein cases were to be decided agreeably to the laws of England, as far as might be. Ten years afterwards the Imperial Act 14 G. III. 83 was passed, and it was enacted that in all matters relating to civil rights and the enjoyment of property and customs and usages, resort should be had to the old law of Canada. An exception was made for land held in free and common soccage. We have not now to enter into the history of the proclamation and its results. It suffices to say that there is but one system of law governing property and civil rights—that established by the Code on the first day of August, 1866. Before that date, the succession to ancestral property, called *propres*, was different from that to property which the intestate had himself acquired, a distinction still kept up in other parts of the Dominion. Those who were not of the blood of the ancestors who acquired the property could not inherit ancestral property; and as in Ontario the expression "property coming to the intestate from his father or mother," included "every case where the inheritance came to the estate by devise, gift or descent from the parent referred to, *or from any relative of the blood of such parent.*" And, as in New Brunswick before the case of Wood *vs.* De Forrest, of which mention has been made at length, these *propres* did not ascend. If, however, the child inherited from the father, and died intestate and without

issue or brother or sister, then the grandfather or grandmother inherited, not as ascendants but as lineal relations. In order to inherit, it was necessary to be related to the intestate by the side and line of the first purchaser of the *propres*, without descending from such purchaser. In default of heirs of the line from which the *propres* came they devolved to the nearest relation of the other line, to the exclusion of the consort and the Crown. The rights of the wife in Quebec are different from those she has in the other portions of the Dominion. The law of Quebec, based in a great measure upon the same principles as those upon which the law of Scotland is founded, recognises a community of property between the husband and wife, *the communio bonorum*. If there be no marriage settlement to the contrary, husband and wife are *communs en biens*, common as to property, real and personal, which they acquire after their marriage, and of movables which belonged to them at the time of the marriage. Immovables which fall to them by succession, or other equivalent title, do not form part of the community. It may be stipulated by the marriage contract or ante-nuptial agreement that their respective property shall remain separate, and that there shall be no community, or that all the real estate which they possess shall be "mobilized," and thus form part of their common stock. If at the time of the death of one of the consorts there be minor children, and the surviving consort fail to have an inventory of the common property made, the community is continued. If there be no fixed dower settled upon the wife by the marriage contract, she is entitled to the legal or customary dower, which consists in the usufruct or life enjoyment by the wife, and the ownership by the children of the one-half of the immovables which belonged to the husband at the time of the marriage and of one-half of those which he receives during the marriage from his father or mother or other ascendants (Art. 1434). The wife cannot be deprived of her dower by her husband: she may renounce it upon any property sold by her husband. The rule—that of the English Statute of Distributions—that there shall be no representation beyond brothers' and sisters' children is strictly maintained in real and personal successions.

Intestate successions pass to the heirs who are seized by law

of the whole estate, subject to the obligation of meeting all the liabilities of the deceased. No letters of administration are required.

It seems that the rules of the Quebec Code regarding the descent of realty are more consistent with the rules of distribution, as laid down by the Statute of Distribution, than is the Ontario Statute of Victoria.

NOVA SCOTIA.

Nova Scotia was ceded by France to England by the Treaty of Utrecht in 1712. Cape Breton was not included. It would be out of place here to refer to the contentions between the English and French Governments as to the extent of territory involved in the treaty; it is sufficient for our present purpose, to know that Nova Scotia with other French possessions were finally ceded in 1763. The General Assembly met for the first time on the 2nd October, 1758. No delay took place in passing a Will and Intestate Act: it is the 11th on the Statute Book. It abolished primogeniture. The eldest son was given two shares or a double portion of the real and personal estate, which preference has since been abolished. In an edition of the laws published by Chief Justice Belcher, the first chief judge of the Colony, he made the following note to the Act: "As to distribution of inheritancy different from the "course of des- "cents at common law, this Act was founded upon Acts of "Assemblies in other Colonies, particularly of the Massachu- "setts Bay, which Act upon solemn hearing and argument before "His Majesty in Council, about the year 1735, in the case of " and Savage, by appeal from a decree of the "Governor and Council of that Province, was judicially ratified "and confirmed." No representation was permitted by the Act beyond brothers' and sisters' children, which is still the law of the Colony in realty as well as personalty.

The right of the husband as tenant by the courtesy of England and that of the wife as tenant in dower have always been maintained. Degrees are counted according to the computation of the civil law only.

Chapter 82 of the Revised Statutes contains the Statute Law now in force. The Married Women's Act has a more conservative character than that of some of the other Provinces.

The rules of succession to real and personal estate are the same, except that the widow is entitled to one-third of the personalty if there be children or not, while of the realty she can claim as tenant in dower if there be children, and if there be none she is entitled to one-half in lieu of dower.

When two or more collaterals are in equal degree, but claiming through different ancestors, the claimant through the nearest ancestor is preferred. The nephew thus excludes the uncle.

Half-blood inherits with whole.

NEW BRUNSWICK.

New Brunswick was separated from Nova Scotia in 1784 The General Assembly met for the first time on the 3rd January, 1786. The 11th Statute enacted a law of Intestacy. It was copied from the Nova Scotia Act of 1758. It abolished Primogeniture. It gave the eldest son two shares of the real, but not of the personal estate.

The common law has been retained to a greater extent in New Brunswick than any other Province.

By the Imperial Act, 3 and 4 Will IV., cap. 106, with respect to the property left by intestates after the first of January, 1834, the person last entitled to the land, although he may never have been in actual possession, shall be considered to have been the purchaser, unless it be proved that he inherited the same. This has not been adopted in New Brunswick, and the common law maxim, that actual possession of the intestate is necessary to constitute him a purchaser, is still in force.

The right of the "heir at law" was construed by the Courts to belong to the collateral as well as to the direct heir. By the 21 Vic., c. 26, the right of the heir at law to a double share was abolished.

The Act respecting the law of descent, chap. 78 of the Consolidated Statutes, is very short. It enacts Sec. 1, "that when any "person shall die intestate, his real estate shall be divided equally

"to and amongst his children, or their legal representatives; and "in case there be no children of the intestate, then to the next "of kindred and their representatives; including those of the "half-blood and their representatives; but children advanced "by settlement or portions not equal to the other shares shall "have so much of the surplusage as shall make the estate of "all equal, reservingthe widow's right of dower."

The different New Brunswick Acts, incorporated in chapter 78, just cited, were drawn up with so little technicality, that they have given rise to a great deal of litigation. A reference to some of the cases will throw light, particularly to the non-professional reader, upon the terms of the recent Statutes of all the Provinces, except Quebec.

In Mahoney *vs.* Crane (3 Kerr 228) the mother contended, that as under the Statute of Distributions she was "next of kin" to her son, the intestate, she was entitled to all his property, to the exclusion of his brothers and sisters. Chief Justice Chipman, a learned lawyer—*primus inter pares*—in rendering the judgment of the Court, remarked that the Act 26 G. III., then in force, combined in a very peculiar manner the two "systems of the common law and the civil law." He was of opinion that the term "next of kindred" was a familiar term under the Statutes of Distribution and not in the common law, and "that the persons to whom this term applies must be "sought for under the rules of the Civil Law," but that the words were qualified by other words, and that the brothers and sisters, as next of kin, excluded the mother. It was not the intention of the Legislature to alter the common law, under which inheritance never ascended. *Hæriditas nunquam ascendit.* He referred to the Imperial Act which had altered the common law and mentioned it as deserving the consideration of the Legislature.

In Doe *vs.* Troughton (3 Allen 414) it was held that the sisters of the intestate were next of kin. Although they had no heritable blood—blood of the ancestor of the intestate.

Wetmore *vs.* Wetmore (2 Pugsley 413) was decided in accordance with Mahoney *vs.* Crane: The brothers were adjudged to be the heirs of the intestate, to the exclusion of the father.

In Shannon *vs.* Fortune, 13 Pugsley, the rights of the half-blood were maintained. Shannon having died intestate, leaving four sisters and a half-sister, Mary Fortune, the right of the latter to a share of the property was contested. The Court held that, according to the rules of common law, if the property had descended to Shannon from his father, the property could not descend to the half-sister, Mary Fortune, because she had none of the blood of Michael Shannon (the father) in her; and in like manner if Edward Shannon was the first purchaser his half-sister could not by common law have inherited. As, however, the Court was of opinion that the Statute and the construction put upon it altered the common law, Mary Fortune was admitted to a share as if she had been of full blood. It was argued by Weldon, as *amicus curiæ*, that to ascertain what was meant by next of kindred in equal degree, reference must be had to the civil law under which the whole blood and half-blood stood in equal degree, and that the Legislature must have intended that real estate should go the same as personal estate.

It must be admitted that some part of the intestate law of New Brunswick is judge-made. We have it decided in one case that it was not the "intention" to alter the common law in one respect, and in another case that it was "the intention" to alter it in another respect, and again one judge, at least, holding that it was the intention of the Legislature to alter the law although the Court had previously decided the contrary.

The Court held in Wood *vs.* De Forrest (23 Pugs, p. 209) that the mother was entitled to the whole real estate as "next of kindred." Thompson *vs.* Allanshaw (1 Kerr, 85), Mahoney *vs.* Crane, and Wetmore *vs.* Wetmore, are not now authorities. The last decision of the Court alters what has been considered to be the law of New Brunswick since 1786. Chap. 78 is a "consolidation" of 26 G. III. c. 11, and of the Acts since passed. S. 12 of the 26 G. III. is in these words, which it will be well to compare with s. 1 of chap. 78, quoted above:

"When and so often as it shall happen that any person dies "intestate, the heir-at-law of such intestate shall be entitled to "receive a double portion or two shares of the real estate left by "the intestate (saving to the widow her right of dower), and the "remainder of such estate shall be divided equally to and amongst

"the other children or their legal representatives, including in the "said distribution children of the half-blood; and, in case there "be no children, *to the next of kindred, in equal degree, and "their representatives.*"

Taking up the cases in chronological order, we find that the Supreme Court of New Brunswick held, in 1840, that who was the "heir-at-law" must be decided according to the principles of the common law. In Mahoney *vs.* Crane (1846): that the Legislature had not intended to alter the common law, and that, therefore, the mother could not exclude the children, inasmuch as it was a maxim of that law that property could not ascend. The words "in equal degree" after kindred were understood to mean that the heirs should be "in equal degree" with the heir-at-law. Great stress was laid upon the fact that no provision had been made for the mother for any share in the realty, while she is granted her share by the same Act in the personal estate.

Notwithstanding the passing of the Imperial Act 3 and 4 Wm. IV., with the Nova Scotia Act before it, the Legislature in 1854, substantially re-enacted 26 G. III., s. 12, and thereby fully and unreservedly adopted the decision of Mahoney *vs.* Crane: that property did not ascend. We imagine that there can be no question about that.

In Lee et al. *vs.* Troughton (1857) the Court said: "When the question is asked, in equal degree with whom? The proper answer is *in equal degree with each other.*"

In 1858 the 21 Vic. c. 26 was passed to deprive the heir-at-law of the double portion of the real estate.

In 1874 the Court in Wetmore *vs.* Wetmore, re-affirmed Mahoney *vs.* Crane. The Chief Justice (Ritchie) remarking, what would at one time have been taken as a truism, "or at least, if they (the Legislature) had intended to alter that interpretation, and to give the words next of kindred the meaning now contended for, and which had been contended for in Doe *vs.* Crane, they would *have used language to show such intention beyond any doubt.*"

In 1876 the Statutes are re-enacted by the Legislature as "consolidated." Chapter 78 passes unnoticed and unobserved, although, as it appears, fraught with the ruin of more than one innocent person. The words "in equal degree" are omitted, and

section 1 is made to retroact to the 6th April, 1858 : date of the coming into force of the 21 Vic.

We now come to Wood *vs.* De Forrest, which was argued before the Supreme Court on the 7th August 1883, upon a motion of defendants to enter a verdict in their favor: a verdict having been rendered at the Albert Circuit in July 1882, for the lessors of the plaintiff. The only ground taken by the defendants was that the omission of the words "in equal degree" in chapter 78 showed the "intention" of the Legislature to alter the common law of descent. Not a word is reported as having been said at the argument about the retroactivity of the law. We hear of that in the judgment only. The judgment of the Court was rendered by Chief Justice Allen and was concurred in by Weldon, Wetmore and King, J. Mr. Justice Palmer gave his opinion separately.

The majority of the Court rest their decision upon two grounds:

1. The omission of the words "in equal degree" in chap. 78.

2. The declaration that section 1 should apply to all cases since the 6th April, 1858.

Reference was made to one of the reasons given by the Court in Mahoney *vs.* Crane in support of its decision, that the words "equal degree" meant equal degree with "the heir-at-law." The expression was afterwards more correctly interpreted in Lee *vs.* Troughton, which case is not mentioned in the judgment. It will naturally be asked, if it could for a moment be supposed that the property of an intestate could go to his heirs in an *unequal* degree? and why, therefore, retain an useless expression in a Consolidated Statute? An expression which, moreover, had received a judicial interpretation, and which had been adopted as the correct one by the country. The Chief Justice, however—with all respect be it said—unanswerably met his own objection. He said: "I think if the Legislature had intended to go further "and change the law of descent, as established by Doe *vs.* Crane, "that the mother could not inherit the property of her de-"ceased child, some words would have been used to show that "the Legislature so intended, and *that it would not have been* "*left as a mere matter of inference*, while the intention to "abolish the law of primogeniture was *clearly* shown. *Rights* "*acquired are not to be taken away by mere implication from* "*the language used in a Statute.*"

With regard to the second objection, the Chief Justice was of opinion that the law had been changed by the Consolidated Statute, and that if he might be allowed to speculate upon the "reasons which induced the revision of the Statute which passed "in 1876 to give chap. 78 a retrospective operation as far back "as April, 1858, I should say it was to get rid of the construction "put upon the Act 21 Vic. c. 26 in the case of Wetmore *vs.* "Wetmore," but if that was the intention or not he considered unimportant, the law being changed. As the Chief Justice had previously declared that he had heard nothing to make him "doubt the correctness of the opinion expressed in Wetmore *vs.* Wetmore," it may fairly be asked how that opinion could be got rid of by making section 1 retroactive? It is admitted by the four Judges that the omission of the words "in equal degree" would not be sufficient to reverse the prevailing jurisprudence, as "it might, perhaps, have been reasonably argued that they were "omitted because they were considered superfluous and that the "words 'next of kindred' were enough." We are told that a judgment given in 1874 correctly interpreting a law passed on the 6th April, 1858, is got rid of by making another law retrospective to that date, which last was also correctly interpreted, and which was originally passed in 1786, and substantially still in force on the 6th April, 1858, and in 1874.

It may be permitted to doubt this doctrine. The Court thought that the words "next of kindred" ought to have the same meaning as that received under the English Statute of Distributions. We are referred to Wm. Ex. 1508 and 2 Bl. Com. 516. Without turning over the pages of the authors mentioned, it may be said that it will not be found that they state that the mother excludes the brothers and sisters of the intestate under the Statute. If the family be a large one, her share will be a very small one indeed.

Mr. Justice Palmer expressed himself strongly, and withou hesitation. All will acknowledge that, as he states, "there is no case which decides that the mother is not of kindred to her son," and, further, that there can be no dispute as to the nearness of such kinship. Chief Justice Chipman did not deny that proposition. He merely decided the question of kindred as the Judges in England had done previous to, and since, his time,—

rightly or wrongly. When reference is made to the Nova Scotia Statutes, it may be as well to say that by sec. 3 of the Revised Statute of 1873 if no issue be left or father, one-half goes to the widow and the other half to mother, brother and sisters. As Mr. Justice Palmer has established that the mother is "next of kindred," we presume, he would have excluded the brothers and sisters of the intestate, if any had been interested in Wood *vs.* De Forest, and would not have followed the Nova Scotia Statute. Chief Justice Chipman, were he among the living, would doubtless approve of all the quotations made by Mr. Justice Palmer as to the manner in which the Judge is to seek the "intention" of the Legislature, as he followed them in interpreting a law which had then been in force some sixty years, and which interpretation was maintained by the same Court for nigh forty years afterwards. He might, however, refer to Reg. *vs.* Battle. 'Mr. Justice Palmer thinks that it is "most reasonable to believe "that the Legislature intended to do away with that barbarous "law that gave the real estate of the child to the Crown or some "distant relation, rather than to its parents." There was a Lord High Chancellor who declared in the House of Lords that the English law of slander was "barbarous," but the law not having yet been changed the Judges go on administering this "barbarous" law. Mr. Justice Palmer would also in a case before him under that law. The question is a legal one. It is for the Legislature, and not for the Judges, to alter the law. There is no pretence of saying that the Legislature deliberately set aside the common law maxim. If a new law was substituted for the old one it was by a Reviser who altered a Statute he was entrusted to consolidate, and whose work became law because it was not examined by the legislators. The Court which decided the case of Mahoney *vs.* Crane was sitting in a Province where the English common law was in force; it held that an amendment to a Statute must be construed according to the rules and maxims of that law. The common law of descent may have been unsuited to New Brunswick. The Legislature did not think so, or it would immediately have made that to be law, which Mahoney *vs.* Crane decided was not law. This last decision may be considered as a contemporaneous one, as it is the first recorded one, and because it was received as a correct

one, and acknowledged to have been by four of the judges in Wood *vs.* De Forrest.

Even if chap. 78 were new law, and that the Statutes 26 G. III. and 21 Vic. had never been passed, we must still come to the same conclusion as the Supreme Court did in the cases cited, previous to the decision of Wood *vs.* De Forrest. The first section of the Act, which by sec. 3 is made to apply to parties who died since the 6th April, 1858, enacts that their real estate shall, if there be no issue, go to "the next of kindred and their representatives." There is nothing to show that the common law had been in any way amended, except that primogeniture was abolished and every child declared entitled to an equal share, and if no child, then "the next of kindred or his representatives." The second section repeats 21 Vic., the "heir at law" of a person who died before the 6th Aril, 1858, is declared not entitled to a double portion. It is to be presumed that no intestate died in New Brunswick on the 6th April, 1858, as no provision is made for such a case. Is an Act passed for the distribution of real estate, where the old common law of England governs, to be interpreted by the law of succession to personal property? What is meant by the term "next of kindred or their representatives?"

With regard to the first point, we answer in the wordsof the judgment pronounced in the House of Lords in Elmsly *vs.* Young: "There is no more reason for importing into the law of "consanguinity the law of succession to personal property than "there is for importing into it the law of succession to real "estate." The law of consanguinity is part of the common law, it has never been abolished in New Brunswick. With regard to the second, we prefer to rely upon, nay, we are bound to follow, the decision of the highest courts in England rather than thelast decision of the Supreme Court of New Brunswick. The cases we are about to cite, relating to personal estate, as they do, are all the more favorable to our interpretation of the New Brunswick Statute.

By a settlement made on the marriage of Emily Mangles the ultimate limitation of a sum of £10,000, which her father James Mangles thereby covenanted to pay, was "to such person or persons as, at the time of her death, should be her next of kin." Emily Mangles died in 1828, leaving her husband and

a child of the marriage, and her own father and mother surviving. The husband married again and died in 1837, leaving his second wife surviving, to whom administration of the personal estate was granted. In 1839 she filed a bill in chancery against the executors of JamesMangles and the surviving trustees of the settlement. She claimed that the £10,000 became, on the death of Emily Mangles, absolutely vested in the child of the said Emily Mangles. We shall not enter fully into the different questions submitted to the Court by the plaintiff, as it is unnecessary for our present purpose. The Master of the Rolls, Lord Langdale, dismissed the bill, holding that, under the limitation in the settlement, the father and mother of Emily Mangles, who were living at her death, were equally next of kin with her child as next of kin, and, as such, entitled to the sum of £10,000 in joint tenantcy.

The plaintiff Withy appealed from the decree, the case was argued before the House of Lords in 1843, (10 Cl.& F. p. 215) It was contended on behalf of the appellant that it must be taken against the correctness of the decision of the Master of the Rolls that that was the first time in the law of England that the parents of an intestate were put in competition with the child, and that, without any reference to the Statute of Distributions, the descendants of any proposed person dying intestate are his next of kin.

For the respondent it was argued, as it may have been in Mahoney *vs.* Crane, that the main question was : that the words " next of kin " did not designate such of the " nextof kin " of Emily Mangles as would be entitled to her personal estate according to the Statute of Distributions, but the person or persons who should be her next or nearest of kin, without reference to that Statute, or any other law regulating the distribution or succession to the intestate's *personal* effects. Counsel quoted the opinion of Lord Commissioner Shadwell in Elmsly *vs.* Young. " It is by no means true, as a general proposition that the term next of kin is taken to signify those who are entitled under the Statute of Distributions," and Lord Commissioner Bosanquet saidthat there was no difficulty that the term " next of kin "before the Statute, meant " next of blood," and then asked, " How, then, did they acquire a different

" meaning, and how can that meaning be applied to an instru-
" ment which does not profess to relate to the Statute of Distri-
" butions. * * * In the interpretation of ' next of kin ' in this
" case, the Statute of Distributions is rejected altogether, and
" reference must be made to the rules of law *prior* to and
" *dehors* the Statute." The judgment of the Master of the Rolls was maintained : " next of kin " meant next of blood at the time of death of Emily Mangles. The Lord Chancellor, pronouncing the judgment of the Court said : " The appellant can only suc-
" ceed by showing that the term ' next of kin ' had, by a
" technical and conventional construction, obtained the meaning
" of those who would be entitled in case of intestacy under the
" Statute of Distributions. That is a question of fact, and, had
" it been so used, all the judges whose opinions have been
" referred to as objecting to the doctrine of Mr. Justice Buller
" in Phillips *vs.* Garth since the year 1790, have been ignorant
" of the fact, and have held that the words had notobtained any
" such construction. * * I think that the appellant has wholly
" failed in proving that the term used *simpliciter* has, by a tech-
" nical or conventional construction obtained the meaning of
" those who would be entitled to in case of intestacy under the
" Statute of Distributions."

" *Contemporanea expositio est optima et fortissima in lege*," contemporaneous exposition of the law is the best and strongest. Sedgwick (Stat. and Const. Law) says that in construing a Statute great regard should be paid to the opinion in respect to it entertained by persons learned in the law. " A contemporaneous is generally the best construction of a Statute, it gives the sense of a community of the terms made use of by a Legislature. If there is ambiguity in the language, the understanding and application of it when the Statute first came into operation, sanctioned by long acquiescence on the part of the Legislature and judicial tribunals, is the strongest evidence that it has been rightly explained in practice—a construction under such circumstances becomes *established* law." Packard *v.* Richardson, 17 Mass, 143. Thes equotations show that precedents followed for years are not lightly disturbed in the United States, much less are they in England, by the Court which pronounced the judgment. Dwarris is equally strong. To try " the

right amendment of a Law." Lord Coke's usual course is first to consider the true import of the words themselves, and then to refer to the old books and authors that wrote soon after the passing of the law, and this, he says, is *benedicta expositio*, a good and sound construction. Mr. Justice Palmer thinks that the words "next of kindred" must have the meaning given to them in the English Statute of Distributions. The Court in Mahoney *vs.* Crane held that they did not. Sir John Leach, in the case of Elmsly *v.* Young (2 My. and K. 82) was of the opinion, that they did, but, on appeal, his decision was reversed. Chief Justice Chipman was doubtless well acquainted with Cray *vs.* Willis—"We have," says Flood, p. 686, "in the foregoing remarks used the expression, residuary legatee, but it is competent to a testator to appoint more than one such legatee, in which case the persons named would be called joint residuary legatees, and their respective shares would of course be equal. Being in the position of joint tenants, the share of each one dying in the life-time of others survives to them, until the last survivor takes the whole." The rule of the civil law is against survivorship in the matter of legacies, and it was once doubtful whether this incident of joint tenancy at common law could be applied to legacies. Sir Joseph Jekyll, M. R., however, in 1729, established the common law rule, in this respect, in his judgment in Cray *v.* Willis, 2 P. Wms. 528), wherein he says: "I do not see that a Court of "Equity should, even in a case of legacy, judge according to the "civil law, but ought rather to pursue the common law, "*as the general law of the land;* for all legacies are [illegible]eers,* and ought to stand or fall by the rules of the common law."

Halton *vs.* Foster, 37 L. J. ch. 547, was decided in 1868. A bequest was made, in a certain event, which happened, to "A's next of kin in blood, as if A had died unmarried." A having died, her sister B, and her nephews and nieces, issue of brothers and sisters, claimed the amount. It was held by Lord Justice Wood, in accordance with Withy *vs* Mangles, that there being no *express reference* to the Statute of Distributions, B, the sister, was alone entitled; and, again, in Eagles *v.* LeBreton,

* A volunteer in law is one who takes a gift or benefit under a will or deed without giving consideration.

42 L. J. ch. 367, there being no express reference to the Statute, a gift to relatives, without severance, went to all the members of the class as *joint* tenants. The Intestacy Statutes of Ontario, British Columbia, Keewatin and North West Territories, after enumerating those first entitled to the real estate of an intestate, enact that, upon failure of heirs, according to the rules laid down, the property will descend according to the Statute of Distribution. Mr. Justice Palmer, in support of his opinion, says that the words "next of kindred" are "without the context qualifying or affecting their meaning in any way." This is precisely the reason why the common law rule prevailed in the above-quoted cases. The author was impressed many years since with the ability, care and attention shown by the Courts of New Brunswick in the disposal of the cases brought before them. He regrets that he could not quote the judgment of Wood *vs.* De Forest without making some remarks upon it; more particularly as one of the learned Judges—Weldon—is now no more, dying full of years and honors. Honest criticism, however, requires that a judgment, which reverses one acquiesced in for nigh half a century as being in consonance with the law, should not be passed over in silence. The judgment assumes an intention on the part of the Legislature to set aside a previous judgment, when no one legislator ever proposed to do such a thing. The Supreme Court decided: that it was the "intention" of the Legislature to change the recognized law of descent by making a law retroactive, which last law did not alter the course of descent, as explained in Wetmore *vs.* Wetmore.

It could not be the "intention" of the Legislature to give the words "next of kindred" in the section relating to real estate, the same meaning as they had received under the English Statute of Distributions. The House of Lords had, on two occasions, decided that the term "next of kin" could have no such meaning, unless there was a reference to the Statute of Distributions. And following the rule laid down in Roddy vs. Fitzgerald 6 H. L. cases 823, quoted by Mr. Justice Palmer, as a primary rule in the construction of Statutes, we say, "that technical "words shall have their legal meaning unless from the context "it is shown that they are intended to have another."

The inhabitants of New Brunswick do not know what surprises

are in store for them. It may be that the Court of Highest Jurisdiction may restore the old law. Be that as it may, it is too evident that the Legislature has been very negligent in the performance of its duties, and it is high time that a proper law of intestacy should be passed. If no one is able to frame one, let that of Ontario be copied, which establishes the rights of heirs, whether in a highly civilised manner or otherwise. Better even have a bad law than one which has a different interpretation put upon it as time rolls on. If the decision in Wood *vs.* De Forrest be correct, those who, according to four Judges at least, were entitled by law to the property of an intestate since the 6th April, 1858, to the 1st May, 1877 (date of the coming into force of the Consolidated Statute), have ceased to be so. If it be literally true, as stated by Chief Justice Allen, that the retrospective operation given to chap. 78 was to get rid of the construction put upon 21 Vic. c. 26, in Wetmore *vs.* Wetmore, it follows that the Court in giving the judgment in favor of the sons in that case, gave them what the Legislature did not intend giving them : the sons or their representatives will keep the property, to the exclusion of the father or his representatives. If there had been no suit the sons would have to give up the property, but then Chief Justice Allen and the three other Judges agree that the judgment giving them the property was a sound one. The property of an intestate who died before the 6th April, 1858, will be divided as in Mahoney *vs.* Crane. If the heirs legally entitled to property left by an intestate on the 7th April, 1858, took possession of it immediately according to the law pronounced by the Judges to be in existence on that day, they find that by a judgment pronounced in 1883 that their property was taken away from them by a Consolidated Statute which came into force on the 1st May, 1877. The legislation is even worse than that. A became entitled to property on the 7th April, 1858, as the legal heir of B. The Court, or four Judges of the Court, admit this. A afterwards sells to C. C, on the 7th August, 1883, learns that his title, *which was indisputable when he bought*, is doubtful, and shortly after, the Judges, who would have maintained his title on the 30th April, 1877, say that the Legislature in passing chap. 78 of the Consolidated Statutes "intended" to take it away from him and give it to one who

had not even laid any claim to it. A has now no property. C has no recourse. Was it really the "intention" of the New Brunswick Legislature to pass a spoliatory law of this kind to deprive a careful and innocent man of his property?

PRINCE EDWARD ISLAND.

The colony was ceded by France in 1758. It was united to Nova Scotia in 1763. In 1769 it was made a separate colony. The first General Assembly met on the 7th July, 1773. In 1781 the law of Primogeniture was abolished. A double portion or two shares were, however, given to the eldest son. The Act now in force, chap. 23 36 Vic. does not reproduce either the Statute of Nova Scotia or New Brunswick. By the present law if there be no children the property is left to the "next of kin" in equal degree and their representatives. These last words have their importance, as, in the absence of any expressions of the testator to the contrary, the term "next of kin" would be held to mean those nearest to him in blood at the time of his death (Flood 699). By the Island Act it is enacted (s. 2) that after the death of the father, the property of a child dying in the life-time of the mother is divided in equal parts among his mother, brother, and sister, and that "when a brother or sister, or a grandfather and grand-"mother shall be such next of kin, the distribution shall "be confined to the brother or sister, or their representatives." This clause, it may be argued, clearly shows that the interpretation put upon the words "next of kindred in equal degree," in the New Brunswick case of Doe vs. Troughton, cannot apply, and that, according to the Act, if the father were alive, he would exclude his children, being in the first degree. Moreover, one of the arguments urged at length by Chief Justice Chapman in Mahoney vs. Crane, was that it was "fair to "infer that the Legislature did not contemplate the real "estate ascending to the parents, or they would have made "a special provision with regard to the share the mother "should have, in case of her having survived the father, at "the time of the death of the intestate, as they have done

"in a subsequent part of the Act with respect to personal "property." Now the Prince Edward Island Act (s. 2) does make the provision, and gives the mother an equal share with the remaining children. A practising lawyer of Prince Edward Island, a well-known member of Parliament, informs me that the interpretation set forth above universally prevails there, and that, to use the words of Lord Hardwicke (Evelyn vs. Evelyn, Ambl. 191.): "It might disturb distributions already made, which is an argument of the greatest weight in the law, if the contrary were now decided." This dictum of Lord Hardwicke is not, however, law, and, if "of the greatest weight," it is sometimes set aside by the highest Courts. (See New Brunswick.)

Blood makes no distinction in the direct line, but when a brother or sister of the whole blood and a brother and sister of the half blood are next of kin, the whole blood excludes the half blood from any share in the real estate.

Real estate, as in England, may "descend" to the grandfather, who is, however, excluded by the brother of the intestate, although in equal degree.

BRITISH COLUMBIA.

On the 19th November, 1858, Governor Douglas issued a proclamation declaring that the Laws of England were in force.

The English Law of Descent, 3 and 4 W. 4 c. 106 (considerably amending the Common Law) thereby became law, but it has itself been considerably altered by Local Statutes, and which now appear as chapter 88 of the Revised Statutes of 1877.

After the union of British Columbia and Vancouver's Island, an ordinance was passed (on the 6th March, 1867) introducing the Law of England. Primogeniture was abolished.

The law of intestacy was assimilated in a very great measure to that of Ontario. Uncles and their descendants exclude the grandfather in successions to real, while they are in turn excluded by the grandfather in personal successions. As in Ontario, on failure of heirs under the rules set forth in the Local Statutes, the real estate descends to the next of kin of the intes-

tate, according to the rules in the Statute of Distribution.

This colony gives a legal sanction to illegitimacy. The Judge fixes the amount which even an adulterous child can claim. The widow and surviving children are to be notified before the Judge establishes the sum which is to be levied upon their property. Legitimate children may, however, be deprived by will of any share in the property of the parent.

MANITOBA.

The Province of Manitoba formed out of the North-West Territories, was erected into a Province by the Act of the 12th May, 1870. The Intestate Act was the sixth of the first session of 1871. The Act is framed somewhat upon that of Nova Scotia. By the Act 34 Vic., c. 2, it was enacted that, as far as "possible, consistently with the circumstances of the country, "the laws of evidence and the principles which govern the "administration of justice in England, shall obtain in the Supreme "Court of Manitoba."

By the 38 Vic., c. 12, s. 2, the Court of Queen's Bench is given all the powers and authorities as by the laws of England are incident to Superior Court of jurisdiction, and which were held by such a Court on the 15th July, 1870. The interests of the widow have been cared for: she is entitled to one-half of the succession of her intestate husband as her own property.

The Intestacy Act applies equally to real and personal estate. There is no distinction between whole blood and half blood. But when two or more collateral kindred are in equal degree, but claiming through different ancestors, those claiming through the nearest ancestor are preferred, as in Nova Scotia.

CHAPTER V.

MARRIED WOMEN.

When there is no marriage settlement in Ontario, the separate personal property of a married woman dying intestate is distributed in the same proportions between her husband and her children as the personal property of the husband is divided. If there be no children the property passes wholly to the husband.

The Nova Scotia Act, in addition to the husband's right as tenant by the courtesy, gives him one third of the personal estate and gives the residue to the children. If there be no children the husband is entitled to one-half of the real and personal estate, the father to the other half; and if there be no father then to the mother, brothers and sisters in equal shares, or their representatives; and if no issue, father, mother, brother, or sister, or representatives, then the whole to her husband.

In Quebec, the married woman, as well as the spinster, has at all times had the same power and privilege of making a will as the married man and the celibate. The rights of a married woman in that Province have been long established by Law. It has not been necessary to pass a "Married Woman's Act."

According to the Manitoba Act, the property of a woman dying intestate leaving children, is divided as that of the husband's is, that is, one-third to the surviving parent, and two-thirds to the children. If there be no children, the property passes as if the Act had not been passed.

By the Statute of Distributions, the husband is entitled to the deceased wife's personal estate, if she has made no will with his consent or if no settlement has been made providing to the contrary.

The following tables are intended to show who are the heirs of an intestate in certain cases. A complete table would be a work of some labor. It is hoped that in the preceding pages the reader will find an answer to any enquiry he may make.

TABLE.

PERSONAL ESTATE.

1. Intestate, leaving no wife or child.	To next of kin in equal degree, or their representatives. O., B.C., N.S., P.E.I., K., N.W.T. To father; if no father, to mother, brothers and sisters, in equal shares; if no father, brothers or sisters, to his mother; if no father or mother, to brothers and sisters; if no father or mother, brother or sister, or their issue, to next of kin, except that when two or more collateral kindred in equal degree, but claiming through different ancestors, to those claiming through the nearest ancestor. Man. 8. Half to father, half to brothers and sisters. The succession is divided into two equal portions. Q. 62: If the father or mother be dead, the share accrues to the survivor. Q. 627.
2. Child, children, or representatives of them.	All to him, her or them.
3. Children by two wives.	Equally to all.
4. A child and children of deceased child.	Half to each, the latter taking *per stirpes*.
5. Father and brother.	Whole to father, except in Quebec (626), where one-half goes to father, and the other half to brother.

6. Mother and brother.	Whole to them equally.
7. Wife and children.	One-third to wife, except in Quebec, all to children.
8. Mother only.	The whole to her.
9. Wife and father.	To father. O., B.C., N.W.T., K. One-half to widow and other half to next of kin and representatives. N.B. One-third to widow and remainder to father. N.S. One-third to widow and remainder to next of kin. P.E.I. All to father. Q. All to widow. M.
10. Wife and mother.	To both equally. O., B.C., N.W.T., K., N.S., N.B., P.E.I. All to widow. M. All to mother. Q.
11. Brother and sister of whole blood and brother and sister of half blood.	Equally to both. No distinction, except in Quebec, where those of the whole blood share in each line, and those of the half blood in their line only. Art. 633.
12. Father's father and mother's mother.	Equally to both.
13. Father's mother and mother's father.	Equally to both.
14. Uncle's children and brothers' grandchildren.	Equally to both, except in Nova Scotia and Manitoba, all to the grandchildren, the latter claiming through nearest ancestor.
15. Grandmother and uncle	All to grandmother, except in Quebec (634), where the grandmother takes one-half and the uncle the other half.
16. Great grandfather and uncle.	Equally to both as next of kin. In Quebec also to both.

	the grandfather as being the nearest ascendant and the uncle as the nearest collateral relation.
17. Aunts, nephew and niece.	Equally to all, except in Quebec (632), Nova Scotia and Manitoba where nephew and niece exclude the aunts.
18. Uncle and deceased uncle's child.	All to uncle.
19. Nephews by brother and nephews by half-sister.	Equally to both, except in Quebec (633), where an equal division is made between the two lines paternal and maternal. Those of the whole blood sharing in each line, and those of the half blood each in his line only.
20. Brother and nephews.	One-half to brother, other half to nephews. Nephews *per stirpes*, coming by representation.
21. Grandchildren and great grandchildren.	To each class *per stirpes*.
22. All grandchildren, or all great grandchildren.	Equally to all *per capita*.
23. Brother and grandfather.	All to brother.
24. Brother's grandson and brother's daughter.	All to daughter.
25. Brother and uncle.	All to brother.
26. Great grandfather and nephews and nieces only.	Equally, except in Quebec where nephews and nieces exclude the great grandfather. (Art. 632.)

* In each case, that of the wife excepted, the nearest of kin living at the death of the intestate is supposed to be mentioned.

REAL ESTATE.

1. Intestate leaving children only? All to children equally.

2. Widow and children? Equally among children, subject to the widow's rights as tenant in dower. O., N.B., P.E.I.

⅓ to widow, rest to children. M., 2.

All to children. Q., 625.

3. No children but grandchildren and great-grandchildren? To each class *per stirpes*.

4. Father only? All to father. Q., 627; B.C., 8; M., 8; N.S., 2; P.E.I., 2; N.W.T., 23; K., 14.

Next of kin and represensatives N.B., 1.

5. Mother only? All to mother. Q., 627; B.C., 1; N.S., 3; M., 8; P.E.I., 2; N.W.T., 23; K., 14.

Next of kin and representatives. N.B., 1.

All to mother. Q., 627.

6. Father, mother, brother and sister? To father, unless inheritance came from the mother. To mother, for so much of the inheritance, during life, as came from her, with reversion to brother and sister. O., 26-27; B.C., 5; N.W.T., 27; K., 18-19.

To father. N.S., 2; P.E.I., 2; M., 8.

To next of kin and representatives. N.B., 1.

To father and mother, brother and sister, property being divided into two equal parts; one half for the father and mother, and the other half to the brother and sister. Q. 626. Father and mother, however, inherit the whole of the property given by them to their descendants who die without issue, where the objects given are still in kind, and, if they have been alienated, the price, if still due, accrues to the father and mother. Q., 630.

7. Father, brother and sister? To father, but that part of the inheritance, if any, which came from the mother reverts to

the brother and sister after death of father. O., 26-27; B.C., 5; N.W.T., 27; K., 18-19.

To father. N.S., 2; P.E.I., 2; M., 8.

To next of kin and representatives. N.B., 1.

Half to father, half to brother and sister. Q., 627.

Ascendant inherits all property given by him. Q., 630.

* 8. Mother, brother and sister? To mother during life, with reversion to brother and sister. O., 27; B.C., 5; N.W.T., 28; K., 19.

To mother, brother and sister in equal shares. N.S., 3; P.E.I., 2; M., 8. In Prince Edward Island, the brother, if of whole blood, excludes the half blood.

To next of kin and representatives. N.B., 1.

Half to mother, half to brother and sister. Q., 627. Ascendant inherits all property given by her. Q., 630.

9. Grandfather, brother and sisters? To brother and sister, except in Quebec, in virtue of Act 630, above cited, if property was given by grandfather.

10. Husband only? All to husband for life as tenant in courtesy. O., 40; All to husband. N.S.,

To next of kin and representatives. N.B., 1; P.E.I., 2.

All to husband, if no relatives within the twelfth degree. Q., 636.

11. Widow only? To widow for life as tenant in dower. O., 40; N.B., 1. P.E.I., 2. N.W.T., K.

To widow one-half. N.S., 2.

All to widow. M., 3.

All to widow, if no relations within the twelfth degree. Q., 636.

12. Brother and sister? All to them. N.S., 6; N.B., 1; M., 6.

All to whole blood. P.E.I., 2.

*The inheritance which came to a child dying under age and unmarried from a deceased parent descends to his brothers and sisters and to the issues of those deceased: if all the brothers and sisters be dead the inheritance descends to the issue *per capita*, if they be all in the same degree and by representation if they be of unequal degree, in Nova Scotia and Manitoba.

All to them, without distinction of blood, unless the inheritance comes by descent, devise or gift, from one of the intestate's ancestors, which case all those who are not of the blood of such ancestor shall be excluded from such inheritance. O., 35; B.C., 14; N.W.T., 36; K., 27.

All to them. If they be of different marriages an equal division is made between the two lines, paternal and maternal, of the deceased, those of the whole blood sharing in each line, and those of the half blood in his own line only. If there be brother and sister, nephew and niece on one side only they inherit the whole of the succession, to the exclusion of all the relations of the other line. Q., 633.

13. No issue, nor father, mother, brother, sister or representative. If inheritance came from father; the brother and sister of the intestate's father or their representatives inherit. If no brother, or sister or representative descendant of either of them, then to the brother and sister of the mother of the intestate, or their representatives. If the inheritance came from the mother, the same, instead of descending to the brother and sister of the intestate's father and their descendants, shall descend to the brother and sister of the intestate's mother and their descendants; if no brother or sister or representative, to the brother and sister of intestate's father, and to their descendants.

If the inheritance has not come from father or mother, the inheritance shall descend to the brother and sister of the father and mother of the intestate in equal share, or their descendants O., 31, &c.; B.C., 10; N.W.T., 32 & 33; K., 23 & 24.

To next of kin, except that when two or more collateral kindred are in equal degree, but claiming through different ancestors, those claiming through then nearest ancestor are preferred. N.S., 3; M., 8.

To next of kindred. N.B., 1; P.E.I., 2.

To nearest ascendants. If the ascendants be of one line only they take one-half of the succession, the other half of which devolves to the nearest collateral relation of the other line. If there be no ascendants the whole succession is divided into two equal portions, one of which devolves to the nearest collateral relation of the paternal line, and the other to the nearest of the

maternal line. Among collaterals, the case of representation excepted, the nearest excludes all the others. When all are in the same degree, they partake *per capita*. Q., 634.

14. Grandchildren only or great-grandchildren only. Take *per capita*. Q., 634.

O. stands for Ontario; Q. for Quebec; N.S. for Nova Scotia; N. B. for New Brunswick; P.E.I. for Prince Edward's Island; M. for Manitoba; B.C. for British Columbia; N.W.T. for North West Territories; K. for Keewatin.

The numbers signify the Section of the Satutes quoted from, viz: Revised Statutes, Ontario, C. 105; Nova Scotia, C. 82; New Brunswick, C. 78; Prince Edward Island, 36 Vic., C. 23; North West Territory, Statute of Canada, 43 Vic., C. 25; Keewatin, Statute of Canada, 38 Vic., C. 49; Manitoba, C. 46; R.S., British Columbia, C. 88 R.S.

APPENDIX.

From the London Law Magazine and Review, May, 1857.

THE DISTRIBUTION OF INTESTATES.

It is singular that in this discursive age our statutory scheme of distributing intestates' personal estates has never been impugned, or even considered. It has been accepted at all hands as a piece of unimprovable wisdom, adapted to all conditions of life and all stations of society; and so thorough has been this acceptation that its origin has excited no one's curiosity, and its discrepancies from the Novells of Justinian and the continental system have neither occasioned surprise nor received explanation.

The rude idea, however, of the English mind has been, that this scheme of distribution is either a direct adoption, or an indirect reflection from the civil law, though what may be meant by that ascription is never clearly stated by those who assert it. They leave us in obscurity greater than doubt as to what is the body of Roman law which our countrymen have borrowed their principles from, and at what epoch and under what circumstances they may have done so. They do not tell us whether it is the original system under which the stern republic brought up her hardy children, the system which Gaius and Ulpian elaborated at the close of the second century of our era, under the influences of the Stoic philosophy; or the system which expanded into truer equity under the open and acknowledged forces of Christianity. And, if it be imputable to the latter, they do not trouble themselves to tell us whether it is the European system of Theodosius the Second or the final perfection of the civil law, which the Novells of Justinian founded in the east and for the east. Yet it is plain, whatever partial assimilation our system may exhibit to all of these, it can only be the legitimate child of one of them which it resembles in essentials. Such is the common idea upon this subject; but it is remarkable that Mr. Justice Blackstone, whose historical acumen is

not in excess, has, in his notion upon it, stumbled much nearer the truth. He says, (Book 11. chap. 32.) "It (*i.e.*, the Act for the Distribution of Intestates' estates) is little more than a restoration with some refinements and regulations of our old constitutional law, which prevailed 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." This is not very scientifically put, but it would show that he was acquainted with the great and grave discrepancies between our system and the constitutions of Justinian, and he felt, therefore, that it was impossible to identify the one with the other; and as, in the then state of learning on the subject, he could not bring his mind to the conception of any Roman jurisprudence other than Corpus Justinianeum, he could do nothing else than Anglo-Saxonize our law of distribution. He did not know that the common law of Europe was for many centuries a præ-Justinian Roman law, and that, as it was only exchanged for the other at a late period in Europe, and under circumstances of the freest election, our own law of distribution might more plausibly be ascribed to the former than to a supposed custom.

In this state of the question we think that any inquiry into the true origin of this section of our law may not be a mere matter of curious historical research, but will tend to show in a clearer light certain imperfections appertaining to it which, though long and unaccountably acquiesced in, are not the less unreasonable and indefensible defects. The Roman law having been, as we all know, established in Britain, underwent with the rest of the empire all those changes in its principles which were elaborated at head-quarters. The great collection of laws, embodying these improvements, which bound all Europe, was the Code of Theodosius II. This Code, which was promulgated A. D. 438, was the common law of Europe for many centuries after the great work of Justinian had become law for the East, and it is to this Code that we must ascribe the origin of the law of distribution. For in it, and in it alone, we find certain specific conditions of legislation which denote the order system rejected by Justinian. We have evidence of a law of distribution in this country in Anglo-Saxon times. Cnut distinctly declares

that an intestate's inheritance shall be divided equally between the wife and children, or amongst the nearest of kin according to their degree of relationship. It is impossible to state in general terms a law of distribution more intelligibly than this is stated. A law to the same effect is recognised by the conqueror and his successor up to the time of Magna Charta, when the jurisdiction over intestates' estates was solemnly consigned to the ordinary. That the law of Cnut (or the Anglo-Saxon common law) and the law ratified by the Norman sovereigns of England, and handed over by them to the Ecclesiastical Court, were identical, can be incontestably proved. The Norman authorities did not introduce the French law on this point; for, far from making this or any other innovation on the plan of distributing Englishmen's effect, they would not willingly allow any distribution at all for many generations after the conquest. The common law of distribution has descended to us in the present day; for we have it contained and confirmed in the 22 & 23 Car. II. c 10. This celebrated Statute at its passing made legislatively no new law, but merely enacted the old law, and that old law was not Justinianean; for the five civilians whose opinion is appended to the judgment of Chief Justice North upon that Act, in Lord Raymond's Reports, use this remarkable expression "our civil law, and the practice of the Ecclesiastical court." We also know historically that the Norman kings resolutely prohibited the propaganda of the Justinianean body of laws in this country, after the rest of Europe had established professorships for teaching it, and had generally embraced its principles.

It is certain that we owe our law to another authorship than that of Justinian, and the question remains—is it of Anglo-Saxon creation? is it an adoption from the European system of Roman law which the Theodosian Code contains? We think there can be no doubt of the latter, for it is preposterous to suppose that the German invaders of our country founded a new private law for their subjects, and that their subjects suddenly forgot their own native private law. Both suppositions are incredible and must be dismissed.

But the private law of the Romanized Briton was the civil law of the Theodosian Code, which France herself did not discard for the Corpus Justinianeum, "until," says De Fresquet (Traité

Elémentaire du Droit Romain, Vol I., p. 20.), "an unknown epoch, but which may be placed from the 9th to the 11th Century."

Now, our law of distribution, as shown by the Statute, is just about the state and degree of the law as laid down by Theodosius—neither better nor worse. In proof of this assertion, we will select one great and salient point of our own law—the right of paternal succession. In this point we are at the stage which Theodosius reached in advance of Pagan law, which Justinian outstripped, and which the French Code has finally put upon a just and satisfactory footing.

Under the second system of Roman law, before mentioned by us, the Roman father had the right to the peculium of his son, to the exclusion of that son's children, if he had any. Ulpian says, "Si filius familias miles decesserit, siquidem intestatus, bona ejus non quasi hæreditas sed quasi peculium patri deferuntur." This harsh principle, though softened by the first Christian emperor, remained substantially the same until Justinian, by his 118th Novell, made the father no more than a joint heir with the intestate's mother, brothers and sisters. In these two contrasted laws we have modes of succession, not merely discrepant, but diametrically opposed in their principles. In the one, the father is all; in the other, he is one amongst many. In the one, we have traces of a hard and artificial social system; in the other, we have nature and equity. But, strangely enough, it is in the early and cramped system that we find the prototype of our own existing rule of paternal succession. And this, while it is a proof amongst others of the source of our law of distribution, is the greatest and most condemnable instance of its insufficiency and want of adaptation to modern times. While other nations have voluntarily brought themselves within the principles of the Novells, we have, with rigid obstinacy, kept outside, hugging ourselves the while upon a peculiarity of law which the rest of Europe has been ashamed of for nearly eight hundred years—the old Roman patria potestas. Under that power, the Roman father had a right to his son's purse, because he had a right to his son's person; but the British father, who claims no right to the one, enjoys the other with a total disregard to logic in an unmodified plenitude. Though this is the real and historical

origin of the right, no one could be hardy enough to defend it on such merely conservative grounds in an age like ours, which has begun to demand a rationale for most institutions. Accordingly, we find that attempts are made to support this institution by means of reasoning, and this reasoning we will now state and confute.

In the first place, the vindicators say that the father, having alimented and advanced his son, has a right to his sole succession, on the ground of that maintenance and advancement. But if the right to a sole succession be founded on such a ground only, it should not be confined, as it now is, to the father alone, for cases continually occur where a widowed mother or an elder brother does precisely the same thing. But no one has ever thought of allowing them the exclusive right of succession. Again, it cannot be said, because the father aliments and advances the son, that he is therefore entitled to be rembursed his charges and expenses. For in this view the father does not give as nature would prompt, but he lends, merely to be repaid, perhaps with a usurious interest for his risk. And in all this there is no attempt to distinguish between the son's property, derived from his own young-hearted labor and success, and that which is purely ex repatris.

In these arrangements the true theory of the right to succession *ab intestato* is entirely lost sight of. This right is a logical consequence from the moral right which the successors had, to be alimented by the predecessor (to use the terms of our late comprehensive fiscal statute) during his lifetime. For example, a man supports his wife and children whilst he lives, and upon his death they take his property to themselves in the place of the previous alimentation, and this is equally applicable to parents or to brothers and sisters. In regard to mediate and more distant relatives, the same principle of old applied with equal force and stringency. But it was in that case the connection of the tribe or larger family. All who have studied Roman law in its original institutions, will readily understand this.

We have here a test to apply to this part of our scheme of distribution, and, tried by it, we shall find the principle of sole paternal succession not only to be wrong, but to be precisely the reverse of what is right. The succession to property, as we have

shown, is due to those who would have been alimented by the deceased if they had needed such aid, and not to those who, in like circumstances of necessity, would have alimented the deceased himself.

The person whom the deceased would have alimented would not be the father alone, but the mother and the brothers and sisters. The love is equal, and the natural proximity is the same.

But the father's claim to the whole of his son's estate is otherwise a clear fallacy. When the son had no legal right to property, the father might logically take all that the son possessed, as the English husband does in case of his wife, and as the American slave-owner does in case of his slave. But, it being granted that the son can have a separate estate, the father's claim to it is no better than those of the mother and the brothers and sisters. For, as it is no longer supported by the *patria potestas*, it can only have such force as reason can give to it, and the just and well-understood policy of the law is to distribute, and not to favor or compel accumulation in the hands of any single person. But, assuming that the father is nearer (artificially speaking) than a brother or sister, that proximity is not of itself conclusive to entitle him to the son's entire succession; for, in other points, our law has unhesitatingly disregarded mere conventional symmetry, where equity and natural considerations have not applied also. The mother, being nearest of kin, does not oust the brothers and sisters, though they are a degree more remote than herself. The brothers and sisters do oust the grandfather, though their calculated kindred is supposed to be equal. In both cases the admission and the exclusion are founded on principles of nature and equity, not of mere artificial and conventional symmetry.

We have said enough, we think, to show the shortcoming of our scheme of distribution on one point, and that it needs such an illustration as shall bring us within the European family in respect of private law. But there is another and a graver point upon which we have even less hesitation in avowing our distaste of English law. It is one in which England stands alone in Europe, we mean the law which allows every testator, under all circumstances, without regard to nature or justice, to

alienate the whole of his personal estate to the disherison of his wife and children. By the virtue of that conflict of principles which dogs English law everywhere, a man must support these persons so long as he lives; but at his death, though possessed of ample means, he may leave them penniless, and a burden upon the stranger or the parish. Caprice or cruelty may impel him to do so, and the law requires no better justification of an Act which it affects to consider to be a legitimate consequence of constitutional liberty. In this, as in many other points, the law is not in equilibrio with the intellect and feelings of the community. Our state of society demands a better law than the unnatural formula, "*dicat testator et erit lex.*" It requires that the children at least should derive such a benefit from their father's estate by law at his death as shall relieve the public from being a burden upon it, however light. The poor law does much, but here it is of course inoperative. The restoration, however, of the old common law of England, the *partes rationabiles*, would effect this justice, and remove the painful inconsistency which we have referred to.

LAW OF DESCENT.

Ontario.

Under the last clause of the 26th sect., if the estate came on the part of the mother, and she and the brothers and sisters of John, the intestate, and the descendants of such brothers and sisters were dead, then the estate would go to the father, Geoffrey. * * The 26th section varies from the Statute of Distribution in this; that failing lineal descendants, personalty goes one-half to the widow and the other half to the father; whereas under this statute, the father takes all absolutely, subject to the widow's right to one-third for life, as doweress. If there be no widow, the father, as being in the first degree, takes all personal estate absolutely, without regard to how the intestate acquired it; such regard is had, however, in the case of realty, for if it came to the intestate on the maternal side, the father only takes a life estate. Section 27 is somewhat explained by what has been said in reference to section 26. It provides for

the case of the father being dead, who otherwise would be entitled to take the inheritance; and also for the case of his being alive, and yet not entitled to take under section 26 by reason of the estate coming *exparte materna*, and the mother or collateral relatives being alive. Thus, assume that on John's death his father Geoffrey was either dead or not entitled to take as above-mentioned, and the mother of John and his brothers and sisters, Francis, Oliver, Bridget and Alice were alive: the mother would take for life, and the brothers and sisters *per capita* and descendants of deceased brothers and sisters would take as provided for in the 29th section (by representation). If the brothers and sisters and their descendants were dead, then the estate would go to the mother. It should be mentioned that all the brothers and sisters of the half-blood would take equally with those of of the whole blood under the 35th section, that i if John were purchaser for money, all the half-blood *exparte pa a* and *materna* would take equally with the brothers and sisters of the whole blood; but if John got the estate *exparte paterna* or *materna* then the half-blood only on that side would take. * * Section 28 if unrestrained by subsequent sections would admit equally all collateral relatives of equal degrees of consanguinity to the intestate, and to allow, therefore, uncles and aunts to share with nephews and nieces, if those classes were the only relatives on the death of the intestate. Subsequent sections control and explain this sections, however. The principle upon which they proceed is, that collateral kindred claiming through the nearest ancestor, are to be preferred to collateral kindred claiming through a common ancestor more remote. The claim of the nephew is through the father of the intestate, that of the uncle through the grandfather. Leith and Smith, Blackstone, p. 481